Case No: 8MC02196

IN THE MACCLESFIELD COUNTY COURT

Macclesfield County Court
2nd Floor
Silk House
Park Green
Macclesfield
SK11 7NA

Wednesday, 6th May, 2009

BEFORE:

DISTRICT JUDGE T R M SWAN

BETWEEN:

ANTHONY LEE RODGERS

Claimant

- and -

LUTEAIM LIMITED

Defendant

MR N McDONELL appeared on behalf of the Claimant.
MISS JARRETT appeared on behalf of the Defendant.

Proceedings
Including Judgments (as approved)

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No of folios in transcript: 146

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Wednesday, 6th May, 2009

MR McDONNELL: Good morning, sir. I am Mr McDonnell for the claimants. Can I ask if you have had the opportunity to read the skeleton arguments?

DISTRICT JUDGE SWAN: I have. Are you going to be referring to passages in Cook?

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MR McDONNELL: Yes.

DISTRICT JUDGE SWAN: Just give me one moment and I will get my copy of it. *(telephone call made)* Sorry for that interruption, Mr McDonnell.

MR McDONNELL: I must take it then, sir, that if you have read the skeleton arguments

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you are familiar with the point that is being raised here.

DISTRICT JUDGE SWAN: Yes. 2,015 is the sum but I appreciate that it may be that it is just the tip of the iceberg.

MR McDONNELL: It is, sir, and---

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DISTRICT JUDGE SWAN: Can I just ask you this. Is in fact the real issue whether you should be required to reveal the commission element of the ATE?

MR McDONNELL: In some respects, yes sir. On the basis that, and I will refer to, there are passages in Cook and some of the cases that are put forward but it is not so much the disclosure of the commission, although whilst that is---

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DISTRICT JUDGE SWAN: I see the way you build your argument. You say that I do not need to consider the practice directions or the list of considerations in the practice directions unless I am not satisfied that the sum represented in this case by the ATE is neither reasonable nor proportionate. In other words, that I do not get to the practice direction 11 unless that hurdle is not crossed. And in those circumstances you say there is absolutely no need for the commission element to be considered. But what is in fact the reason or the basis upon which you say that the commission element, if you are wrong in

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saying that the considerations set out in the practice direction do not come into play what is the basis upon which you say that it is privileged?

MR McDONNELL: I think the use of the word "privileged," on reading the skeleton argument I do not agree that "privilege" is the correct term.

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DISTRICT JUDGE SWAN: It does not have legal and professional privilege.

MR McDONNELL: No, it does not, sir. The actual term I should have used was commercially sensitive.

DISTRICT JUDGE SWAN: I can see that, undoubtedly. I am not trying to suggest that I have pre-judged anything but let's assume that you are wrong---

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MR McDONNELL: Yes.

DISTRICT JUDGE SWAN: ---in separating out the Part 44 reasonable and proportionate test and the circumstances required to be considered in the practice direction.

MR McDONNELL: Yes, sir.

DISTRICT JUDGE SWAN: If you are wrong about that then how can I make a decision without actually knowing what the element of commission is because let's assume the commission element set against the pure premium element is 50% of £367. Even allowing for my ignorance of insurance matters and applying the broad brush approach which the Court of Appeal have suggested is all us judges can do, that would leap out and say unreasonable and disproportionate, wouldn't it? Whereas if it is, I don't know, 15/20/25% they probably wouldn't.

MR McDONNELL: In response to that, sir, I think I have two points to make. Firstly, the practice direction was drafted before the further comments made by the Court of Appeal in *Rogers v Merthyr Tydfil* which is in the skeleton and in fact the defendants refer in their skeleton argument and says the Court and the defendant are entitled to ask the question with regards to commission. And in principle I agree, but it is the context in which that information is presented.

Following the drafting of the practice direction we have subsequently heard from the Court of Appeal in *Rogers v Merthyr Tydfil* who say that it is important to consider any such breakdown with the use of expert and actuarial evidence. Such evidence would put such a sum into context. By disclosing, let's say, for example, using your example, sir, that the commission element was 50%, without a knowledge of the ATE marketplace and what other ATE providers, how they structure their premiums, assessing it purely on the premium itself there would be no frame of reference to compare it to. It would be necessary to obtain expert evidence and actuarial evidence from the underwriters and from the ATE provider themselves and also from other ATE providers in order to put the various elements that make up that premium into context. So, whilst in principle the practice direction does provide---

DISTRICT JUDGE SWAN: Just pausing there, is that the effect of *Rogers v Merthyr Tydfil*? You have selected a quotation from Lord Hoffmann at paragraph 42 of your skeleton. It is a quotation from, it is not Lord Hoffmann, I do not know who it is, but the Judge who was providing the quotation that you have chosen refers to Lord Hoffmann in *Callery v Gray* and says the Judge did not:

> "have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces."

What was he actually talking about there? Was the Judge talking about the commission element?

MR McDONNELL: Not specifically, sir.

DISTRICT JUDGE SWAN: Isn't that what we are dealing with here, the commission element?

