IN THE COMPETITION APPEAL TRIBUNAL

Case No.1175/5/7/11
1176/5/7/11
1177/5/7/11
1178/5/7/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 September 2011

Before:

LORD CARLILE OF BERRIEW
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

D H FRANCIS Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

D B FOWLES Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

N V SHORT Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

2 TRAVEL GROUP PLC (IN LIQUIDATION) Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Michael Bowsher QC (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Claimants 2 Travel Group PLC.

Mr. Huw Francis appeared In Person and on behalf of DB Fowles and NV Short.

Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

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MR. BOWSHER: I appear again for the claimant, 2 Travel, with Mr. Aldred. My learned friend, Mr. West, appears for the defendant, Cardiff Bus, and then the shareholder claimants Huw Francis and Mr. Fowles are both here.

THE CHAIRMAN: Sorry, which shareholders are here?

MR. BOWSHER: Mr. Francis and Mr. Fowles, but not Mr. Short. Sir, there are obviously various items on the agenda, it may be logical to deal with the security for costs first.

THE CHAIRMAN: It might be a good idea.

MR. BOWSHER: In which case it is probably for me to sit down and ----

THE CHAIRMAN: Well let me tell you where I thought we were going. It seems to me we might start briefly with the venue, then look at security for costs, then issues of disclosure by Cardiff Bus, and then disclosure by 2 Travel, and then disclosure of material by the OFT, and then witness statements, expert evidence, skeletons, the terms of the stay in relation to individual shareholders, and the timetable of individual shareholder's claims. That is the order in which I had looked at these issues. I do not mind in the least if anybody wants to look at them in a different order as long as you allow me to catch up.

MR. BOWSHER: It seems sensible to me.

THE CHAIRMAN: Shall I just say a word about venue? Obviously, everything is presumed on there being a trial. The Tribunal has the jurisdiction, of course, to sit in Wales or Scotland and nothing would cause me personally greater pleasure than sitting in the land of my birth, and I am perfectly happy for any trial to take place in Cardiff – any other case management conferences will simply have to take place in London for practical purposes. I think you should know though that there is potentially considerable extra cost to the Tribunal in sitting in Cardiff because, as you know, those of you who practise here the Tribunal is not amply, but efficiently set up in this building and, like the old Assize Courts, would have to transport itself lock, stock and barrel, or at least part of it, to Cardiff with all the cost that goes with that, and that is something that would have to be reflected upon. But, subject to anything anyone would like to say, I think having said that we might just park that issue for the time being.

MR. BOWSHER: If I can say this, for our part we are keen that the venue be in Cardiff, it seems the obvious place. There seems to be appropriate accommodation. I am not able to get into the figures but for whatever additional cost there may be for the Tribunal there is likely to be significant countervailing cost benefits for the parties and convenience benefits as they are all Welsh based, but there is probably not a lot more that I can say at this moment on that.

THE CHAIRMAN: Yes. Does anybody else want to say anything about that?

MR. WEST: Sir, we agree with the suggestion of parking it for the moment.

THE CHAIRMAN: Thank you very much, Mr. West. Does anybody else want to say anything about venue at the moment? There will be opportunity to make further representations about venue if anyone wishes to, but at the moment I will direct that the question of venue of any trial is to be reconsidered at a further CMC in due course.

Right, let us move on to security costs, and that is probably over to you, Mr. West, is it not?

MR. WEST: Sir, it is now common ground that the Tribunal has jurisdiction to order security in this case on the grounds that there is evidence that 2 Travel might be unable to meet the costs at the conclusion of the trial. The question is simply how the Tribunal should exercise its discretion and 2 Travel appear to be running two main arguments as to why there should not be an order for security. The first is that any such order would stifle the claim, and secondly they contend that the application is late. There are some subsidiary points on the authorities and the merits, which I will also deal with.

As to stifling the claim, the parties appear to be in agreement that the relevant law is as set out in the decision of the Court of Appeal in the *Keary Developments* case. I have a bundle of authorities here which I have handed to my learned friend and I will also hand up. This judgment is also in the CMC bundle, although it is not the proper report.

THE CHAIRMAN: Do you want me to refer to your proper report?

MR. WEST: Yes, if we can refer to my bundle.

THE CHAIRMAN: So that is flag 7.

MR. WEST: Flag 7 and the relevant passage is at p.540. It is the paragraph which begins with "6", and it then runs on to p.542. Paragraph 7 is to do with lateness. I wonder if I could invite you to read paras. 6 and 7.

THE CHAIRMAN: Page 540, para 6. Why do you not sit down whilst I re-read this in this form. (After a pause): Yes.

MR. WEST: If I can summarise what I say comes out of that, it is that in the ordinary case a party who opposes an order for security on the ground it will stifle the claim has to put up evidence not only as to its own means but also as to its ability to raise funds from backers or other affiliated persons or companies. The relevant evidence which has now been submitted by 2 Travel is in the witness statement of Mr. Aldred, which is in tab 9 of the CMC bundle.

THE CHAIRMAN: I am sorry, I have been working from a working bundle at home which is not in very good order as a result. (After a pause): Yes, I have it; I have read Mr. Aldred's statement.

MR. WEST: I do not want to start with a litany of complaints, but it is at least unfortunate that Mr. Aldred's statement was served after the close of business on Thursday and that is why my skeleton argument makes no reference to it, but there we are.

Before looking at what Mr. Aldred's statement addresses, it is worth noting what it does not say and what it does not deal with, and that is the question of whether 2 Travel can raise funds from elsewhere, such as the shareholders, and some of them are here today, or for that matter professional litigation funders, and they exist, of course, in this country. This, in my submission, is a rather surprising omission from Mr. Aldred's statement, because it is apparent from the skeleton argument served at the same time that 2 Travel were well aware of the law set out in the *Keary Developments* case, which is cited in their skeleton argument. So, in my submission, the only conclusion one can draw from Mr. Aldred's failure to deal with this point is that 2 Travel has failed to show that it is unable to raise the funds from elsewhere.

THE CHAIRMAN: Do you mean that it is able to raise funds from elsewhere?

MR. WEST: It has failed to show that it is unable to raise the funds from elsewhere.

THE CHAIRMAN: Right.

MR. WEST: Sir, it may be rather odd if that were the case, that it were so unable, given that this is a company with, so it is said, a significant asset in the form of a claim for tens of millions of pounds, which has reasonable prospects of success.

Then at paras.17 to 19 what Mr. Aldred does refer to is the question of his client's ability to provide security by means of something called a "Bond" provided by the ATE insurers, QBE. You have read this before, but at para.18 he says that they might be able to secure a Bond from QBE, however they might also not be able to do so, depending on the terms offered. Again, this does not show that an order for security would stifle the claim, because, as Mr. Aldred himself says, the claimant might be able to meet the security by providing a Bond. What is very unsatisfactory about this is Mr. Aldred's position, whereby they might or might not be able to do so. There is no obvious explanation for his failure to have followed through on those investigations to the stage of being able to say whether they can or cannot do so. Again, the conclusion has to be that 2 Travel have failed to show that an order for security would stifle the claim. Mr. Aldred has not seen fit to provide any draft form of Bond wording. Again, it is rather surprising, but, as a result, Cardiff Bus must reserve its position as to whether it would be prepared to accept this Bond by way of security.

Having never seen the draft wording or terms and conditions, it being somewhat unclear as to what the nature of the product actually is, it is not clear whether this is a self-standing Bond or whether, in effect, this is the type of comfort letter to which I referred in my skeleton argument, whereby in effect Cardiff Bus is added as an additional policy holder on the ATE policy. My learned friend may be able to provide some clarification on that, I simply do not know.

As to how one deals with this problem in practice, my suggestion is that the Tribunal orders the provision of security for costs by way of a payment into court, but that 2 Travel has the right to provide security in such alternative form as is reasonably acceptable to Cardiff Bus. In the event the parties are unable to agree as to whether a Bond, whatever the terms and conditions are, is or is not reasonably acceptable security, the Tribunal can make a ruling on that without anyone having, as it were, sold the pass.

It is rather unsatisfactory, however, because there is simply no reason why we could not deal with that today. We are all here. This is the argument about security for costs, rather than having to come back when we have finally seen the terms and conditions of the Bond. In a similar vein Mr. Aldred does not condescend in his witness statement to provide any explanation as to why his client has refused, and continues to refuse, to disclose the terms of the ATE policy. They have simply chosen to leave Cardiff Bus and, for that matter, the Tribunal in the dark.

Sir, that is what I have to say about stifling.

So far as concerns delay in making the application, sir, we say there is simply nothing in this. The proceedings were begun by a claim form on 18th January 2011. The question of security for costs was first raised by Cardiff Bus by a letter of 13th April 2011, which is p.16 of the attachment to the letter whereby the application for security for costs was made. That attachment is not in the CMC bundle, but I assume the Tribunal will have it somewhere.

THE CHAIRMAN: I am sure we have. What was the date of the April letter?

MR. WEST: It was 13th April 2011, p.16 of the attachment.

THE CHAIRMAN: I have it.

MR. WEST: You will see, sir, how it is put in the third paragraph:

> "As you will appreciate our client has an interest in reviewing the terms of the policy in order to satisfy itself that your client is in a position to pay our client's costs if ordered to do so. We would be grateful if you could provide us with a copy. Subject to reviewing the terms, we hope it will be possible to resolve any

issue about security for costs without the need for an application under Rule 45."

The correspondence on this point carries on in this bundle up to 19th July, pp.25-26. As you are aware, 2 Travel refused to disclose the policy and impasse is reached. The application is then issued on 27th July.

So, in my submission, there is not any delay. The application is intimated by letter in April, only three months after the claim has commenced. Cardiff Bus act reasonably in seeking to avoid the need for an application by disclosure of the policy. When that fails the application is made. It is made at the end of July and is listed to be heard today, which, in my submission, is also entirely sensible, rather than having some separate application earlier this month.

If there is any delay there is not any prejudice. It has not been said, for example, that if the application had been made earlier 2 Travel would not have begun the proceedings or would have discontinued them straight away, and it would thereby have avoided incurring further costs which in the event it has incurred. Indeed, that point is not available to 2 Travel because it has not incurred any costs whatsoever. All of its lawyers are acting on conditional fee agreements. It has not paid a penny to anybody. It has not even paid a premium for the ATE policy we now find out. The possible exception is apparently that it is liable for a proportion of the mediator's fees, but again it is not suggested that that would have been avoided if the application had been made earlier.

Can I just deal briefly with two further points: merits and the authority of the *BCL Old* case? I appreciate, sir, you would not go into huge detail on the merits because this is not the trial. If necessary, I do say that this is obviously a massively exaggerated claim. There are three main elements to it: the profits on the Cardiff routes which are said to have been lost, the losses resulting from the insolvency of the company and exemplary damages. The claim for profits on the Cardiff routes is £76,000, on the routes which were actually operated for the period when they were operated. Cardiff Bus claims that there would not have been any profits on the Cardiff routes, even absent the infringement. It might be worth just saying something about the methodology here because it is also relevant to the question of experts which we will come to later.

The methodology here starts with the revenues which were actually earned on the White services, which I believe was approximately £120,000 for the period of their operation. Cardiff Bus has never disputed that a proportion of that revenue would have gone to 2 Travel if the White services had not operated. The questions are: 'what proportion?'and

'would that have enabled 2 Travel to make a profit?' When seeking to identify the proportion which would have gone to 2 Travel one of the relevant considerations is that some of the White service revenue came from season ticket holders, they would never have travelled on 2 Travel's buses because their tickets were not valid, so one has to discount a proportion for that.

So far as concerns the balance, the usual principle in the bus industry is that people will take the first bus which arrives, which is going to the destination they wish to get to. So in identifying the relevant proportion one has to discover how many Cardiff Bus standard livery buses arrived for each 2 Travel bus. If, for example, it was three Cardiff Bus standard livery buses for every one 2 Travel bus then the appropriate assumption would be that 2 Travel would get a third of the revenue, a quarter - my mathematics ----

THE CHAIRMAN: You are assuming that the public in Cardiff are not too discriminating about which bus they get on.

MR. WEST: I am assuming that, because ----

THE CHAIRMAN: You are probably right.

MR. WEST: -- that is my understanding of the relevant economics. Of course, there might be some price elasticity in which case it will have to be adjusted.

You then plug whatever figure that is into 2 Travel's accounts, and see if it enables you to get a profit out of it. This will be dealt with in the experts' reports, but the Tribunal will be aware that we went through a very similar exercise before the OFT and the experts then retained by Cardiff Bus concluded that 2 Travel would not have made any profits except if one assumes that 2 Travel has no driver costs, effectively it gets its drivers for nothing. But if one assumes that there is a substantial marginal driver cost 2 Travel does not make any profits even if there are no White services. So that is that point, and it is by far 2 Travel's strongest claim in my submission.

We then have the claim that, absent the infringement, 2 Travel would not have gone bust, but I am afraid there is just no credible evidence for that contention. Indeed, Mr. Aldred's witness statement attaches quite an interesting document which, since the Tribunal has already seen it, I would ask you to refer to again – it is at the end of tab 9 at p.72. This is a contemporaneous email from Mr. Brown of Cardiff Bus to Mr. Heath of Cardiff Bus in which he analyses 2 Travel's published interim results for the period through to February 2004, that is pre-infringement, and can I ask you to look at the last and second last paragraphs on that p.72, and the first two paragraphs on the next page.

THE CHAIRMAN: (After a pause): Yes.

MR. WEST: So Cardiff Bus' contemporaneous analysis is that the company was in a complete mess it would not be able to trade out of before the infringement started. I attached to my skeleton argument one page of a report prepared by Grant Thornton, which was a report commissioned either by 2 Travel or its bankers as to its financial position in November 2004. I do not know if you have that document. I can hand up another copy if you like.

THE CHAIRMAN: Yes, I have it.

MR. WEST: I can perhaps hand up another copy in any event because the conclusion set out by Grant Thornton is tantalisingly on the next paragraph over the page.

THE CHAIRMAN: Which I do not have.

MR. WEST: Well it is not relevant to the disclosure point but it is relevant now. Paragraph 1.6: "the company is clearly insolvent at present being unable to pay its debts as and when they fall due and there is the prospect of further cash injections that could resolve this situation, at least in the short term". So their own advice was: "You are clearly insolvent; absent further significant cash injections, you have to think very seriously about whether you can continue", and that is in November. I will not go through the rest of the report but it makes equally terrifying reading.

THE CHAIRMAN: Yes, obviously I have not seen the process by which the company went through with the alternative investment market, presumably the nomads would have been involved in that as well. A suspension of shares on the alternative investment market is a very significant step to take.

MR. WEST: It is, and that occurred at around the same time, November 2004, I believe, the flotation had been in January 2003 from recollection. The test for causation, as you are well aware, sir, and as appears clearly from the *Enron v EWS* case is the standard "but for" test of causation in law. What 2 Travel are going to have to satisfy you of in due course is that such profits as it would have made on the Cardiff routes, and I have explained why we say it would not have made any, would have enabled it to trade out of its subsequent insolvency, and in my submission that is just totally incredible.

As far as concerns exemplary damages I have made the various points in my skeleton argument. Such awards are extremely rare in our system, and awards of £3 million-odd, such as are sought here, are more rare still.

Finally the *BCL Old* case which we are very familiar with, but it is in my authorities bundle if you wish to turn it up at tab 3.

THE CHAIRMAN: I had it open a minute ago. Yes, just draw my attention to the particular parts you think I should give particular attention to.

MR. WEST: The Tribunal's analysis begins at para. 24, and really runs to para. 42. It may be simpler, Sir, for you to read that?

THE CHAIRMAN: Yes. I am familiar with the authority. Is there anything in the *BCL Old* case that really distinguishes the security for costs jurisdiction from any other case, for example being heard in the High Court?

MR. WEST: Not so far as concerns the legal principles, but perhaps as concerns their application in this specific follow-on competition law context. It can perhaps be summarized by saying in a cartel case in any event, where there is no dispute that the claimants as direct or indirect purchasers are paying more money and therefore suffered a loss, the only dispute is as to whether and to what extent they pass some of that on to their own purchasers. An order for security may well not be appropriate, because there can be no real doubt about the eventual outcome of the case. The eventual outcome of the case is that the claimants are going to win, the only question is how much? Indeed, in that case the reason the defendants were fighting it was not because they thought they were going to win, it was because they wanted to have a resolution of the issue of principle about the availability of the passing on defence, and the Tribunal said "In those circumstances you can take the costs risk." Nothing which I intend to say about this case is intended to detract in any way from the correctness of that, or any part of it. What I say is that the present case is totally different for the reasons I have just explained. In the present case we say that no loss was suffered at all because the routes would not have been profitable anyway, and because the infringement did not cause the insolvency of the company.

The appropriate comparator authority in my submission is the *Enron* case, and that is really the conclusive proof that it cannot be assumed that a follow-on action will succeed simply because liability is not an issue, because of course the result in that case was that the claim failed in its entirety.

THE CHAIRMAN: Well the generality of the principle seems to me to be set out in the first half of para. 40, is that right? That is why I asked my earlier question. There were special features in the *BCL Old* case but unless there are special features of that kind which should be weighed in the balance when the Tribunal exercises its discretion, is it not the case that actually the principle is set out there in para. 40 and is identical to the jurisdiction that a judge would exercise in the Queen's Bench Division?

MR. WEST: With respect, exactly. However, this case has been taken by some as authority for the proposition that in follow on actions security for costs are unlikely to be ordered and that is a misunderstanding of the case.

THE CHAIRMAN: Yes, I noted that. Do you concede then that there is any authority to support the proposition that because there has been a finding in a follow on case that security for costs should not be ordered or should be considered on a different basis?

MR. WEST: Well it is undoubtedly a relevant factor. The claimant is not going to fail ----

THE CHAIRMAN: On liability.

MR. WEST: --- proving liability, and in a case where there is no doubt as to causation it is not going to fail, it is going to win. In this case there is doubt as to causation.

I have not been able to find so far what order the CAT made in the *Enron* case about costs. It appears not to have made any order so far. But in the Court of Appeal the order was that the claimant paid the costs of the appeal.

THE CHAIRMAN: Bear with me for a moment. (After a pause): I sat on the *Enron* case but I cannot remember either, so we will check. We may be able to help.

MR. WEST: The order of the Court of Appeal is at the back of tab 5, it says at para. B: "The claimant shall pay the respondent's costs of this appeal."

THE CHAIRMAN: Yes.

MR. WEST: So far as concerns the amount of security which has been sought, this is set out in the schedule, or attachment to the security for costs application. It begins at p.3 of the attachment. I will just explain how this works. There is a figure on p.4 just above the heading "4", there is a sub-total and then there are some figures £7,996 and then £353,493. That £353,493 is the cost incurred to the date of security for costs application. The schedule then goes on, so that is an actual figure, the balance of this is estimated. The schedule then goes on to estimate the costs up to exchange of skeletons, and that figure is at p.7, the £805,019. We were asking for an order for security in two tranches, the first tranche up to the exchange of skeletons and the second the costs of the trial, which is over the page at p.8, at the bottom of that page, the £325,595, and the idea of having two tranches is that if the case does settle in the meantime the claimant does not have to put it all up at once. These are clearly significant amounts of money but it has not been suggested that they are excessive and, indeed, Mr. Aldred in his witness statement makes clear that the claimant's fees are substantially more – that is at para. 22 of Mr. Aldred's statement. He is rather coy, for reasons which I do not entirely understand. At the end of para. 22 (tab 9 of the CMC bundle):

> "The Defendant has asked that we disclose on an open basis the costs incurred by the claimant to this point. This figure has already been provided to the Defendant on a without prejudice basis. Suffice it to say, that the total costs incurred

preparing this claim, including the base fees and success fees of Michael Bowsher QC and Addleshaw Goddard LLP, the ATE insurance premium, the professional fees [etc] and the mediator's fee are in excess of £1 million. It is also likely that the additional costs to trial will be a six figure sum …"

It appears, in any event, that the claimant's costs are more than the defendant's costs. These sums are justify that, I would say, given the nature of the claim being pursued, a claim for tens of millions of pounds, raising complex issues of quantification in a competition law context. If the claimant had limited itself to, for example, just claiming the lost profits on the Cardiff routes, the costs would no doubt be much less, and indeed I very much doubt we would be here today.

Those are my submissions on security.

THE CHAIRMAN: Mr. Bowsher?

MR. BOWSHER: Just by way of preliminary, what we say is that this is a case where, yes, the Tribunal does have jurisdiction to make an order, but it is relevant to have regard to the nature of this claim. We are not saying that the jurisdiction is different, but that it is important to have regard to the fact of the history, which is a history of oppression, and of course oppression is one of the factors when it comes to the Tribunal looking to have its discretion. There is a history of oppression going back to the beginning of 2004. The very context of this case is a context in which the defendant seeks to put the claimant out of business. It succeeds. It intends to put us out of business, it succeeds in doing so, and this case remains a case in which a claim for the liquidator to try and recover that which the creditors and others are due. In those circumstances, it really does not lie in the defendant's mouth to say, "This is just a regular case where one should balance in the normal way". This is a case where the context of the case is very special.

When we come on to the merits, and I will look at them presently, it is necessary to look at the way in which we have developed the case as opposed to the way in which the defendants developed it. On Friday we served our witness statements. No witness statements have come from the defendant, and I will pick up a couple of points on that presently, and I will invite you to just look very briefly at a few extracts from those witness statements to give you a flavour of the weight of case which we are putting forward. This is a case which the liquidator takes seriously. He has judged it a serious case, and, in my submission, it would not be appropriate to do anything that would risk stifling the claim and undermining in effect the policy of these follow-on claims.

These follow-on claims are special claims as a matter of policy. They are a means of ensuring proper recompense against those who have been subject to serious penalties, or at least serious adverse decisions, and of course particularly odd in this case where, for technical reasons, the penalty itself was not imposed on Cardiff Bus. I notice in the skeleton that my learned friend tries to characterise his breach in a rather low key sort of way. This is not some, "We carried out some rather low cost bus services", this is an abuse of dominant position. It does not come more serious than that in competition law. It is an intentional abuse of dominant position, and it is an intentional abuse which the OFT has found in its decision was conducted with the intention of driving us out of business, and that is para.7.29 of the decision, to protect their own dominant position as a retaliatory reaction to new entry (also para.7.29) and on causation it is relevant. It is not the case that there is no material on causation in this case. Evidently, the causation of what flowed on from the decision was only partially relevant to the OFT's decision. It was not necessary for them to decide what the precise effects were of the abuse. So it would have been surprising if they had gone further and said, "We have gone through the causation analysis and decided what would have happened".

In that context, where it is not actually necessary to engage with that, it is really rather significant that the OFT has gone as far as it does in para.7.235, in which it says as follows:

> "It is likely that Cardiff Bus's predatory conduct was a contributory factor in 2 Travel's exit from the market."

That is as strong a finding as the OFT was ever likely to make in this decision. It seems to us, therefore, that at the very least there is an overwhelming likelihood that we will succeed in the first stage of showing that they have pushed us out of the market.

It is also relevant as a matter of law that the approach to causation need not be cast in stone in the way suggested by my learned friend as a "but for" test. Certainly the *Enron* case adopts that as an approach. The *Enron* case perhaps is a slightly unusual competition case for a number of reasons. There is no point in arguing the relevant distinctions now, but this is, in a sense, a very simple case. The abuse was that they intended to do us harm, they did it, they succeeded.

Can I just take you, sir, to a couple of passages from a decision of the House of Lords in *Smith New Court Securities v. Citibank*, which I handed up loose this morning. I do not think one needs to look at the case in any detail, it is simply to provide the headline for the argument which we will develop. Would you go to p.284F, the third line:

"It is now necessary to consider separately the three limiting principles which, even in a case of deceit, serve to keep wrongdoers' liability within practical and sensible limits …"

and he goes on to deal with that. Then under G he deals with the question as to what the right test is. He says just above H:

"The development of a single satisfactory theory of causation has taxed great academic minds …"

and gives various references –

"But, as yet, it seems to me that no satisfactory theory capable of solving the infinite variety of practical problems has been found. Our case law yields few secure footholds. But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is that the 'but for' test, although it often yields the right answer, does not always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result. On other occasions judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection. There is no material difference between these approaches."

If I can then go back in the judgment to another passage to show what that meant in this case, the context of that was that in the ----

THE CHAIRMAN: Just before you go on, those last two sentences of p.285B, I take it those are the remarks of Lord Steyn rather than the remarks of Lord Wright?

MR. BOWSHER: I would imagine so, yes.

THE CHAIRMAN: Having sat through *Enron* and some fairly sophisticated arguments on the "but for" test, I must say I was left with that impression. Where were you going to take me next?

MR. BOWSHER: Page 280, this is just a headline point so that you understand where our case is going. Under 280D there is a heading, "The old cases":

"For more than 100 years at least English law has adopted a policy of imposing more extensive liability on intentional wrongdoers than on merely careless defendants …"

Then there is a long analysis of the authorities.

I take from that two points: firstly, the "but for" test is not the only test, it is a convenient test often used, but there are other tests as a matter of fact, and particularly so where we are talking about a case involving intentional wrongdoing.

I will come on to the facts of the merits presently, but I just wanted to set out that overall context as a matter of law as to why we say that it is important to deal with this case in a very particular way.

As regards the relevant law to be applied to this application, my learned friend has already taken you to *Keary*, but perhaps I can just briefly run through the key decisions, *Keary*, *Michael Phillips*, and *BCL Old*, so that one can see how that works in this case. His copy of *Keary* was at tab 7 of his file and, as you have already used that, it is perhaps convenient to use the same one. The principles are all set out from p.539. 3 is important. I am not going to read them all out, but I would suggest that it is worth looking at all of the seven principles, but in particular 3, at the top of 540:

> "The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered."