MR McDONNELL: It is.

DISTRICT JUDGE SWAN: Which is not, surely, fixed by all those complicated things. I mean the commission element, as I understand it, is something which the insurer pays to the solicitor, or whoever it might be to, and I do not mean this in any pejorative way but to induce the solicitor to choose that insurance company for his client.

MR McDONNELL: In some respects---

DISTRICT JUDGE SWAN: And thus if the commission element appears to be inflated as compared to the pure premium element, isn't somebody with my, albeit simplistic and lay view of insurance, able to say, "Well, it is not reasonable and it is not proportionate."

MR McDONNELL: With the greatest of respect, unfortunately, sir, I would say no, on the basis that it would require an examination of the market as a whole to see what - the first point is that they are very limited ATE providers.

DISTRICT JUDGE SWAN: Are you able to tell me what the commission element is?

MR McDONNELL: I am instructed to not advise, unfortunately, sir. On the basis---

DISTRICT JUDGE SWAN: The burden is on you, isn't it, to demonstrate that your costs are reasonable and proportionate?

MR McDONNELL: That is right, sir.

DISTRICT JUDGE SWAN: How are you going to do it if you do not tell me?

MR McDONNELL: Well, firstly on the basis---

DISTRICT JUDGE SWAN: On the basis that your first argument fails which, as I have said, I have not made my mind up about at all.

MR McDONNELL: Looking at the broad brush approach, as referred to in *Rogers* which may not necessarily prevent you from looking at the practice direction, the Court of Appeal have already commented on the sum of £367 RTA insurance premium eight years ago in *Callery v Gray* and determined that that premium as a whole is unreasonable, was reasonable.

DISTRICT JUDGE SWAN: I have to say that on the face of it £367.50 does not seem reasonable. So if you are successful on your first argument I think Miss Jarrett is going to be in some difficulty, but if I am then required as one of the circumstances, and you are wrong on this, the first limb of your argument, if one of the circumstances which I am

required to consider is the amount of the commission, then I am a bit at sea if I do not know how much that commission is.

MR McDONNELL: In terms of this particular assessment hearing I would probably agree but then what I would be advising my client to do and requesting from you here today, sir, would be to list a directions hearing whereby specific actuarial and expert evidence can be put forward in order to put this aspect of the premium into context across the marketplace as a whole. It is something that cannot be considered reasonably, in my submission, sir, in itself on this particular premium on this particular product. It is something that needs to be considered across the entire marketplace with regards to what is reasonable and what is not reasonable. I would submit, sir, that the reasonableness of any commission element should be put against what other ATE providers are doing with regard to whether it is reasonable or not. The market currently is---

DISTRICT JUDGE SWAN: You mean so that if they are all charging 50% by way of inducements or commissions then that is - why does that make it any more reasonable or unreasonable?

MR McDONNELL: Because, sir, I would submit that it is important to understand how the market works. The ATE providers throughout the whole of the market are extremely competitive so they are constantly trying to find this balance, that they can remain and provide ATE to the insurance market but keep the overall premium within reasonable parameters, and whilst the market is competitive it is the disclosure of such information such as commission in particular that is commercially sensitive that could quite dramatically prejudice this particular ATE provider within the market in what is already a very---

DISTRICT JUDGE SWAN: In other words, if - well….

MR McDONNELL: The only other point to mention, sir, is that the defendant has produced no evidence to suggest that there is any point of issue in any event. The defendant is faced with a premium which is widely regarded, and has been for a number of years, as to be a reasonable sum on the face of it. There is nothing to suggest and there is no evidence that has been produced to require the court to analyse this beyond that which the premium appears to be on the face of it. And the information sought by the defendant can quite drastically, in my respectful submission, sir, jeopardise this particular ATE provider within the marketplace.

I think also, sir, within the whole context of what we are talking about £367.50 has been regarded by the Court of Appeal as being reasonable, it has done for many many years. There was a close analysis of this premium by the Court of Appeal way back in 2001. Premiums are creeping up now, I suppose in part due to satellite litigation such as this, and, whilst it is unfortunate, nevertheless I would submit, sir, that the information is commercially sensitive and without any strong grounds or evidence from the defendant that the premium itself or any part of the premium is unreasonable, I would ask you to consider the premium on the face of it, sir.

DISTRICT JUDGE SWAN: What about the first limb of your argument that if I am

satisfied in relation to Part 44.5 then I really do not need to consider or should not in fact consider the practice direction paragraph 11.10? I mean don't they work together?

MR McDONNELL: They can work together. I am not saying, sir, that they are mutually exclusive but the practice direction provides guidance and I think it does specifically refer to factors which can be considered.

DISTRICT JUDGE SWAN: I think it says---

MR McDONNELL: "Relevant factors to be taken into account include," but it is certainly not an exhaustive list.

DISTRICT JUDGE SWAN: No. Absolutely not.

MR McDONNELL: But it is a list that can be considered and, whilst it is a practice direction, the Rule is paramount, the practice direction is there to guide, I would respectfully submit, sir, the Court where they have doubts as to whether the premium is unreasonable on the face of it. There have been other cases, sir, Claims Direct Test Cases and the Accident Group Test Cases where these premiums have in fact been dissected and deconstructed.

DISTRICT JUDGE SWAN: Yes.

MR McDONNELL: And in fact it was referred to as the deconstruction approach. Master Hurst and the Court of Appeal have both said in those cases that only in very exceptional circumstances should these premiums be deconstructed. I can certainly refer you to the paragraphs which---

DISTRICT JUDGE SWAN: It says:

> "There is in principle no difficulty over the inclusion of referral commission in the overall costs of an insurance premium. The commission was, however, attacked as being far more than could be justified on a true premium of £140, given that the amount payable to underwriters following re-allocation is £451.55 that argument loses a considerable amount of its force."

The difficulty which I have already alluded to is that you are, for reasons you have given, digging your heels in. I do not mean that rudely at all but simply saying, "This is a reasonable amount on its face and we are not going to tell you what the commission element is." So I cannot even begin the deconstruction approach, whether on a broad brush basis or not, which is the only thing that gives me pause for thought, frankly.

MR McDONNELL: I certainly appreciate what you are saying, sir, but the Court of Appeal has already said the circumstances under which the Court should approach these premiums using the deconstruction approach, I think a couple of cases were passed to you with the defendant's skeleton argument. If I can refer you to, it is the Accident Group Test Cases, 15th May 2003. It should be one of those in that bundle, sir.

DISTRICT JUDGE SWAN: Give me the reference will you?

MR McDONNELL: The reference is [2003] EWHC 9020.

DISTRICT JUDGE SWAN: I am not going to read it all.

MR McDONNELL: No, no, just a specific paragraph, sir. If I can refer you to page 65 and paragraph 259.

DISTRICT JUDGE SWAN: Yes.

MR McDONNELL: In fact I think I have flagged it for you, sir.

DISTRICT JUDGE SWAN: I think you might have. Yes. Who is giving this judgment?

MR McDONNELL: This was Master Hurst in the Supreme Court Costs Office in the Accident Group Test Cases and he is alluding to the Court of Appeal's comments in the Claims Direct Test Cases. Both cases sought to deconstruct the premium into its constituent parts, including the commission element, and what Master Hurst says is:

> "Reference has been made to my judgment and that of the Court of Appeal in the Claims Direct Test Cases. It is important to bear in mind what Brooke LJ said:
>
> > 'In my judgment, in this quite exceptional case, it was inevitable that the Master should adopt this [deconstruction] approach in order to identify what should truly be treated as a premium.'"

If I could then go down to paragraph 260, sir:

> "The Claimants accept that in an exceptional case dissection or deconstruction of the premium is an appropriate course. The question is whether this case is an exceptional case of the type which Brooke LJ had in mind in paragraph 87 of the judgment which I have just quoted. Mr Neish argues, and I accept, that what is exceptional about this case is that I am not dealing simply with the question of whether the recoverable premium claimed is reasonable but rather dealing with a claims management company selling a basket of services."

DISTRICT JUDGE SWAN: So the claimant's management company was in the position of - who was the claimant's solicitor in this case in fact?

MR McDONNELL: JB Law solicitors. They are a local firm, a Macclesfield firm.

DISTRICT JUDGE SWAN: And they are not a claims management company selling a basket of services?

MR McDONNELL: They are not, sir. No.

DISTRICT JUDGE SWAN: So you say that for that reason, amongst others, this is not the exceptional case which requires the deconstruction approach?

MR McDONNELL: That is correct, sir. And the amongst others has effectively been that there has been no evidence to suggest that this case is an exceptional case. Cook on Costs I appreciate - was your copy---

DISTRICT JUDGE SWAN: Yes. I have got it.

MR McDONNELL: If I can refer you to page 694 of Cook on Costs which effectively summarises the Claims Direct and the TAG position.

DISTRICT JUDGE SWAN: Just give me a moment if you would.

MR McDONNELL: Yes, sir.

(short pause)

DISTRICT JUDGE SWAN: Yes. Page?

MR McDONNELL: Page 694, sir.

DISTRICT JUDGE SWAN: Yes.

MR McDONNELL: His Honour Judge Cook effectively goes on to summarise the Court of Appeal's position in Claims Direct and Master Hurst's position in TAG. About half way down, a paragraph beginning: "A similar exercise."

> "A similar exercise was conducted by a Senior Costs Judge in the Accident Group Test Cases known as TAG. The premium claimed ranged from £840 to £997.50 and were challenged on the same basis as Claims Direct premium as including benefits that were not insurers. This is called deconstructing the premium. The exercise required considerable evidence and produced a lengthy judgment followed by a revising judgment after still more evidence. Importantly, the Senior Costs Judge has made it clear that these were wholly exceptional cases affecting thousands of claims. In ordinary circumstances such an exercise and the production of actuarial evidence will not be appropriate."