It is a weighing process. On the one hand, you have the interests of the liquidator, and more particularly the creditors that the liquidator is seeking to protect, against those of a party which has conducted an oppressive campaign.

THE CHAIRMAN: Are you saying that we have here an indigent company? I thought there was an after the event insurance policy.

MR. BOWSHER: There is an ATE policy, but I am saying that this is a case where the claimant is likely to be stifled, yes, they are at risk of being stifled.

THE CHAIRMAN: Because?

MR. BOWSHER: Because we do not know that there is going to be any ability to meet security. All we have is, on the evidence of Mr. Aldred, the possibility of obtaining some sort of Bond, which is not just a letter of comfort. It is some sort of Bond for some minimal amount.

THE CHAIRMAN: How is the Tribunal to know whether this is a case falling within principle 3, just taking principle 3 on its own, if the Tribunal is not to know what is either in the ATE policy or what is the real potential of a Bond or any other arrangement that might be made, including possibly money from the shareholders?

MR. BOWSHER: We have provided the information regarding the ATE policy that we are required to provide in terms of the limit. We have long since provided all that information. It is a policy for £1 million. We have provided all of that requisite information. We are not permitted by the insurer to disclose the policy itself. There is nothing more we can do on that. The fact that the policy exists is some security. That is the limit of the security which we have available, and Mr. Aldred's evidence shows how he has gone to see what else we could obtain to top that up. He has looked at obtaining a Bond. What has been made very clear at this is that certainly we have not been offered any particular Bond. It is not necessarily the case that any such Bond would be available on terms acceptable to the liquidator.

THE CHAIRMAN: Just pause for a moment. Let us have another look at what Lord Justice Peter Gibson was saying.

> "The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim made by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity."

Now, are you saying that because you can provide no certainty through the ATE insurance, so far as is disclosed, or the possible Bond arrangement, we are actually dealing with an indigent company and therefore the claim would be stifled? Or, are you saying you are not an indigent company, in which case, what is the problem?

MR. BOWSHER: We are saying that we are an indigent company and we have reached the limit of what we can provide unless we are able to get some sort of Bond to top up the security that exists. But we are, as it stands, an indigent company. The resources available to the company are set out by Mr. Aldred in his evidence. That is why we have accepted the jurisdiction exists, we did not really have any choice.

THE CHAIRMAN: But how do we know you are an indigent company if you are not disclosing the terms of the insurance policy? The Tribunal is not much interested in the desire of the insurance company to protect its confidentiality. The court is interested in whether the principles in relation to security for costs is satisfied.

MR. BOWSHER: It does not stop us being indigent whether the policy exists or not. The ATE policies are not our resources, they are only some security which may be called upon by the defendant in appropriate circumstances. Sorry, can I just take instructions?

THE CHAIRMAN: Of course.

MR. BOWSHER: (After a pause): It does not stop you being indigent, the fact that you know that you have some ----

THE CHAIRMAN: Forgive me for interrupting you, Mr. Bowsher. The terms, not the precise terms, a general description of the terms of the after the event insurance policy might enable the Tribunal to know that, for example, the insurers have the right to pull out of the action at a certain point and at that point only be liable for a proportion of the costs that have been incurred up to that point. Now, I have no idea if that is the case because we have not been told, it is not clear from Mr. Aldred's statement. But in weighing up whether security for costs should be given is the Tribunal not entitled to know a rather fuller picture than it does?

MR. BOWSHER: Sir, there are a number of points here. No application has ever been made for this policy. It was made very clear in May – there was a point about delay been made to you, there was delay in making this application – they asked for the policy in April and it was made very clear on 10th May (it is in the bundle) that they were not going to get it, and no application was ever made for it to be produced. Now, what would have happened if that application had been made?

THE CHAIRMAN: Well you would have refused it, you have just told me that.

MR. BOWSHER: We would have been instructed to refuse it and the Tribunal ----

THE CHAIRMAN: It would not make any difference whether they asked for it or not.

MR. BOWSHER: We would not have produced it. Whether or not the Tribunal would have ordered us to produce it is another matter, but that is by the by. The existence or otherwise of the policy does not affect whether we are indigent or not. It may be relevant, and the relevance of it is explained in the *Michael Phillips'* case. The relevance is if one is looking at whether or not there is any security which the defendant can look to, so if I were in a position to show you the policy I might be in a position to make a stronger case to say: "Look at this policy, it is an iron cast policy, they already have a million pounds." I cannot make that submission; all I can say to you is that there is a policy which exists which does provide some security. It also provides the security to the liquidator to know that he can proceed with this case, that he can engage KPMG, because that provides some cover against their costs as our experts. It is some security to the liquidator to know that he can proceed with this claim. It does not affect whether we are or are not indigent, it is simply the fact that that is the best that the liquidator has been able to obtain. The resources remain. If I can take you to the evidence, and it is necessary to go through in detail – Mr. Aldred says: "On instructions from the liquidator" it is in his statement at tab 9, and it is under the heading: "Assets of the claimant", para. 12:

"The following information [comes to me from the liquidator].

The Claimant is in liquidation … it owes more money than it has available to it. It has £34,000 in cash on deposit. Those funds are insufficient to pay out the creditors … The lack of funds has meant that the liquidator has never formally advertised for claims. Also, the directors of the company have never submitted a statement of affairs to the liquidator or the Official Receiver. However, whilst the claims made by creditors would still need to be formally adjudicated, the value of creditor claims would appear to amount to millions of pounds. However, absent adjudication the liquidator cannot say whether the figure is in the low millions of pounds, or higher.

The liquidator has kept funds available in cash so that he is in a position to make *ad hoc* payments in respect of the liquidation as and when necessary. For example ..."

And there is the specific example of the mediators fees that one would expressly refer to, but as indicated where there are specific *ad hoc* fees that have to be paid they have to come out of that £34,000, but that is all there is. This is an indigent company.

THE CHAIRMAN: It seems to follow, and correct me if I am wrong, from my reading of paras. 16 to 19, that although there is some potential of a Bond, it is normal for such a Bond to be paid for – if you will excuse the crude expression – 'up front' and there are no funds to pay for it up front, which makes the potential for a Bond smaller in a nutshell.

MR. BOWSHER: Exactly. That is why so often in these cases when security is ordered they will often appear where the claimant seeks to fortify the order, or there is argument about what the terms of the order are, because one simply cannot get from the market a hard offer in the vacuum without knowing what it is referring to. It is not right for us to say that there can be no further security provided and Mr. Aldred has tried to set that out as fairly as possible in that passage that you have just referred to from para. 16 onwards. But if the only way in which that additional Bond can be obtained requires us to pay a premium in advance, this claim will come to an end – unless it is a very trivial premium, and it seems hardly likely that it will be. So we do fall slap bang in the middle of the category of an indigent company.

I was just going to pick up a few more points from *Keary* but maybe, as you have just mentioned it, I can just take you to *Michael Phillips*, which is the previous tab – I will come back to *Keary* in a moment, para. 18 again – I do not think one needs to get into the detail of the case, but para. 18 in the *Michael Phillips'* case, a decision of Mr. Justice Akenhead,

where he summarises what one might draw from an ATE insurance policy, or from its existence. He reviews the previous cases and then said:

> "These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend on whether the insurance in question actually does provide some secure and effective means of protecting the defendant in circumstances where security for costs should be provided by the claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:
>
> (a) There is no reason in principle why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection."

THE CHAIRMAN: You see in that case, if I remember rightly, when I read it earlier, the terms of the ATE policy were provided to Mr. Justice Akenhead, were they not?

MR. BOWSHER: Yes.

THE CHAIRMAN: So he was able to make an assessment as to whether the ATE policy did provide sufficient "security" for the costs.

MR. BOWSHER: And decided it did not provide much in that case.

THE CHAIRMAN: And it did not provide much, and so in weighing whether there should or should not be security for costs he was able to make a reasonably sophisticated analysis of the policy.

MR. BOWSHER: Yes.

THE CHAIRMAN: In this case I am not able to make an analysis of the policy with any sophistication but we certainly have a case in which the costs of both sides are going to be well in excess of £2 million.

MR. BOWSHER: Yes. With respect, sir, one needs to break this down into its logical stages. First, does the Tribunal have jurisdiction to make the order? Yes. So we are into discretion. The first stage is: should an order be made? When one is first looking at the question of stifling and merits, one is looking at the question: is this claimant in a position that, if an order is made, it is likely that the claim will be stopped? That is the stifling question. The ATE policy is not relevant to that question. With the exception of the KPMG fees, which is a point which I will come on to, so there is relevance, but in general terms the ATE policy

does not fund the claimant's costs. The claimant's costs are funded by Messrs. Addleshaw Goddard and me in effect, on our CFA. That is the source of funding.

THE CHAIRMAN: Yes, but there is an agreement for an ATE policy, the premium for which is paid at the end of the litigation.

MR. BOWSHER: Yes, that is not relevant as to whether or not this claimant can proceed because at the moment what will stop us proceeding or otherwise is having to pay out more money because there is no more money to pay out. So if we were ordered to enter into an ATE policy or some other investment that required payment today then this claim could not proceed.

THE CHAIRMAN: Under this ATE policy.

MR. BOWSHER: Because the ATE policy is something different. The logical reason why one looks at the ATE policy is to say: "Right, there is jurisdiction. As a matter of discretion I am going to order security but how much?" The ATE policy is engaged at that third stage when the court is saying: "Should I order more security than there already is, or is there enough already?" It is not as to whether they are stifling or not. The question of stifling has nothing to do with whether the ATE policy exists. The question of the ATE policy is about how much security is required and whether or not there is enough already, and the context of the discussion in *Michael Phillips* is the claimant said: "You should not order any more" – apart from all the other matters which I have said – "you should not order any more because there is already this ATE policy", and Mr. Justice Akenhead said that he wanted to look at the policy to decide whether there is any more and whether he should order more to be made. That is not this case.

The reality is on this evidence we have done all that can be done. We have set out in the evidence what little more could be done. We have provided such security as there is and any more, barring this Bond, will stifle this claim, and so one does not get into that third stage, there simply is no more to be provided, save for the £34,000 – it is a bit less than that now, £30,000-odd. The questions are: is there exercise of discretion? Will this in fact stifle this claim? Of course not only would it stifle this claim it might have a knock on effect on the shareholders' claims to the extent that they may be hoping that they would get some benefits out of our claim to support their claims, so it stifles not only our claim but other people's claims.

While I understand the Tribunal's frustration at not seeing the ATE policy, and considering that it would like to see it, it is not actually relevant to this question of stifling, because if it was the most gold-plated absolute obligation without any let outs, and I do not think there is

any such ATE policy, it would still be what it is. The question is what more can be done now.

THE CHAIRMAN: So that leaves the Tribunal working on the basis that if this claim goes to trial, and the claimants – they are not going to lose on liability, but they lose substantially on the issues before the Tribunal – are not going to recover any costs at all?

MR. BOWSHER: The defendants will not recover.

THE CHAIRMAN: Yes, the defendants I mean, the defendants will not recover any costs at all.

MR. BOWSHER: Other than on the ATE policy, yes. That may be why the Jackson Review – there are many reasons why this was thought to be a way of funding litigation, not everyone thinks it is the best way of proceeding but this is the model, and it is the only model available to companies in this situation. The liquidator has no other means of pursuing this claim. If it were not for this, then an insolvent company – this is, of course, where it is entirely from other claims in the Tribunal – an insolvent company with effectively no real assets, or trivial assets, has no means of bringing this claim other than doing the best it can, securing a CFA and getting such cover as it can under an ATE. Yes, that puts the defendant at risk, but frankly they are the ones that infringed the Competition Act 1998, and this is the statutory consequence of what they have done. That is why it is relevant. If I can go to *BCL Old*, to look at the way in which the Tribunal approached the matter there. It is certainly not a rule, but it is relevant to have regard to the approach that they set out. It is in tab 3 of my learned friend's bundle. Could you go to paras.40 and 43. 43 is particularly relevant. There they were dealing with a passing on claim. Both 40 and 43 are relevant here. It is the end of 43:

> "In these circumstances we consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the claimants in whose favour liability is at least *prima facie* established."

These are intentional infringers in this case.

I have taken my submissions rather out of order, but I hope we have tried to respond to the Tribunal's concerns.

If we go back to where we started, para.3 of Lord Justice Peter Gibson in *Keary* at tab 7, p.540:

> "The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the

failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity."

Usually in these cases, of course, you get the normal rather unedifying correspondence about who caused what to whom, typical in the sort of building litigation ----

THE CHAIRMAN: There has been a fair amount of aggressive correspondence in this case. However, be that as it may.

MR. BOWSHER: In this case we do not need to get into that. It is decided by the OFT. When the Tribunal is weighing the exercise of discretion this is, in our submission, an overwhelming factor in favour of exercising discretion not to order any security. To be blunt, in circumstances where the claimant has taken what steps it can, as set out by Mr. Aldred, to meet these concerns, it remains an indigent insolvent company which has been put there by the defendants' actions, and if this is a case in which further security is to be ordered then frankly it is difficult to see how a company in liquidation with no assets could ever bring a follow-on claim. It is important to see it as boldly as that.