So again, sir, it is highlighted there that if we bring together the Court of Appeal's decision in *Rogers v Merthyr Tydfil* and the Court of Appeal's decision in the *Claims Direct Test Cases*, in *Rogers v Merthyr Tydfil* they have recommended that courts adopt a broad brush approach and they have also said in the *Claims Direct Test Cases* that the premium should only be deconstructed into its constituent parts, which here includes the commission element, in exceptional cases, which brings us back to the broad brush approach which I respectfully submit, sir, would be to consider the premium on the face of it in light of the

Court's knowledge and experience with regard to assessments that one might have.

DISTRICT JUDGE SWAN: You say that this is in effect a standard figure really, don't you, for fairly low level claims.

MR McDONNELL: That is correct, sir. And exceptional cases require a deconstruction. I would say this is remarkably unexceptional. It is in fact the norm and has been for a number of years. In fact, it is probably at the lower end of the norm on the basis that premiums are actually rising and there is nothing about the premium that requires the deconstruction particularly.

DISTRICT JUDGE SWAN: I think you said that it is the same premium as in fact applied in---

MR McDONNELL: *Callery v Gray*.

DISTRICT JUDGE SWAN: *Callery v Gray* which is going back now 7 or 8 years, isn't it?

MR McDONNELL: That is correct, sir. 2001, sir.

DISTRICT JUDGE SWAN: In fact *Callery v Gray* started here.

MR McDONNELL: Macclesfield County Court.

DISTRICT JUDGE SWAN: Yes, oddly enough. Oh dear. I hope this isn't another one. It was not me, I hasten to add. Right. Okay. Is there anything more you want to add, Mr McDonnell, at this stage?

MR McDONNELL: At this stage no, sir.

DISTRICT JUDGE SWAN: Okay. Miss Jarrett.

MISS JARRETT: Thank you. First of all, I just want to make reference to the figure that was deemed reasonable in the case of *Callery v Gray*, the £350 plus IPT. In *Callery v Gray* Lord Phillips did confirm that that figure should not be treated as any sort of determined figure that is reasonable in all cases that is parallel with *Callery* and that approach was mirrored in the *Claims Direct* [2002] with Chief Master Hurst in which he also says in the judgment that you have got at paragraph 234, that he had used £350 plus IPT as no other evidence was available but it certainly was not intended as a benchmark. On that basis obviously there isn't any authority for the fact that the starting figure is £350 plus IPT and that is automatically reasonable, which seems to be suggested in the claimant's skeleton argument. It certainly is not the case.

If I now just go on to the *Claims Direct* approach. Again in that case the claimant attempted to argue at the outset that because the premium was reasonable it should not be subject to any further breakdown, but the Court obviously proceeded to deconstruct the premium because there were arguments by the paying party that there were elements that

could not be recovered under section 29 of the Access to Justice Act.

DISTRICT JUDGE SWAN: But you are not putting forward that argument, are you?

MISS JARRETT: No.

DISTRICT JUDGE SWAN: So why do I need to deconstruct then?

MISS JARRETT: The deconstruction that took place in *Claims Direct* and also in the TAG test litigation was a far more detailed deconstruction and that is what is referred to in the cases. It is not simply asking a question, "Do you receive any commission? If so how much?" In those cases the courts have to, for example, started with sums paid over to the underwriters, then deducted percentage attributable to risk that could not be recovered under section 29, then they added back in commissions. It was a whole lengthy process which required obviously huge amounts of evidence from various interested parties, and that is the deconstruction that they talk about in those test cases that should not be adopted across the board, and obviously the later cases such as *Rogers* again reiterate that it should be a broad brush. We are not here to break down every single premium into their---

DISTRICT JUDGE SWAN: I think what Mr McDonnell would say today is that as soon as you open the door to deconstruction it is not just saying, "Well, I am only asking for one little discrete piece of information," because the whole basis upon which the global figure of £367.50 is calculated is immensely complicated.

MISS JARRETT: Yes.

DISTRICT JUDGE SWAN: And if the element which makes up the commission is to be deconstructed and, as it were, put on one side, you simply cannot do that because you would have to know the whole basis upon which the premium was calculated, including the amount of commission paid, in order to decide whether the commission is in itself reasonable and proportionate. Is that right? Is that what you are saying?

MR McDONNELL: In part, yes, but also across the board it would need to be compared with the rest of the market as well.

DISTRICT JUDGE SWAN: And say that you are asking for a huge welter of information or at least you are not asking for it but that is what you get, in order that this can be considered.

MISS JARRETT: I would disagree with that contention, sir. Basically the Rules and the practice directions quite clearly point to commission as being a factor to be considered. Commission is stand alone. It is quite separate. The deconstruction required in these test cases involved, as you mentioned earlier, the basket of services, some of which could not be recovered under section 29, some of which could. The argument for the paying party in this case is not that the premium contains irrecoverable items and we want a breakdown of the actual premium claimed, it is simply the one element, the commission factor, and how much of the overall premium relates to the commission because in a premium of a

relatively low sum such as £350 plus IPT it is queried how much of that could be commission. It is within the claimant's knowledge and the Rules and the practice direction quite clearly state that it is be considered. As I say, in *Claims Direct* obviously you quoted the relevant paragraph at 185 which in that case the Court did consider the reasonableness---

DISTRICT JUDGE SWAN: Where are you taking me to?