My learned friend says one should go and look at other funders. The problem with looking at other funders, of course, is that this is a company in liquidation. We already have a bunch of creditors who are looking for their money. The liquidator is not concerned to try and dilute the fund even further. It has taken the reasonable steps that it can. For Cardiff Bus, the intentional infringer, to say, "In order to give us peace of mind we think you should go out into the market and dilute the fund that might be available to creditors to whoever in the City may or may not be interested in supporting you", frankly just lies ill in their mouth. This is not about trying to keep the financial markets going and provide them with interesting products that may or may not be traded, this is about doing justice for the creditors. I am sorry, there may be a bit of purple prose, but it is important, as a matter of principle as to how this discretion is exercised.

THE CHAIRMAN: I understand.

MR. BOWSHER: As we were at *Keary*, it would be useful just to quickly run through the remaining factors. I will come on to the merits in a moment, but item 4 is:

"In considering all the circumstances, the court will have regard to the prospects of success but should not go into the merits in detail."

I will hope to respect that injunction. That is 4. Then 5:

"The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed provided that it is more than simply a nominal amount."

That is the third stage of the decision. I understand why the Tribunal finds that difficult because of that we have dealt with the ATE policy, but, in my submission, we simply do not get there.

Then 6:

> "Before the court refuses to order security …"

and this is the passage that my learned friend took you to –

> "… on the ground that it would unfairly stifle a valid claim, the court must be satisfied that in all the circumstances it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence."

Then he refers to one of those cases. Here you do have evidence, but in fact this is the sort of case where the Tribunal could sensibly infer, where you have evidence that there are no other assets, for the purposes of this claim there will be stifling. There is simply no other basis of the case. This is not a commercial case between two commercial entities such as in *Keary v Tarmac*, where people are trying to sort out the accounting on a loss where one can see what may be a contractual claim as a *chose in action* might want to be traded to others. This is the consequence of public law proceedings.

Then there is a lengthy discussion of that principle, which I do not think we need to get into. Paragraph 7, which is actually on p.542, highlights that the lateness of the application is a matter which can properly be taken into account.

THE CHAIRMAN: It is not your best point, is it?

MR. BOWSHER: It is a point. I will, whilst we are on it, make the point. The short point is, they asked for the policy in April. We made it absolutely clear on 10th May that they were not having it. If I can just give you the page number, it is p.17 of the application. The only thing which apparently has held them up is this issue about the ATE policy. As I say, we always have been indigent from the very outset. If they wanted to make this application they could and should have made it at the outset. They knew they were not going to get any more comfort from us from 10th May. They should have made this application earlier.

In the meantime, we have carried out a very large proportion of the work on this case. We are not saying we would not have done the work if the application had been made, but it is necessarily more oppressive to all those who are standing behind this claim that all this work has now been done – witness statements prepared, disclosure carried out, some inspection, initial work with experts (more than initial, we are in the midst of work with

experts), all done in circumstances where, if my learned friend has his way, all that funding will be exposed. Frankly, that is not a fair way to run litigation.

Can I just look a little bit more at the merits as to why we say we will succeed. It may be that I can just start with the document which my learned friend took you to, which is attached to Mr. Aldred's statement, p.72.

If I can just clarify a couple of things, this is not before the infringement. This is whilst operations are going on in Cardiff, 29th May 2004, six weeks into the infringement, I think it is, and if you go to the top of p.73 and just read those paragraphs, the second paragraph on p.73:

> "So on the face of it they are in a complete mess …"

This is Cardiff Bus commenting on the state of 2 Travel –

> "… a situation which would be virtually impossible to trade out of on current turnover even with a significant improvement in performance which they will not be getting in Cardiff."

There seems to be an exclamation mark there.

> "The fear is that they will be seeking to raise more capital but on current performance that would be an uphill struggle."

Just pausing there, what we are seeing here is a determination apparently by Cardiff that 2 Travel will not be getting any more money out of Cardiff, and they are clearly afraid that 2 Travel might manage to bolster its trading performance so as to provide a competitive response to Cardiff Bus. Then the last paragraph:

> "I remain of the view they are very vulnerable. Please could you tip off the trade press, give them the web link and point out the post-tax loss/profit before 'exceptionals' has gone from 73k to 253k. Could you also tip off industry colleagues that the results are now available?"

You can see from the response to that at the top of p.72 that that was actioned. So Cardiff Bus are taking steps to make sure not only that they themselves take steps to neutralise 2 Travel, they are also trying to make sure that all those around are made as widely aware as possible. It is hard to imagine why that would be done as a matter of public information. It is plainly being done as part of a campaign to try and destabilise them.

If one looks at the evidence which we served on Friday, which are the witness statements for the trial, and I will do no more than canter through to give a flavour of what we have been able to produce. You can see that there are ten witnesses. Some of them were internal 2 Travel individuals: 2, 3, 4, 5 and 7, and if I can just point out three of those. There is Mr.

Harrison of PricewaterhouseCoopers, of course a member of this Tribunal, who is someone who had direct factual knowledge of the state of the business at the time it was making its plans. He actually looked at the 2 Travel business to consider how it would develop.

Then 9 and 10 are two individuals who we have come across – we will come presently in this hearing to the issues about the disclosure of the deleted parts of the OFT decision, but as a result of correspondence we became aware that some of these individuals had commented on the decision. We followed that up, so we have been able to get evidence from other people with direct factual knowledge of the Cardiff Bus market.

Then 8 deals with another part of our claim, the property claim.

If I can just show you briefly how that works, Mr. Harrison, for example, of PWC, who had looked at the business plan. If I can take you to p.8 of his statement at 43:

> "It was self-evident that the continuing predation in Cardiff, stifling 2 Travel's earning potential, with no end in sight, was inflicting enormous damage on 2 Travel. My understanding is that Mr. Short (a successful business man with whom I had also worked with professionally in respect of his other business interests) and Mr. Francis provided guarantees on behalf of 2 Travel and supported the company. However, as the position in Cardiff did not change, 2 Travel's financial position went from bad to worse and eventually the company collapsed.
>
> 48. Throughout, the management strategy was based on expansion, particularly in Cardiff. In my opinion, the basis of the management's strategy was sound and, if it had been able to open up these routes, its fortune would have been markedly different. The company could have gone on to become a profitable business."

The next statement is by Mr. Fowles, who is one of the claimants. He gives quite a bit of evidence, as you can see a substantial statement with attachments, where he goes on to review the knowledge of individuals in Cardiff, the likely operation of the business. I do not propose to take you to all that detail now, although he does set out a lot of detail about each service, how it would have worked, why it would have done better gathering business, it would not have been a case of just the first bus on the rank, as it were.

Mr. Short, again he provides evidence. Mr. Huw Francis also provides evidence and Mr. David Fowles also at 5.

What is perhaps particularly telling is when we come on to some of the other witnesses. Mr. Cartwright is now with 2 Travel, but at the time he had actually worked with Cardiff Bus, he is at tab 6. This is someone who is speaking about his time with Cardiff Bus.

Paragraph 6:

"I was involved with operating the infill services for 2 Travel and so I am fully conversant with the infill model…"

That is the business model that is discussed in the evidence.

"Infill services are often very lucrative routes for operators. There is usually scope for varying operators to exist on the same routes, normally a quality operator and a low cost operator.

I knew of the routes that 2 Travel selected for its infill services from my time at Cardiff Bus. The routes were very lucrative routes, there's no doubt about that, they were high performing routes."

Then he points out at para. 17:

"When I worked at Cardiff Bus, it was common knowledge there was a source of money available specifically to fight off competition if necessary."

Mr. Sutton, I mention at para.8, simply because he deals with this claim which is to do with the valuation of some land at Swansea and, in short, provides useful corroborative evidence in para. 42 but I do not think I need to read that out, but he corroborates this claim about the effect of the insolvency on the business losing that value.

Then Mr. Durbin and Mr. Jones are the last two. As I say, they are the independents – if I can put it that way – as far as one knows the only involvement they had was they had an input in the OFT proceedings. If you look at Mr. Durbin on p.639, para. 11:

"I read about the predation with interest as I knew the set up in Cardiff, having grown up in Barry. I watched the situation in Cardiff unfold. The outcome was inevitable. That's the way it always works out. Cardiff Bus had deeper pockets.

I understand 2 Travel survived in Cardiff for approximately 8 months. Managing to survive for that long against such tactics was good going.

By the time the authorities stepped in it was too late for 2 Travel."

He currently runs South Gloucester Bus and Coaches, this is someone in the industry who knows his business.

Mr. Jones who, likewise, is in the industry has much the same to say at para. 16, p.643. He says:

"I think the way they have been treated by Cardiff was terrible. The business model for Cardiff (2 Travel's Business Model) failed, in my view, because of the joint effort of Cardiff City Council and Cardiff Bus to destroy 2 Travel in any way they could."

Those are not 2 Travel people speaking, they do know the industry. The merits on liability are already dealt with. When it comes to the merits on causation, both as a matter of law, it seems to us that we are well placed because it seems to be the right test is not to prove some precise 'but for' test predicting the future, but even if it were, the evidence we are producing meets that 'but for' test, and it is dispassionate third party evidence. So we get over causation. It is inherently likely, it is much more likely than not that we will succeed and to that extent it is important to have that in mind.

My learned friend also comments on the quantum of our claim. Yes, the numbers are large, and of course the numbers were prepared effectively by lawyers who had no access at the time to accountants support and it was trying to draw inferences from pieces of paper that were available, and it is right to say that there may be some overlap between the claims which may be alternative claims, e.g. the claim for loss of profit and the claim for loss of a capital asset may cover the same territory. It may be the claim for lost profit is better characterised as one or the other, but there is nothing surprising in proceedings such as this when one is bringing those claims to make the claim in two alternative ways, one does not know how the facts are going to develop, particularly in a case such as this. Particularly when you do not know the legal route we are going to be travelling down it would only be wise to do it that way. We have the loss of profits both before and after liquidation. I understand there is the issue about who caused the liquidation. We say the evidence is pretty good, the liquidation was caused by this infringement, this intentional infringement. So we are immediately into sums of millions on our claim. It may well be that KPMG go through that and say the sum is a lot less, but it is some millions. There are then claims for loss of commercial opportunity, in particular the loss of opportunity on the Swansea depot – the reason why I showed you that evidence is the ----

THE CHAIRMAN: The Lidl?

MR. BOWSHER: The Lidl… that is a real claim, it is not an imaginary claim, we have evidence from Jones Lang. This is not a claim for £50 million, evidently not. It is a claim for some millions of pounds, and it would be ridiculous of me to put a number on it given we are in the midst of our first attempt to get forensic assistance in coming up with this number, but this is not a trivial claim. Within the constraints that we had, we provided an enormous amount of particularity in the claim form in terms of its calculations and you have seen the wealth of that, and if you compared it with what you would get in a High Court claim form it is just not comparable, and that is the way the rules of this Tribunal work. We have fulfilled those, we have provided detailed calculations which will, of course, have to be

looked at again once the expert evidence is in. All in all it seems to us that this is a case where the Tribunal gets to the point of concluding that this is a case which could very likely be stifled if any order were made unless it were possible to enter into some Bond, and that is not a matter of certainty. In those circumstances, given this case – this is not a different sort of case from *Keary*, this is a straight forward application of *Keary* principles to a case such as this, to say that the Tribunal should exercise its discretion not to order any security be made by any means whatsoever.

There is a sort of back to front reference in my learned friend's skeleton to offers. I would invite the Tribunal to ignore that reference, he says they may or may not have had offers and you may or may not have regard to them. In my submission you should simply have no regard to that and assume that no offer has been made. In the High Court if an offer has been made one maybe makes an application to another Judge or to another Master so that if there is obviously an issue about disclosing offers to the prospective trial Judge, and it is obviously something that happens quite a lot in the TCC, and usually the application is transferred to another Tribunal. If my learned friend wants to make something of an offer that he has or has not made, he should make the offer and then we should have the application in front of someone else, but this sort of: "Well, maybe I have, maybe I haven't" approach should not be countenanced.

THE CHAIRMAN: Right.

MR. BOWSHER: Can I then just pick up a couple of small points on the approach to litigation and the way the numbers are totted up. For that purpose can I take you to the application and the numbers which are set out in the application? My learned friend had you looking at it from p.3 of his application. The point I want to make here is the numbers themselves need to be treated with some care because, in fact, they are not consistent with the defendant's own position as it now takes it, so one would be concerned about the value of some of those numbers. Also, one needs to look at the way in which the case is now being developed by the defendant and the way that in itself may work some oppression.

The first point is this: on p.5 this application for security includes a sum of £31,925 for witness statements, it is said that they are going to produce four witnesses. It now turns out there are going to be no witnesses at all, and there has been no recognition of that at all along the way, that in fact this is not, on its face, true. We all know these security for costs applications are hyper-digital.

THE CHAIRMAN: In the general context it is a small factor.

MR. BOWSHER: It is a small factor but important. We all know these figures are assessments, but this is a whole heading of this assessment, this application which is simply not borne out by what has happened.

The second point is this, it is the history of the experts, and we will come on to this question of the economic experts and we are very concerned that this application is being made now for a number of reasons, and we will deal with that then, but if I can deal with it in terms of oppression. We went through all of this last time, and on the last occasion my learned friend very much urged upon you that each side should have its own experts, but he was very concerned that it was only a matter for quantification, indeed, he said as much in his skeleton, paragraph 51: "Complex economic issues such as market definition have already been resolved at the infringement stage. The experts here are concerned only with quantification". That is what he said in his skeleton the last time around, and of course we had the debate about how that was to be dealt with. We have appointed forensic accountants, it is not easy for us – I will not labour the point any more – you will understand it was not straight forward to secure the services of a forensic accountant. It turns out, when we look at this schedule that in fact a great deal of work had already been done by the defendant's experts, on p.3 we can say they had already done – there is a number here £48,000-odd up to the review of the claim form, certainly by the time we were actually talking about it, and there was £7,000 on the defence, some pretty substantial numbers. So they were already up and running with whatever expertise they thought they needed, and now what is a very late stage in the day, we are two or three weeks before the date when the experts' reports are to be produced, and we are told that there may or may not be a new discipline that needs to be introduced. We do not know how the questions are, we do not know how that is going to be dealt with and that in itself will be oppressive. We simply have not engaged with how we might deal with that; I am not sure how we will deal with that if we have to meet that material.

Our primary position will be that evidence about how the bus market in Cardiff should develop will be evidence that is largely a matter of fact to be dealt with by people who know these things in Cardiff. It is perhaps surprising that Cardiff Bus does not want to tender any evidence about the development of its own market. But if there is some other, more sophisticated point, that cannot be dealt with by economist members of the Tribunal that is something, as a matter of fairness we have to be able to deal with, and to have this sprung upon us now tells us a lot about the way in which this claim is being met in a way to maximise the difficulty and, frankly, to exploit the difficulties that we are in. That, of

course, is the characteristic of the defendants since 2004, to try and nail 2 Travel, to put it colloquially.

I think I have dealt with the level of resources. You have read Mr. Aldred's statement, and I have made the points at some length. The ATE policy is obviously important and the fact that I cannot produce it limits what I can say about it, but it is not actually directly relevant to the exercise of discretion. Your enforced ignorance means that there is very little you know about as to what the real value of the £1 million is. That is all it amounts to. It is enforced by others, not us, that is the important point.

The reality is that this is a case in which security ought not to be ordered. Even modest sums by way of security will eat into the very little available for experts, and will very significantly imperil the chances of our being able to get this claim to trial next year.

Sir, I have gone on rather longer than I should have done, but this is, to some extent, life and death for our client.

THE CHAIRMAN: Not at all.

MR. BOWSHER: Unless there is anything else, those are my submissions.

THE CHAIRMAN: Mr. Bowsher, Mr. West, I had been given to understand before we started that the three gentlemen at the end may want to say something about this application, and I am minded to allow them to do so before you reply. That will be in ten minutes. We are going to have a short break for ten minutes.

(Short break)

THE CHAIRMAN: Mr. Bowsher, Mr. West, I have just had the case of *Enron* checked because it was far from fresh in my memory as it is now nearly three years ago that I made the relevant order, and I think it provides nothing of relevance really. Just so you know, what happened was at the beginning of January 2009 the Tribunal, with myself as Chairman, made an order whereby a reservation of £500,000 of costs was made by the liquidator, and indeed I have been helpfully provided with a transcript of the discussion because I know that when that was being dealt with I had expressed some concern as to whether a liquidator had power to reserve £500,000 as what was described in shorthand as a "pot" for the costs of the claim. The liquidator was present and provided assurance that he did have such power, and so it proceeded on the basis that there was a pot of £500,000 in that case for security for costs. It was not paid into court, as I recall it, it was simply with an undertaking.

MR. BOWSHER: This is probably just an academic question, but I am not sure I quite understand, reserved out of what?

THE CHAIRMAN: Out of the assets that were in the possession of the liquidator, there being assets in the possession of the liquidator in that case. I should have made that clear, it was nothing to do with ATE policy, or a bond or anything of that kind. Now, I said I would give Mr. Francis, Mr. Fowles and Mr. Short the opportunity to say anything, if all or either of them wished to do so, on the subject of security for costs only at the moment?

MR. FRANCIS: Sir, we have not prepared anything but it does affect us, so we thought we would say something.

THE CHAIRMAN: Well keep it as brief as you can but say whatever you would like to say.

MR. FRANCIS: Sir, a lot has been said by the defendant regarding the financial position of 2 Travel. I was a non-executive director on the board there and was very familiar with the financial issues and problems that they faced. Mr. Short and I made it clear to the board that we were prepared to invest a further £4 million absent predation. We both bought the property off the company for £2.5 million. However, when the predation continued for the length of time that it did it seemed that we would be throwing good money after bad and at that juncture we pulled out. I also think, sir, it would be beneficial for you to hear from us as to some example as to the type of predation that 2 Travel suffered from. This is not something that happened overnight, it carried on for nine months and, during the course of that nine month period, the directors instructed me to write to the police, the Office of Fair Trading, to Cardiff Bus and to Cardiff Council, to tell them that 2 Travel was suffering very badly from this behaviour and what the likely consequence of that behaviour was going to be.

It was not particularly encouraging at the outset when we started that the managing director of Cardiff Bus, Mr. Brown, ‘phoned up one of our directors and told us that he would literally see to it that we were "run off the road". This is the type of behaviour that 2 Travel suffered from, and they put up with it for nine months. Most of the letters that we wrote remain unanswered. We wrote to Russell Goodway, the Chairman of Cardiff Council. He acknowledged the letter but did absolutely nothing.

This behaviour consisted of buses in front of our buses, buses behind our buses obstructing us, and videos were taken, and the videos were sent to the police who informed us that they considered it to be a civil matter. Over and above all this, Sir, there were breaches of transport law, breaches of road traffic safety laws by Cardiff Bus, all of which are detailed in our witness statements, and all of those things went unpunished. It would be fair to say, and again it is in our statement, that this is not the first time that Cardiff Bus found themselves in this position, it has happened to our knowledge on two previous occasions.

Yes, 2 Travel did suffer from a shortage of cash, but there was capital available to it to pursue the plan. Stephen Harrison advised on. Stephen Harrison has advised Nigel Short and myself for over 20 years and we were prepared to follow his advice, but it was then agreed between us that the predation was such, and no one was prepared to do anything about it, that had we carried on more money would have been lost. In my very simple way, Sir, because I am not familiar with your procedures in this particular Tribunal, the question that I think needs to be asked is: should they benefit from the cash shortage that they caused? I would ask you to consider that, Sir, when you are deliberating over the application that has been made.

THE CHAIRMAN: Thank you very much. Do either of the other gentlemen wish to say anything? Thank you very much indeed. Just bear with me for a moment, Mr. West. (After a pause) Mr. West?

MR. WEST: There are a few points I would like to pick up on what Mr. Bowsher said. The first is the reference to the OFT decision at para. 7.235. In my submission, read in its entirety this paragraph supports my case and not his. I do not know whether you have that decision, it is annexed to the claim form, p.241 of the decision.

THE CHAIRMAN: Yes.

MR. WEST: Mr. Bowsher read part of this paragraph, but the whole paragraph reads:

> "On this basis, whilst there may be a question as 2 Travel's long term viability, the OFT considers it is likely that Cardiff Bus' predatory conduct was a contributory factor in 2 Travel's exit from the market potentially accelerating its exit."

In my submission what that means is 2 Travel, it is quite possible, would have gone bust anyway but this predation accelerated ----

THE CHAIRMAN: What does it say: "There may be a question"?

MR. WEST: Yes.

THE CHAIRMAN: It does not say they were likely to go into liquidation.

MR. WEST: The OFT used the word "accelerated", in other words "advancing the date upon which the inevitable occurred". I foresee, Sir, we are going to come back at some point to precisely what this finding of fact is. This is the principal finding of fact where the parties are still in dispute about what the relevant finding actually is. 2 Travel's case is that this is a finding of causation, and Cardiff Bus' case is that it most certainly is not, certainly not 'but for' causation.

THE CHAIRMAN: This is exactly the sort of issue we had to deal with in *Enron* in which the OFT did not nail its colours to the mast, nor would one really expect it to under the current

system that we operate at least, and the Tribunal had to determine whether the 'but for' test, as we applied it in that case, had been satisfied. I must say, reading that paragraph, and I think the technical term in grammar is a 'periodic paragraph' because the last sentence of the previous paragraph is relevant to it, I am not sure that it takes us anywhere, does it? "Maybe" and "Maybe not".

MR. WEST: Yes, that is precisely our case.

THE CHAIRMAN: And if the answer is "maybe it did lead to the demise of 2 Travel" which otherwise could have traded out of its financial difficulties dealt with in para. 7.34 of which we know anyway, then there may be a very substantial claim, albeit not the £50 million that, as Mr. Bowsher has suggested, may be a substantial claim of a lower order.

MR. WEST: But my point is simply that insofar as Mr. Bowsher is saying that the OFT has already decided causation, it certainly has not. At the very least there is going to be a dispute about that.

THE CHAIRMAN: Well as I understand the point it decided liability but not causation in its most sophisticated form.

MR. WEST: Mr. Bowsher then says 'but for' causation is not the appropriate test in all cases, and, Sir, I accept that entirely, sort of week 1 tutorial in criminal law – if someone is the simultaneous victim of two stabbings then applying the 'but for' test, neither of those stabbings, if either of them would have been sufficient to result in a death in and of itself, is a 'but for' cause of the death. So in a case where one is dealing with a claimant who is the victim of two simultaneous or, I suppose, potentially consecutive breaches, one cannot apply the 'but for' test. Indeed, the case to which Mr. Bowsher referred, *Smith Newcourt*, was a case in which the claimant had been a victim of fraudulent misrepresentations, as a result of which it bought a company which had itself been the victim of a substantial fraud. There is no suggestion of that type of situation applying here. There is only one infringement which is pleaded and relied upon and so the relevant test is 'but for' and we see that from *Enron*.

THE CHAIRMAN: Yes.

MR. WEST: Mr. Bowsher then says the reason 2 Travel has not disclosed the policy is because the insurer does not permit it. I was somewhat surprised to hear that evidence from Mr. Bowsher because it is not in Mr. Aldred's statement and it is contrary to what we have been told before in correspondence. The relevant correspondence is at p.17 of the attachment to the security for costs application, Addleshaws explain why they are not disclosing the policy. What Addleshaws say is:

"We have taken our client's instructions. We have already provided you with the details regarding our client's ATE insurance policy that we are required to provide under the Costs Practice Direction in the notice of funding."

Mr. Bowsher said that as well.

"We would have thought that is sufficient. Notwithstanding the above in the case of *Arroyo* the High Court held that an ATE insurance policy was not disclosable and also that it was privileged. Therefore, whilst we appreciate that your client may wish to review the terms of that policy, it is clear that your client has no legal basis for doing so. In the circumstances our client declines the invitation to disclose the policy."

So what they are saying there is: "We are not disclosing it because you have no right to its disclosure, it is not a disclosable document", and I entirely accept that. There is no relevance to the issues in these proceedings and I have never suggested there was. My point is rather a different one that if the claimant wishes successfully to resist an application for security for costs it would be well advised to disclose the policy, because if it does not it will not be able to demonstrate that an order for security will stifle the claim.

Mr. Bowsher now criticises us for failing to make an application for disclosure which, as his instructing solicitor, correctly said would have been bound to fail.

THE CHAIRMAN: I suppose there is an argument for saying that the non-disclosure, to use a neutral term, of the ATE policy puts you in a more advantageous position because you are able to say that this case has to be approached on the basis that we have a potentially completely impecunious party.

MR. WEST: The difficulty is that under the approach in the case of *Keary Developments* the claimant has the burden of proof on the question of stifling the claim, and so it is not open to the claimant to say: "We are not going to tell you, you have to proceed on the assumption that the claim will be stifled."

THE CHAIRMAN: What we have been told is the nature of this insurance policy is that it is an insurance policy that does not provide for any payment of costs at this stage. It comes into effect at the end of the proceedings, that is as I understand the way it was put by Mr. Bowsher. He put it rather dramatically saying that he, and I guess Mr. Aldred and his instructing solicitors, carry the risk at the present time, but that is where we are, is it not? We know that is the type of policy it is.

MR. WEST: That does not create any difficulty at all. If the policy provides sufficient security, and that depends on its terms and conditions, the fact that it does not lead to any payment

into court now is irrelevant, what matters to us is that we can recover if an order for costs is eventually made in our favour at the end of the case. I suppose it might become an issue if there were an order for costs of an interim application, but we simply do not know whether that would be covered under the ATE policy – I strongly suggest that it would, subject to the other terms and conditions of the ATE policy.

THE CHAIRMAN: Yes, I understand.