MISS JARRETT: The *Claims Direct* [2002].

DISTRICT JUDGE SWAN: Have you quoted this in your skeleton?

MISS JARRETT: I have actually. Yes. Sir, I have paraphrased it in my skeleton argument.

DISTRICT JUDGE SWAN: Where do you paraphrase it?

MISS JARRETT: It is at paragraph 7.

DISTRICT JUDGE SWAN: So we are in the *Claims Direct* case, are we?

MISS JARRETT: Yes, sir.

DISTRICT JUDGE SWAN: Paragraph 185.

MISS JARRETT: Yes. It is just saying what you actually said earlier, sir, that---

DISTRICT JUDGE SWAN: Just a moment.

MISS JARRETT: In the claimant's skeleton argument it is quoted in full.

DISTRICT JUDGE SWAN: There is no paragraph 185 in the *Claims Direct* case.

MISS JARRETT: It is the *Claims Direct* 19th July 2002.

DISTRICT JUDGE SWAN: It is the first instance decision is it?

MISS JARRETT: Yes. The CCO decision. It was tagged to the claimant's skeleton argument.

DISTRICT JUDGE SWAN: Yes. And the point you seek to make is?

MISS JARRETT: Clearly commission is an important element of the premium and that is obviously backed up by the Court of Appeal and it is also prescribed within the practice directions that it is a factor to be considered when assessing whether the cost of the insurance cover is reasonable. Sir, there is nothing from the Court of Appeal, or indeed the Civil Procedure Rules or the practice directions, that flesh those out to say that commission is irrelevant if the overall sum is deemed reasonable. Therefore, it is, as I say,

specifically referred to the amount of commission payable and therefore it is a reasonable question to ask the claimant. It is within their knowledge and it would not require a breakdown of the true premium which has been claimed because we are not seeking to obtain a breakdown of services or any sort of internal fees that are used for decorating and things like that, or the burning costs of the premium which is the deconstructive approach taken by the Court of Appeal. The commission is completely separate. There is the premium, which is obviously made up of various factors which are recoverable, and there is the commission which in principle is recoverable, but that commission has to be reasonable in relation to the premium itself and therefore I would argue that the exceptional cases to which the Court of Appeal refers---

DISTRICT JUDGE SWAN: Well, that is not actually what practice direction 11.10 says, is it?

MISS JARRETT: It says, "In deciding whether the costs---"

DISTRICT JUDGE SWAN: It is not whether the amount of commission in relation to the rest of the premium is reasonable. It is the amount of commission paying to the receiving party. I suppose it comes to much the same thing, doesn't it?

MISS JARRETT: Indeed. And obviously, as I quoted before, Chief Master Hurst comments that although he considered £110 commission in the Claims Direct case to be high, when taken with the premium of £451 it is £451 plus the £110, although high he did not think it was unreasonable and it was allowed and he obviously makes specific reference to it being a new product and requiring advertising. So it clearly is an important element of the premium to be considered. For example, if it were the case that of the £350 £200 was in relation to commission, then clearly the Court is capable of deciding or making a reasoned judgment as to whether that is a reasonable amount or not.

DISTRICT JUDGE SWAN: Applying an ignorant broad brush approach.

MISS JARRETT: Applying a broad brush approach.

DISTRICT JUDGE SWAN: An informed ignorant, shall we say.

MISS JARRETT: I would not say ignorant.

DISTRICT JUDGE SWAN: No. I said it. It's all right. Don't worry.

MISS JARRETT: But clearly it is a very important part of considering whether the overall premium is reasonable and referring to exceptional circumstances and the Court of Appeal's wish to avoid the deconstruction approach being taken.

DISTRICT JUDGE SWAN: You say you are not asking me to deconstruct it, you are just asking me to consider whether a premium which contains a 50% element of commission is reasonable or, alternatively, if the commission is only 10% then you will probably say that is fine. But what you do not know is what element is the commission element.

MISS JARRETT: And also I just wanted to refer to I think it was in *Callery v Gray*, I will just check, that there was a push really from the court, an appeal for transparency within the ATE market. It is in the *Callery v Gray* [2001] case which was also attached to the claimant's skeleton argument. It is at page 5 of my copy but it is paragraph 15 of the judgment. It says:

> "It is highly desirable in the interests of justice that an effective and transparent market should develop in ATE insurance."

DISTRICT JUDGE SWAN: Yes.

MISS JARRETT: Therefore I say there is nothing from the courts or in the Rules or the practice directions that indicate that commission should be disclosed. Indeed, it is quite the opposite and obviously in the absence of anything to the contrary clearly it is well within the Court's discretion to consider commission as part and parcel of the premium. They have argued and obviously, as you say, it is for the claimant to prove that their costs are reasonable. A reasonable question has been asked. It is within the claimant's knowledge how much commission is received, as dictated within the Rules and the practice directions, and they have chosen not to disclose that information and obviously that is why we are here today, sir, just to find out really how much of that premium is in relation to commission.

DISTRICT JUDGE SWAN: You will see that in relation to commission in *Callery v Gray* the commission is accepted as a reasonable part of the premium but their Lordships, perhaps optimistically, relied on market forces to prevent premiums being unreasonably inflated to reflect extravagant commission payments. I say "perhaps optimistically," I have no idea whether it was optimistic or not. That is the difficulty I am faced with.

MR McDONNELL: In response to that, sir, I would say that that is effectively still the Court of Appeal's position today on the basis that they have said in *Rogers v Merthyr Tydfil* that---

DISTRICT JUDGE SWAN: You can rely on the market to keep the---

MR McDONNELL: The underwriters are not going to price themselves out of the market, they are not going to construct a premium in a way that makes it uncompetitive for them, but, faced with the broad brush approach which has been advocated by the Court of Appeal, the broad brush approach must apply to the premium as a whole. That is what the court has experience of assessing, premiums as a whole. The Court of Appeal and the Supreme Court Costs Office---

DISTRICT JUDGE SWAN: Essentially what you are saying, it seems to me, Mr McDonnell, is that the premium here is in line with the market and in the absence of exceptional circumstances I am entitled to say, "Well, market forces will have operated to ensure that the commission element is in line with other commission elements and that this particular provider of insurance will not be paying over the odds because it would be bust if it did."

MR McDONNELL: That is correct, sir.

DISTRICT JUDGE SWAN: I know that is putting it in very brutal broad brush terms but---

MR McDONNELL: The Court of Appeal have said that the market would be imperilled if such an analysis were adopted across the board.

DISTRICT JUDGE SWAN: Clearly such an analysis may be justified if there is something which flags up the presence of something unusual which would make one think, "Well, there is something funny going on here. Somebody is making a fast buck," and I suppose in the, it was the TAG case wasn't it, the fact that there was a basket of, the claims manager was providing, what was the phrase, a basket of services.

MR McDONNELL: Yes, sir.

DISTRICT JUDGE SWAN: Yes. Is there anything else? Sorry, Miss Garrett, but Mr McDonnell and I rather interrupted you. Is there anything else you want to say?

MISS JARRETT: Not overly fair(?), just simply that the practice directions clearly show that commission is a relevant factor and that question has been asked and has not been answered and obviously we are not seeking the deconstructive approach which should only be taken in exceptional circumstances.

DISTRICT JUDGE SWAN: I am a bit troubled by that, you see, because I am not sure that once you open the door of Pandora's Box all sorts of nasty things don't fly out and I suspect that I find in your favour it seems to me that I am left in some difficulty as practically what to do because I would have no idea, would I, about how much would be reasonable or proportionate. Clearly some element of this £367 is including an element for commission, so what do I do? I direct, do I, that Mr McDonnell would disclose the amount of the commission element and in default of him failing to disclose that element then no part of the insurance premium will be allowed. That is probably what I would do and you would be scurrying off to the next level of Judge, wouldn't you, I think inevitably if your submissions are well founded because your principals would say, "Well, it is commercially sensitive. We are going to run it."

MISS JARRETT: If I may just on that point, sir, the fact that the claimants are with-holding information that the practice directions indicate are a factor to be considered, that should not deny the paying party access to justice and obviously the fact that costs would be incurred by the claimant's refusal to disclose the relevant information, again that should not have a bearing in finding against the defendant. The fact is that the Rules and the judgments and the practice directions all clearly indicate that commission is a factor to be considered. The exceptional cases to which my opponent refers are completely irrelevant because they are in relation to a very detailed deconstructive approach that was taken in order to ascertain whether or the extent to which items of premiums can be recoverable at all under the then newly drafted regulation, or sorry, the Access to Justice Act. It is very different to the situation that we find ourselves in now whereby it is accepted that there are

elements of premiums which are recoverable under section 29. It is accepted that commission is recoverable in principle. However, the Rules clearly indicate that in order to decide whether the total amount of the premium is reasonable a factor to consider is the amount of commission payable and therefore everything points towards the fact that the ATE market is supposed to be transparent and, as I say, a relevant factor is the level of commission recovered. I just cannot reiterate enough really that if the claimant refuses to provide that information which is reasonably requested, that should not bear against the paying party in this case.

MR McDONNELL: I would submit, sir, that the argument is circular. To disclose any commission element would require a disclosure of the rest of the component parts in order to put it into context but not only with the premium in this particular product but across the market. There needs to be an assessment of the framework across the board in order to put it into context. The transparency my friend refers to certainly cannot be the transparency as to how the premium is made up. That is an avenue that the Court can go down in exceptional circumstances. There has been no evidence, there have been no submissions that demonstrate that this particular product, this policy, which is remarkably unexceptional on the face of it, requires any further investigation beyond considering it in broad brush terms.