MR. WEST: Then Mr. Bowsher says there is a possibility of obtaining a Bond, but that may have to be paid for up front. Again, that is not quite what Mr. Aldred says in subparagraphs (a) to (f) of his para.17:

> "(a) the cost of a bond would typically between 12 and 15% of the amount of the bond ...
>
> (b) the sum due to issue of the bond is usually payable before the bond is issued;
>
> (c) it is unusual to defer this cost until a later date;
>
> (d) it is even more unusual for the cost of obtaining a bond being deferred and contingent on success …
>
> (e) if a deferred, contingent on success bond was issued, that … would have to be factored into the amount due to QBE to issue this type of Bond."

Then he considers whether that would be a recoverable additional expense. He then says that:

> "(g) QBE would be happy to provide us with a written offer once the amount of any bond as may be required was determined."

So he is there raising the possibility of a Bond issued on the basis that the premium was only payable at the end of the case, and he says such a Bond may or may not be obtainable. Well, if it is obtainable there is nothing to pay up front.

We then have the question of whether money could be obtained from funders or backers. Mr. Bowsher said that was not relevant because the company is in liquidation and it is not appropriate to dilute its assets. I am completely baffled by that. Let us assume a third party funder puts up the security monies and the claimant then wins. The security monies are simply paid out to the third party funder. There is not any order for costs in the defendant's favour. The funder gets its money back and the assets are not depleted.

Option two, the claim fails: there is no dilution here either. The funder has put up the money for the security, the claim fails, there is an order for costs in the defendant's favour which it recovers from the funds sitting in court. The loss is suffered by the funder.

The only exception seems to be in the case where the company, itself, has paid some costs in order to obtain the security, such as where it has paid the cost of obtaining a bond. Mr. Aldred's evidence is that that may be perhaps 15 per cent of the amount. So if it is an order for security for £1 million it is perhaps £150,000. The liquidator then has to decide. Let us say a third party funder puts up the money in exchange for the liquidator's agreement to repay the £150,000 out of the assets if the claim is successful.

THE CHAIRMAN: That is a bit like the *Enron* position, is it not, the "pot"?

MR. WEST: Exactly. The liquidator's decision is, is it acceptable for me as a liquidator to pay £150,000 out of the proceeds of this claim in order to enable me to pursue the claim in the first place. I would suggest that that is not a terribly difficult decision for him to make.

My learned friend did not deal with the question of whether third party funding was actually available from anybody. No doubt the reason is that there is not any evidence about it. He did refer the court to the witness statements served on Friday. I have not had a chance to read all of these, but they tie in with what Mr. Francis has just told the Tribunal. His evidence on that and Mr. Short's, is that absent the predation they would have been prepared to put another £3 or £4 million into this company. That is money that they had.

It should be borne in mind, of course, that the Swansea property which my learned friend mentioned, and which is dealt with in one of the witness statements, is a property which, as a result of the insolvency was purchased by the former directors and which, as I understand it, they still hold. It might perhaps be thought rather surprising that there are these individuals, with assets of millions of pounds that they would have been prepared to put into the company at the time, who are now not prepared to put up £150,000 to enable the Bond to be procured. There is simply no evidence of that because 2 Travel have chosen not to tell the Tribunal what the position is.

Mr. Bowsher then said that the ATE policy was not relevant to the question of whether the claim would be stifled. That is, in my submission, illogical. If the claimant can provide security via the ATE policy the claim will, by definition, not be stifled, but the claimant bears the burden of proof on that point and it is simply refusing to disclose the policy.

If my learned friend's submissions were right that because this is a company in liquidation an order for security should not be made, the whole basis of Rule 45(5)(c) would fall away, because under that Rule it is precisely in the situation where the claimant is impecunious that an order for security can be made.

I also rely, sir, on what you have just told me about the *Enron* case because that also seems to cut across my learned friend's submission that an order of this nature is not appropriate in

an abuse of dominance case. That is precisely what happened, as I understand it, in the *Enron* case, an order for some form of security was made.

THE CHAIRMAN: Yes.

MR. WEST: I only have two other short points. My learned friend took you to some of the evidence which was served on Friday. I feel I have to put a marker down on behalf of my client as to whether very much of what he showed you is admissible. A lot of it seemed to consist of various individuals saying, "In my opinion, the reason why 2 Travel went bust was because of the predation". The Tribunal has given an order permitting the parties to adduce expert evidence. It is not appropriate that they do so via various factual witnesses. We are particularly concerned at the apparent attempt to adduce expert evidence from Mr. Harrison. It simply puts us in an intolerable position if a member of this Tribunal has been called as an expert witness in a case proceeding before the Tribunal.

THE CHAIRMAN: I have to say to you that I do not know Mr. Harrison. He is a new member of the Tribunal, is he not, Mr. Lusty? He is a completely new member of the Tribunal. I think I have had the opportunity to meet him but was unavailable at the time anyway, which may be felicitous. As far as I am concerned, he is just another expert witness among many. I am sorry, Mr. Bowsher, you wanted to say something?

MR. BOWSHER: He is not an expert witness.

THE CHAIRMAN: He is not an expert witness, he is a witness of fact, among many.

MR. WEST: I do not know if I have to show you his evidence again, but it is full of, "In my opinion, this", "In my opinion, that", and indeed Mr. Bowsher read out one of those sentences.

THE CHAIRMAN: He did, and I noticed it. If there is evidence – forget about Mr. Harrison just for the moment and let us just focus very briefly on Mr. Durbin and Mr. Clayton Jones – that Cardiff Bus were predatory against others habitually – just for the sake of argument, I have not read it in detail yet – and have the reputation in the industry for being predatory against others, how is that not relevant and therefore admissible? They might have to apply for permission to adduce it, but it is bound to be relevant, is it not?

MR. WEST: In my submission, it is completely inadmissible, and the reason is that that was one of the allegations considered by the OFT, the suggestion that Cardiff Bus had predated against others such as the Cardiff Bluebird, which I think was one of the names, Allisters of Barry. I cannot now remember which footnote it is, but in the decision the OFT says, "We do not find any of that proven, it is all prior to the Competition Act anyway, so we have no jurisdiction over it and it is not part of the infringement finding". This is a follow on

damages claim. The question is what damages were suffered by reason of the infringement found by the OFT, not some other arguable infringement that was not found by the OFT.

THE CHAIRMAN: I suppose they do not need to prove it anyway because the finding of fact has been made that there was predation? It would be icing on the cake.

MR. WEST: It is background as well.

THE CHAIRMAN: At best it is a bit of icing on a cake that has already been eaten by the OFT because they have found that there was predation.

MR. WEST: That may be one way of characterising it, and in that case one really doubts whether it is necessary or appropriate to have it. To have Mr. Durbin saying, "The outcome was inevitable, that is the way it always worked out", that is clearly opinion evidence, in my submission.

THE CHAIRMAN: Yes, I am sure it is, on the face of it. That argument may have to be had on another day and possibly in another place.

MR. WEST: Yes, I fear it must.

My learned friend also went into the question of expert evidence, but I think we are supposed to deal with that later in the agenda. I am happy to deal with it now, but ----

THE CHAIRMAN: Do not deal with it now, let us deal with it separately.

MR. WEST: That was all I was proposing to say.

THE CHAIRMAN: Thank you. Let me get back to my agenda. Can we move on to the rest of the agenda and then I will deal with whatever orders are to be made together? I think we are now on to the question of disclosure by Cardiff Bus. What I am slightly unclear about is what 2 Travel Group are asking for in terms of disclosure by Cardiff Bus, because there is not a draft form of order.

MR. BOWSHER: That is a very fair point, and the short point is that we have a number of concerns about the disclosure, the way it has been listed and offered for inspection. That topic is not yet complete in correspondence. As matters currently stand, on 12th September – that is the letter at tab 29 – the defendant's solicitors told us that they were going to carry out a limited further search, p.148, para.7.2.

THE CHAIRMAN: Yes.

MR. BOWSHER: They have agreed to undertake a further limited search in respect of certain categories of documents.

THE CHAIRMAN: What database are they searching?

MR. BOWSHER: I think they are searching their electronic database of the documents they have. As I understand it, essentially their disclosure is the boxes of papers which came out of the

OFT proceedings and as a rough approximation if it was in the OFT proceedings it is relevant.

THE CHAIRMAN: This is a Burges Salmon database which they are searching using search terms?

MR. BOWSHER: Indeed. There has been some debate about search terms, but they are carrying out a further search and the further search described elsewhere in the letter, 2.9(r), and there is rather more detail about what they will search for on 1.43. The short answer to your question is that we are not seeking a specific order today, because it seems to us that the most effective way forward is to see what comes out of that further search. Then if we need to make a specific disclosure application we will do that. As my learned friend has already canvassed, I think it seems inevitable that there will have to be a further CMC not that far away ----

THE CHAIRMAN: I am sure there will.

MR. BOWSHER: -- once we get over the next steps, and this may be a point we have to deal with then.

THE CHAIRMAN: Mr. West, my reaction to this aspect of the CMC was that there would have to be a much clearer setting out the form of order that was required, and we do not have that as yet, so no order should be made on that part of the agenda. Are you content with that?

MR. WEST: I am, subject only to this point, that the letter setting out 2 Travel's concerns about our disclosure was dated 18th August, and we replied on 12th September.

So far as concerns the additional searches we have agreed to carry out, I accept nothing further can be done about that, but there is no reason why, if 2 Travel were not happy with the answers we gave on 12th September, they could not have brought forward their concerns now. I have to reserve my position if we end up coming back to argue about something later.

THE CHAIRMAN: I will simply express the view that if there is an application to be made in this context – I think I am probably looking out of the corner of my eye at Mr. Aldred at this moment – it should be made promptly, using "promptly" as a term of art.

MR. WEST: I think also I have to clarify one point. I am told that the electronic documents are not held by Burges Salmon, but they are an image of the client's electronic system currently being held by a third party data company.

THE CHAIRMAN: Do I need to know that?

MR. WEST: I do not know, but I am told ----

THE CHAIRMAN: I do not think I want to know that unless it is really important! It is very interesting, but there we are.

So we now move on to the issue of disclosure by 2 Travel. My understanding is that disclosure is sought of 2 Travel's instructions to Grant Thornton for its 2004 report on 2 Travel's financial position and documents in the hands of Mr. Fowles. Is that right?

MR. WEST: There is a further request for documents in the hands of the liquidators.

THE CHAIRMAN: Documents in the hands of the liquidators. I am sorry, my eye had strayed past that. I think what you are saying is that those documents go to the issue of whether 2 Travel would have been viable, notwithstanding the OFT's findings.

MR. WEST: That is certainly the case so far as concerns the liquidator documents and Grant Thornton. Mr. Fowles' documents are slightly different. Those have been disclosed. We just want inspection of them, which for some reason has been delayed.

THE CHAIRMAN: Where are they?

MR. WEST: I am afraid I do not know.

MR. BOWSHER: My instructions are, and Mr. Fowles may be better placed to tell me, that they are, as they say, "in the post", but I am not quite sure whereabouts they are.

THE CHAIRMAN: The Welsh post.

MR. FOWLES: They left me on Wednesday of last week.

THE CHAIRMAN: (Welsh spoken).

MR. BOWSHER: My learned friend is right, they have been disclosed, the issue is inspection.

THE CHAIRMAN: So there is not an issue on that.

MR. BOWSHER: Maybe they arrived in Manchester this morning.

THE CHAIRMAN: So far as the other documents are concerned, the documents in the hands of the liquidator and the instructions to Grant Thornton, what do you say about that?

MR. BOWSHER: Grant Thornton: my learned friend has helpfully provided the copy of the letter, you had it earlier on. This letter is just obviously wrong when you read it, or that introduction. Grant Thornton ----

THE CHAIRMAN: It is so long that the obviousness of anything may have escaped me.

MR. BOWSHER: There is something in that. The premise on which my learned friend ----

THE CHAIRMAN: It is a criticism I make of both sides by the way. Go on.

MR. BOWSHER: This is just a document, the premise that my learned friend says that this is a document written in response to instructions from the directors of 2 Travel and he derives that from the first page and that is what he attached. He has helpfully provided us with the rest of the letter today for different reasons. The short point is Grant Thornton were

appointed by the bank not by the directors. The directors did not give any instructions. They could not and would not have given any instructions. It must just be the way it says: "We write to you in connection with your instructions", "your" simply will not be the directors and one can see that very clearly if one goes on and reads the letter further on. It is slightly bizarre, I have to say that they should make such an error, but if you look at the terms of it this was a report carried out for the directors but at the instance of the bank. The directors themselves simply do not have any instructions.

THE CHAIRMAN: So what is the consequence of that?

MR. BOWSHER: There is no order to be made, we say.

THE CHAIRMAN: Okay, so we are only now dealing with ----

MR. BOWSHER: I am sorry, I should clarify, that said we have written to Grant Thornton to ask them if they are prepared to disclose whatever instructions they do have.

THE CHAIRMAN: That may need an application for third party disclosure.