Whilst my friend made reference to the fact that the claimants in the *Claims Direct Test Cases* stated that on the face of it the premiums in those cases were reasonable but the premium then went on to be deconstructed, that is because there was evidence available already to lift the veil, if you like, and require that analysis. This is effectively potentially opening up a door for disclosure of such information in all detailed assessments across the country which, in my respectful submission, should not be something that should be adopted in every single assessment but the defendants would seek to reduce premiums.

DISTRICT JUDGE SWAN: I think Miss Jarrett would say, forcibly, that there is absolutely no reason why the premium should not be broken down into two figures, one being the commission element and one being the rest of it. I mean that is how people who sell mortgages, life policies, they are required to tell you how much of the amount that the customer, because there is always a customer to consider, is paying consists of commission.

MR McDONNELL: It is not an obligation, as far as I am aware, that applies in these circumstances.

DISTRICT JUDGE SWAN: It isn't. Absolutely. I think that Miss Jarrett is saying that it should and she is saying that transparency is something which the higher courts have referred to and, of course, litigation requires cards on the table, transparency.

MR McDONNELL: And I would argue, sir, that in certain circumstances that is certainly an avenue that the courts are capable of going down. The Rules and the practice direction provide for it but I would submit, sir, that it is not something that should be adopted across the board in every detailed assessment which, if the defendant succeeds today, may very well be something that is brought in in every single assessment and I would not like to see the faces on the ATE market should that become the case.

DISTRICT JUDGE SWAN: Yes. Well, I hope you both feel that you have ventilated your arguments sufficiently. Miss Jarrett?

MISS JARRETT: Just one very small point. I will make it very brief. A very basic point that if the receiving party, the claimant in this particular case, is dissatisfied with the fact that the practice direction clearly points to commission to be a relevant factor, then that would be an issue for them to take to further courts and to have the Rules amended, but as it stands it is a relevant factor to be considered.

MR McDONNELL: I think this ultimately comes down, sir, to the Rules providing the Court with the discretion. It is not a mandatory factor that needs to be considered. It is a factor which the Court can consider and I would submit, sir, that the extension of that is can be considered in the right circumstances. There is nothing in this particular product, this premium, that raises any further investigation and it is something that has been stamped by the Court of Appeal. Whilst the Court of Appeal said £367.50 is not be used as a benchmark, my understanding of that decision is that RTA premiums should not be limited to £367.50 and that premiums can in fact go beyond that. The premium in *Callery v Gray* was not reduced to £367.50, that was all that was claimed. I believe the Court of Appeal was saying that if more is claimed that does not necessarily mean that that is unreasonable. But it is certainly a factor that the Court does have the power to consider and it is through that practice direction that the deconstruction can take place in *Claims Direct* and *The Accident Group Test Cases*, but it is not a mandatory requirement that the Court takes that approach and I think it is encouraged with the overriding objective and the discretion the courts are provided with under Part 43 that the court can choose to assess this based on whether any flags are raised and whether any further investigation is required.

DISTRICT JUDGE SWAN: Yes. Thank you.

1. This is a detailed assessment of the claimant's costs relating to a claim made by him for damages following a road traffic accident which took place on 1st August 2007 and the claimant's claim was compromised without the need for the issue of proceedings for the modest sum of £1,800.

2. The costs fall to be calculated in accordance with the fixed recoverable costs scheme set out at section 2 of the Civil Procedure Rules 45.7 and in large part those or that scheme has served its purpose in precluding a complicated argument about the amount of costs which the claimant should recover.

3. Alas the scheme has not been entirely successful in its purpose in that there has remained one item for the parties to argue about and that is the insurance premium which the claimant took out after the event to fund his costs claim or the costs liability. The amount of the premium set out in the claimant's bill of costs is £367.50. It is not disputed by the defendant, the paying party, that an element of commission is a reasonable element to be contained within the insurance premium. What the defendant says in effect is, however, that unless the defendant knows what percentage of the entire premium is made up of the commission paid to the

solicitor by the insurance company for the introduction of the business, it is impossible to know whether the premium as a whole is reasonable and proportionate.

4. The starting point in considering the amount of costs is CPR 44.5 which says that the Court is to have regard to all the circumstances in deciding whether costs were, in assessing on a standard basis as I am, proportionately and reasonably incurred or were proportionate and reasonable in amount.

> "The court must also have regard to -
>
> (a) the conduct of the parties, including in particular -
>
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any, before or during the proceedings in order to try and resolve the dispute;
>
> (b) the amount of value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the case; and
>
> (g) the place where and the circumstances in which work or any part of it was done."

5. Those matters are set out in the Rules and in addition guidance is given in the practice direction to Part 44 and section 11 of the practice direction includes this at 11.10:

> "In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include,"

and then four specific items are set out followed by the fifth which is the amount of commission payable to the receiving party or his legal representatives or other agents.