MR. BOWSHER: It may or may not. It may be that we do not need an application but we will be able to tell those instructing my learned friend what comes back from Grant Thornton and once we have that description Grant Thornton will either let us have them or there will have to be a fight about it, I do not know.

THE CHAIRMAN: The only set of documentation in this category then is documentation in the hands of the liquidators relating to the financial position of 2 Travel.

MR. BOWSHER: The difficulty with this is I am not sure what this is an application for. There will be boxes of invoices from other creditors which have nothing to do with this case, are not relevant to this case and have not been provided. 240 or so boxes have been produced on disclosure on our side in a rather short circuited way so that we did not list each and every document. As you have seen from Mr. Aldred's evidence, and it maybe you were looking at it for another reason so there is no reason why you would have picked up the relevance for this point, but he made the point in his evidence if I could see it at p.66, para.15, it is the paragraph of the £34,000.

THE CHAIRMAN: Yes.

MR. BOWSHER: And he makes the point there has never been any advertisement for claims, the directors have never submitted a statement of affairs. There has never been an adjudication of claims. The sort of document which this rather non-specific application may relate to does not exist. Now, it may be that there is another specific document which those instructing my learned friend want us to go and look for, but to simply say "documentation in the liquidator's possession relating to the financial position of 2 Travel", as far as we are

concerned we have disclosed everything we have that will tell you what 2 Travel's position was. If there is something we have not disclosed and that is obviously missing then no doubt an application for specific disclosure can be made. But, as I say, with the exception of some crude underlying document, underlying primary documents, which may not have been produced, as far as I am aware they have it, but it is a bit difficult to deal with it in this rather inchoate way.

THE CHAIRMAN: Mr. West, what do you say about that? What are you looking for, summaries, or ----

MR. WEST: Yes, some indication which may have been produced by the liquidator of the financial position of the company. If Mr. Aldred feels able to say there is a deficiency in the millions, whether they are low millions or high millions, what is that based on, is there some analysis which has been carried out? My learned friend says there is no such document. There concern we had was that was not the position being advanced in correspondence. In correspondence what was said is that such documents are irrelevant because it is not in dispute that the companies' assets are insufficient to meet its debts. That is not a good enough answer.

THE CHAIRMAN: Would it be clearer if the term "relating to" was replaced by "describing"? What it seems to me you are after is some kind of summary or description that drew the threads together and it would be surprising if such a document – well it seemed to me at first blush surprising - if such a document did not exist summarising the contents of 30 boxes, or however many boxes of invoices it is. Is that really the sort of thing you are after?

MR. WEST: Boxes are slightly different, Sir, because the 240 boxes, as I understand it, are the documents removed from 2 Travel's premises. What we are looking for are the documents the liquidator has which are to be considered 2 Travel documents because he is the agent of the company. As I understand it the 240 boxes do not include anything the liquidator has produced with his view, preliminary or otherwise – or not necessarily preliminary – of the condition of the company.

THE CHAIRMAN: Well I have the point and I think we will try and formulate some words. No doubt the other side are very conscious of their duty to the court and their duty of disclosure and will fulfil it honourably, I am sure.

MR. WEST: If there is nothing there is nothing, but that was not our understanding.

THE CHAIRMAN: Okay, thank you. Now just before we adjourn, the disclosure of confidential information in the OFT's decision, I had this drawn to my attention some time ago, and the provisional view I took was that the OFT should disclose this information and I had in mind

an order of which the OFT have seen a draft for their review and comments, and we are awaiting a response from the OFT, but at first blush it seems to me that that is the responsibility of the OFT and I feel sure that they will cooperate in due course.

MR. BOWSHER: Do you want me to deal with this now or after the adjournment.

THE CHAIRMAN: Just deal with that now.

MR. BOWSHER: We are perhaps further back in the preparation of this than others in Cardiff Bus and the Tribunal. We did last week receive – I am not quite sure how we received it – a letter to the Tribunal of 14th September came to us, and that is in the file at tab 30, p.149. This is not the only file copy letter from the OFT. The OFT is clearly very anxious about all this and not having obviously been party to the correspondence between the Tribunal and the OFT I do not know how this fits in with what you have just mentioned, Sir. This would seem to be a somewhat unhelpful letter on its face because it would seem to suggest the OFT is not going to cooperate. I can make submissions about how I thought this could be cut through by the Tribunal making an appropriate order because it seemed to us that s.237 of the Enterprise Act firstly does not apply to the Tribunal and is without prejudice to other powers and duties to disclose. So if the Tribunal makes an order then at least through Cardiff Bus that will end up being dealt with. But I am not quite sure how far I need to deal with that now, or whether I should leave it.

THE CHAIRMAN: My inclination, Mr. Bowsher, would be not to make an order in this context today but to await, perhaps with a little bit of prompting on the grounds of urgency, a proper reply by the OFT to the Tribunal and then if necessary we can take it further.

MR. BOWSHER: We are more than happy with that if I could only emphasise the word "urgency' simply because, for example, my understanding, as I am sure you were aware of Mr. Clayton-Jones, but the importance of getting in touch with him to produce a witness statement by the agreed date for the production of witness statements only came when we saw the first page of that letter, we had very little time in which to do that work. Now, if there are other things we need to know we may have to look again when we come to look at factual evidence is all I am saying.

THE CHAIRMAN: Very well. Shall we adjourn now until 2 o'clock?

(Adjourned for a short time)

THE CHAIRMAN: I think we were up to disclosure of documents in Cardiff Bus's custody from the OFT file. That was the next category. I think 2 Travel, am I right, was looking for some documents which have come from the OFT's file but are in the possession of the defendants.

MR. BOWSHER: Indeed, and we are simply suggesting that they go into a confidentiality ring if there is a problem with producing them. I am not sure there is much more to be said other than what we have already said in correspondence.

THE CHAIRMAN: What documents are you looking for here?

MR. BOWSHER: It is all the third party material which we have not seen. It is the content of the third party interventions in the proceedings. I do not know what is in it because it has not been produced on inspection, but that is what we want to look at. It is there, it has just not been provided. It may be that there are confidentiality issues which, as I say, we ----

THE CHAIRMAN: There certainly are some confidentiality issues.

MR. BOWSHER: We are content that they be dealt with by means of a confidentiality ring if that is the route through, but if there is some other route then so be it, but I am not sure there is much more one can do. It is patently relevant material.

MR. WEST: Sir, our concern is that we cannot produce these consistently with the law. Under the Enterprise Act these are documents which – perhaps I can show you the relevant provisions which are in my little blue bundle at tab 8. As the recipient of the statement of objections we have the right to the OFT's file and it was sent to us on a CD in the usual way, and other documents have also come into our possession by virtue of our participation in the investigation, and these are all documents to which s.237 applies, as we see it, or at least that is the concern.

I should make clear that we have no objection to disclosing the documents in themselves apart from our desire not to breach ----

THE CHAIRMAN: This was why I had come to the preliminary view that this is really a matter for the OFT.

MR. WEST: I entirely agree.

THE CHAIRMAN: (After a pause) What is it that the parties are asking the Tribunal to do about this?

MR. BOWSHER: We have not seen them so I do not know what is in ----

THE CHAIRMAN: What are you asking for?

MR. BOWSHER: This is a category of documents which is patently relevant. They patently exist. I do not know what specific points the OFT may want to make about them. My learned friend has made a very helpful observation which is consistent with what he has said before. It seems to us that the simple answer is that this Tribunal can order their production, albeit perhaps on terms. Under s.237, which you have in front of you, I think:

"(5) Nothing in this Part affects the Competition Appeal Tribunal.

(6) This Part [Part 9] does not affect any power or duty to disclose information which exists apart from this Part."

The Tribunal's Rules are given statutory force by a different Part, Part 2, so the power or duty to disclose is a power which is engaged under a different Part and is expressly carved out, it seems to us, under s.237.

It might very well be better if the OFT would simply allow this to go forward, but the short answer is that if you, Sir, were to make an order that there be such disclosure, if there are specific points – and I do not want to pre-empt anything, there might be a point where the OFT says, "No, you cannot disclose" ----

THE CHAIRMAN: There may be some redactions, for example.

MR. BOWSHER: There may be some redactions, there may be a point they want to make about a particular document. I cannot pre-empt them. They may want to make submissions, I have no idea. It may be that this needs to be a slightly more sophisticated order than simply, "Produce it on Monday", but there we are, that is all I can say.

THE CHAIRMAN: Mr. West?

MR. WEST: My Lord, it seems to us that the right parties to argue about this are my learned friend's clients and the OFT. We, if you like, are standing in the middle, and we simply do not want to find ourselves committing a criminal offence under the Enterprise Act.

THE CHAIRMAN: Absolutely. My inclination, Mr. West, is that, as Mr. Bowsher has pointed out, sub-section (5) has some effect on the issue. I think it is going to be neater if we make our order and we give liberty to apply. If the OFT want to come and argue a point in front of us, they can do so.

MR. WEST: I think it is quite likely that they will do so because the OFT's view, as set out in the correspondence at tabs 14 and 15, is that the Enterprise Act prohibits disclosure.

THE CHAIRMAN: They may not have read sub-section (5).

MR. WEST: They may not, I accept that.

MR. BOWSHER: I am sorry to keep jumping up and down, it is slightly irregular. It may be that if the order was simply expressly pursuant to sub-section (5) and (6) and a time is allowed for them to apply to come before the Tribunal then we will no doubt have to attend and deal with it.

THE CHAIRMAN: I do not think they will get quite that encouragement, Mr. Bowsher.

MR. BOWSHER: I hope not, and again one's concern is that we would be spending a great deal of the Tribunal's time and resources on something which, as I say, without having seen it, may or may not be a worthwhile exercise.

THE CHAIRMAN: We will think of something! Witness statements: the filing of witness statements needs to be orderly, and I should say in general terms that whatever happens the Tribunal is going to exercise fairly strict and cost conscious management of the processes in this case. I note that there is an intention to invite the Tribunal to call witnesses from Cardiff Bus, Cardiff City Council in the event that they are not called by the defendant. That is not a very open door. The Tribunal has powers to issue witness summonses and order witnesses to bring documents with them. My inclination is that if anybody wants to call an unwilling witness that is the way to do it, save in the most exceptional circumstances. It may have been done in Competition Appeal Tribunal hearings in the past, I do not know, but I must say I am not enthusiastic about the Tribunal calling witnesses save *in extremis*.

MR. BOWSHER: Again, we are getting many steps ahead of ourselves. There is an issue about what position those witnesses are in the case once they are called, and whose witnesses they are may be relevant at that point.

THE CHAIRMAN: It may.

MR. BOWSHER: I do not want to start on the whole issue of hostile witnesses now.

THE CHAIRMAN: Let us not go down that route. I just thought a gypsy's warning on that might be helpful.

MR. BOWSHER: That is understood, and somehow or another, if it were necessary to call people, they would have to be identified, that is clear.

THE CHAIRMAN: Not that I should be taken to be saying anything about gypsies in this difficult time because I would not mean it anyway.

Expert reports: given that there may be circumstances in which rebuttal reports might be filed, and I am conscious that there might be a necessity to do so in the minds of one party to the other, I must say I much prefer the sequential process, generally speaking.

MR. BOWSHER: Sir, the problem is this: we have exactly the same concerns that you do, that there is almost bound to be a need for rebuttal. Indeed, the nature of these sorts of cases, it is often the claimant's rebuttal evidence that ends up being the most useful– you, first of all, put up the Aunt Sally, you wait to have it knocked down by the defendant and then you respond and say what the answers are to those points. The difficulty is a simple and practical one. My learned friend has, I think, suggested that he might need six weeks to respond to our expert evidence – that is what was suggested. If that is 14th October, certainly we are working on the 14th October date which has been in the directions from the outset. Six weeks from then takes us ----

THE CHAIRMAN: 28th November, something like that.

MR. BOWSHER: -- takes us to 25th November. Even with the best will in the world, that means that we are not going to have an experts' meeting until December at the earliest. I am not quite sure when preparation of our rebuttal report is going to happen. As it happens, at the moment, we are due to produce skeletons on 30th December. I think there may be some common ground that we can push that back a week or two, but given the fact that we have a trial on 12th March there simply is not scope to start having sequential reports. It seems to us the only way to keep this timetable working is for us to have both reports in October, then have a meeting, and then have rebuttal reports maybe in early December.

THE CHAIRMAN: The first skeleton is due on 13th January, not 30th December.

MR. BOWSHER: The proposal is 13th January. The direction at the moment says 30th December at the moment.

THE CHAIRMAN: You would be pushing at open door. I am giving you my thought process. I had realised 30th December was unrealistic.

MR. BOWSHER: That is as may be. The short point is that it seemed to us that in order to get this ready for trial so that we can all be preparing our submissions during that December/January period, we need to get the expert evidence cleared away before Christmas somehow or other. I do not see how that is going to happen if we have sequential reports starting from 14th October. Inevitably that may then lead on to some specific requests for further documents. That is fairly typical in this sort of field.

That is our simple practical problem, trying to get a useful meeting in and time for rebuttal, and I am not sure what the answer is.

MR. WEST: The answer is that there is plenty of time between 14th October and Christmas in which to have sequential exchange of experts. It is simply a question of identifying some appropriate dates.

THE CHAIRMAN: If we were to have the claimant to serve skeleton argument by 13th January, and the defendant to serve skeleton argument by 15th February, that would fit in with the proposed trial date, would it not?

MR. WEST: Yes.

THE CHAIRMAN: We then come to the individual shareholders' application to amend the terms of the stay.

MR. WEST: There is one other point which we have not dealt with yet, and that concerns the scope of the existing permission and potential application to extend it. The existing permission – I do not know whether you have the order from last time – para.12 of the order

from last time says that each party may serve its own expert evidence in the field of forensic accountancy in relation to the issues of causation and loss. You will recall, or you may recall, that I was explaining previously the nature of the calculation which has been done to identify whether any profits would have been made on the routes. It requires assumptions to be made about what proportion of the White Bus revenue would have gone to 2 Travel. It also involves assumptions about how long 2 Travel would take to achieve that proportion, and whether 2 Travel's entry to the market could result in some growth in the market overall.

These are all points which emerge from the claim as pleaded. You can see that from the claim form itself, in particular annex C at p.100. Paragraph 9.14 addresses this precise point about what proportion of the White Bus revenue would have gone to 2 Travel and in the second sentence it is pleaded that it seems reasonable to assume this was approximately 40 per cent given that a large proportion of the passengers were concessionaries who did not mind which bus they travelled on and were likely to use the first bus that came along, hence 60 per cent of the passengers would have used 2 Travel in the absence of the White Bus. That is the pleaded case as to the proportion of White Bus revenue.

Then as to the time it would have taken to reach full maturity, that is at p.103, para.9.32, the second there. They plead that in Neath revenue reached full maturity after six months and grew overall by 3.33 times in that period. So they make some appropriate assumptions about what would have happened in Cardiff.

The expert in preparing his report has taken the view that those allegations are not strictly a matter of accountancy, they are a matter of economics and particularly the economics of the bus market - what proportion could a new entrant achieve and how long would it take that new entrant to achieve it? We have instructed a separate firm of economists to provide the evidence on that point. As you can see from the pleading, it is already a pleaded issue. The concern we have is whether that is strictly covered by the existing form of permission. The existing form of permission refers only to forensic accountancy, although that might be thought to be a rather fuzzy term.

The existing form of permission also does not state, although it may well be premised on the assumption that each party only has one expert.

So, Sir, in order that does not come as a surprise to anyone later on, I raise it now, that we intend to serve two separate reports, one of some accountants and the other one of some economists. To the extent that it is necessary to vary this permission in order to do that, we would ask that that be done. It seems to me that this is a problem which has to be grappled

with because the issue is there on the pleadings, and it is going to have to be substantiated by somebody. I do not really see, unless there is permission for an expert economist, how anyone can deal with it. So I assume it is a problem ----

THE CHAIRMAN: What is the particular expertise that an economist is exercising on this?

MR. WEST: It is to do with how the bus market would have developed, the economics of the bus industry, and there are other examples of ----

THE CHAIRMAN: Extrapolated into, I suppose I have to say, up to Neath. He or she looks at the economics of the bus market and extrapolates those conclusions to how many people get on and off buses at different times of day in Neath?

MR. WEST: Well it would be in Cardiff, yes.

THE CHAIRMAN: Cardiff, all right, you referred me to a paragraph that referred to Neath earlier.

MR. WEST: Yes. That is right effectively.

THE CHAIRMAN: Does that really require economists? It may be that forensic accountants look for support to econometrics, or economic measures or articles about the bus market, but does it really require a separate set of experts?

MR. WEST: Well it is a different field of expertise, it may be possible that forensic accountants, for example, would be in a position to deal with both. For what it is worth my instructions are that it would be more expensive for our accountants to deal with both because what we are proposing to do is to retain a firm of economists who already know about the bus market, and who have some existing models and figures they can simply plug into rather than requiring the accountants to go away, research it all and make up their own minds about it. So whether or not it is possible to have a single expert dealing with it, someone will have to produce these assumptions and someone will no doubt find themselves being cross-examined about them, and it makes more sense if the person who is cross-examined about them is the person who produced them rather than cross-examining the accountants about a schedule.

THE CHAIRMAN: I must say, Mr. West, if it ever comes to a consideration of costs in this case I would need some persuading that economist experts in the bus market were needed as separate experts to deal with this aspect of the case.

MR. WEST: Sir, as I say, my instructions are that it is actually cheaper to do it this way than to have the accountants go away and reinvent the wheel rather than instruct somebody who actually knows about the bus industry already.

THE CHAIRMAN: Unless, of course, one uses accountants who know something about the bus industry. What do you say, Mr. Bowsher?

MR. BOWSHER: A number of things. One quakes when one hears the idea that there are going to be economic experts who bring their existing models and figures. The short concern we have, of course – you will not be surprised if I say this –if they have one we better have one. We do not think we need one but if they are going to have existing models and figures someone is going to have to help us understand are these models and figures valid. It did seem to us in this case that at the last CMC my learned friend had had our claim form for a little while, the passage was not new, and he said then "The experts here are concerned only with quantification". We understood that. It did seem to us that if there were experts – whatever you want to call them, quite how the evidence should be classified - the experts on how the Cardiff bus market works you might think are my learned friend's own clients.

THE CHAIRMAN: I must say, it sounds awfully like simple arithmetic to me, and I am ashamed to say that what flew through my mind as this started was that children's song about the "wheels of the bus going 'round and 'round".

MR. BOWSHER: I have already made the point about oppression, that we are concerned about this, the way this is launched now, because it does raise the prospect of other problems, and I have made that point already. So the mere practicalities, we are puzzled as to why it would be necessary now at this late stage to bring on board this discipline. Not something which evidently must have been in the works for some time. We have now got three weeks in effect to get a report going and think about what all this is about. We do not even know what the question is that is being asked.

THE CHAIRMAN: Well, Mr. West, I must say what I had in mind with para. 12 of the directions was an expert, not a team of experts, although admittedly it does not say so, or at least an expert who drew together, as experts often do, a contributory expertise of others. I think I want to make it clear now that at the moment that is what the court has in mind, and if your clients have in mind wanting to call economists or an economist then you will have to make a separate application which will be considered on its merits when made, but I am sorry to say that I am not terribly enthusiastic, as you may have gathered at the moment, because this is about 'bums on seats' in the end.

MR. WEST: I hear that, but if I can just make a couple of short points. I do not propose that it is going to be terribly complicated. Effectively it is how much of the market would they have got and how long would it have taken them to get it.

THE CHAIRMAN: When did you last see an economist's report that was not terribly complicated? I have been sitting in this Tribunal for a few years now, and it may be the first time. Anyway, I have made my views clear.

MR. WEST: But, Sir, the other short point I was going to make is that if my learned friend is opposing it then I may have some points to make if, subsequently, he ends up cross-examining my accountancy expert on the basis: "Well, these are not your assumptions, are they? Where did you get them from? Why are the people who actually came up with them not here?"

THE CHAIRMAN: It is a perfectly fair point, and an expert witness is entitled to rely upon the contributory expertise of others, as I have called it, and the other side are perfectly entitled to cross-examine as to whether that contributory expertise is reliably based or not.

MR. WEST: Yes, but if my learned friend does not get it from the horse's mouth then he will have his own opposition to our application to answer for that. Alternatively, if our forensic accountants have to go away and spend an awful lot of time and money getting up to speed on it I will have some points to make if one ever comes to consider the cost of that.

THE CHAIRMAN: You make a specific application if you really feel you must and it will be considered on its merits.

MR. BOWSHER: My learned friend makes an important point, he has put down a tactical marker for the future and so I should respond to that. The application we are dealing with is set out at p.176 and 177of the bundle, and it certainly did not identify in any specificity the sort of matters this economist was going to deal with, indeed, it is a rather open ended list. I am more than happy to look at an application which sets out: "These are the questions that he is going to speak" and then we will have to consider how best to deal with it.

THE CHAIRMAN: Let us deal with that separately, Mr. Bowsher.

The individual shareholder's applications to amend the terms of the stay – do the individual shareholders want to apply to amend the terms of the stay and, if so, how?

MR. FRANCIS: Sir, it is more a question of clarifying the order you have already made. During the course of this matter, Sir, we feel as if we have become increasingly isolated in terms of what is going on, certainly so far as the mediation was concerned, it was quite apparent to us that we were tolerated but not welcomed, and we are certainly not having sight of any of the documentation, thus making us increasingly nervous and, as a result of that, we felt inclined to instruct a firm of solicitors to act on our behalf. Though it is fair to say after the mediation the claimants have shared a lot of their information and that has been particularly helpful.

It is also fair to say that during the course of this hearing other solicitors have followed the matter and we have had representations from about three firms who are prepared to act on a no win no fee basis. What we were going to suggest to you, Sir, was that we were hoping to have a meeting with the claimant's solicitors during the course of the next month, and discuss it with them, and then possibly we would instruct a firm of solicitors to act on our behalf.

It is not our intention that we delay this hearing, or make it unduly complicated, but from our point of view we have heard a lot of evidence that the claimant may or may not have the funds to pursue this to its logical conclusion and from our point of view we do have those funds, and we feel it might be in our best interests to instruct a firm of solicitors to represent us now. So what we wanted to try and establish today, Sir, was what it was the order meant, because when we sought to lift the stay the defendants objected to that and our understanding was that the stay could have been lifted, simply on notice. So our application is not to lift it but simply to ask for clarification of it, Sir.

THE CHAIRMAN: Thank you. Mr. Bowsher, Mr. West, suppose an application was made in due course on behalf of Mr. Francis and the other gentlemen, to become interested parties, could that seriously be resisted?

MR. BOWSHER: For our part, no, subject to some practicalities about the legwork, as it were.

THE CHAIRMAN: Mr. West, how could one resist that?

MR. WEST: Subject to the appropriate directions about non-duplication.

THE CHAIRMAN: Mr. Francis, obviously you must have whatever meetings you think appropriate and, if you think it appropriate, instruct solicitors. What I would say to you is that they must act quickly – as quickly as possible. Were you to make an application on your own part or that of yourself and the other gentlemen to be added as what are called "interested parties" then I will give an indication here and now that such an application would be likely to succeed, which would mean that you, either in person or through your representatives – you can do it in person – would be able to make submissions and participate in the trial as long as you were not duplicating what other people were doing. So that would enable you to protect your position. If you discuss it with solicitors they will explain in greater detail.

MR. FRANCIS: We understand that perfectly, Sir.

THE CHAIRMAN: I understood also, forgive me, Mr. Francis, again, that you were asking for the possibility of a timetable for the hearing of any claims to proceed by the shareholders. I do not think it is possible to give that timetable until the claim is disposed of. I suspect

though that in due course once the claim is disposed of in one way or another, whatever the conclusion, an awful lot of things would fall into place.

MR. FRANCIS: We would hope so, Sir, but we have been concerned about the delay to get to where we are today and any further delay, Sir, would not have been welcomed. We were just looking for a time frame to see how it would work.

THE CHAIRMAN: I do not think we can give a time frame as yet, but be assured that when this present claim is determined then the need to deal with any subsisting claim by the shareholders expeditiously and quickly will be very much in the Tribunal's mind, and that is on the record.

There is a substantial issue which I would like to consider further on the question of security for costs, and I will give a short judgment of the Tribunal in the near future, not today, on that issue together with an order relating to the other matters that have been raised, if everyone is content with that – I am not sure what happens if you are not content with it, but if you are content with it, it may help.

MR. BOWSHER: We are content with that. I just wondered, if we are going to have sequential – my learned friend says there is plenty of time between now and Christmas, whether we need to just thrash those dates out.

THE CHAIRMAN: I think you should assume that the timetable is that we discussed earlier. In other words, we work backwards: defendant's skeleton argument by 15th February, the claimant's skeleton argument by 13th January, experts' reports to be exchanged on 14th October with sequential exchange and rebuttal. I am quite sympathetic to the view that there is enough time between October and Christmas – I do not think I would say "plenty" but enough.

MR. BOWSHER: It may be something that the Tribunal wants to think about, but in terms of enough time do we not need to set how long the defendant is going to have to respond to our report on 14th October.

THE CHAIRMAN: If I must.

MR. BOWSHER: Well at some point there is going to have to be some order, I would have thought, just in order to give some structure, so we know when the meetings are going to happen and so forth. Maybe that is something that can be dealt with when you produce the order.

THE CHAIRMAN: We will deal with that and the detail of it.

MR. BOWSHER: We are going to want to rebut that, so that whole process of at least three rounds is going to have to be fitted in, plus a meeting is going to have to be fitted in some time between then and Christmas.

THE CHAIRMAN: Right. There will be a judgment, which will be handed down with an order. I do not want to put the costs up so nobody need attend at all; please do not assume you need to attend. You can attend if you want to. I shall not be offended if I am addressing an empty court – I have done so before here on several occasions.

Thank you all very much. Thank you gentlemen. Mr. Francis, thank you very much.

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