6. I have been referred during the course of argument between Mr McDonnell, who appears on behalf of the claimant, and Miss Jarrett, who appears on behalf of the defendant, to a number of fairly recent cases relating to costs and beginning with

the well known case of *Callery v Gray* which was in some quite remarkable aspects very similar to the case with which I am concerned in that it was a similar simple running down action compromised for a similar amount of money, with in fact an insurance premium of a very similar amount, albeit now some 7 years ago, to the amount of £367.50 paid in this case.

7. Whilst I bear in mind the warning given in *Callery v Gray* that the approval of the I think £350 premium in that case as being reasonable and proportionate did not set a benchmark by which other premiums should be measured, I cannot lose sight of the fact that in similar cases similar premiums have been applied.

8. I also bear very much in mind the warnings given by the Court of Appeal in particular in the case of *Rogers v Merthyr Tydfil* in which the Court was astute to warn against, and it was the Court of Appeal, warn against judges indulging in unnecessary and complicated and expensive deconstruction of the elements contained within an insurance premium, and the reminder that a broad brush approach is in almost all but exceptional cases the appropriate approach to take.

9. I bear in mind also the repeated reliance, in many of the cases to which I have been referred, on market forces controlling the inflation of premiums of insurance for litigation or supporting litigation of this sort above what would be reasonable amounts.

10. The nub of this matter is that the claimant has steadfastly refused to split the £367.50 into its constituent elements so that the amount of commission is ascertainable. Mr McDonnell says that that is commercially sensitive information which might be extremely damaging to the insurance provider and that if such information were to be provided it would inevitably bring with it the deconstructive approach which has been disapproved of, save for in exceptional circumstances, because it is impossible, he says, to separate out the commission element without then considering all the other elements which go to calculating what is a proper premium and that would require specialist expert evidence and it would also require an analysis of the premiums charged by other market providers or providers of insurance in the market in order to carry out a proper comparison to see whether this particular premium in the light of all that information was reasonable and proportionate.

11. Set against that Miss Jarrett makes the telling point that transparency is to be encouraged and indeed required in litigation and that transparency, she says, should go to the provision of this simple piece of information.

12. I have come to the conclusion that on the face of it the sum of £367.50 which is a figure around which one sees other insurance premiums in other cases of this size and nature on a daily basis, is reasonable and proportionate in amount.

13. On balance it seems to me that the requirement to deconstruct the amount of that premium is unnecessary and not required and indeed in itself would be a disproportionate exercise. I can see nothing in this case which could be

characterised as exceptional or which otherwise puts me on notice or enquiry that there is something in this case which might make what otherwise appears to be an entirely normally sized insurance premium unreasonable or disproportionate. There is, for instance, not the factor which was present and identified by Chief Costs Judge Peter Hurst in the *Accident Group* cases which was the fact that rather than a solicitor handling the case on behalf of the claimant it was a claims management company who were, to quote him, "offering a basket of services." This claim has been run by what I might term an ordinary, I do not mean that in any way rudely, an ordinary firm of solicitors on behalf of the claimant. Miss Jarrett has not been able to point to anything which raises any suspicion of anything exceptional or untoward which might make one feel that the inevitably complicated and expensive analysis or deconstruction of this ordinary seeming insurance premium should be embarked upon.

14. In all the circumstances of the case my conclusion is that it is unnecessary to do more than look at this premium, consider it in the light of my experience of premiums paid in similar cases and to find, as I do, that it is a reasonable and proportionate sum.

15. Accordingly, I find in favour of the receiving party and assess the amount of the premium as being the £367.50 set out in the bill.

DISTRICT JUDGE SWAN: Right.

MR McDONNELL: Thank you, sir.

MISS JARRETT: The only item which remains in dispute is the cost incurred in drafting the claimant's bill of costs which are claimed at---

DISTRICT JUDGE SWAN: On the bill themselves are they?

MISS JARRETT: It is claimed at item 6 and item 7 with the relevant success fee in addition to that.

MR McDONNELL: Sir, the defendant disputes the need for a bill on such a discrete issue and therefore the costs of the bill should not have been incurred.

DISTRICT JUDGE SWAN: Detailed assessment requires a bill, doesn't it?

MR McDONNELL: My argument exactly, sir. The Rules require service of notice of commencement with a bill of costs.

DISTRICT JUDGE SWAN: You could have asked for it to be dispensed with.

MR McDONNELL: I could have asked for it to be dispensed with, sir, but the Rules do not provide for the parties to agree to dispense with that so an application would have been necessary and the costs of making such an application would have far exceeded that of drafting of the bill in the first instance. I would submit, sir, that the claimant has taken

the cheapest and the most proportionate way forward in commencing assessment proceedings.

MISS JARRETT: If I could just refer to the case of *Burgess v Breheny Contracts Ltd*. It was attached to the claimant's skeleton argument. [2009]. It is an SCCO decision of Master Howarth.

DISTRICT JUDGE SWAN: Yes.

MISS JARRETT: Sir, paragraph 30 which is page 8, there is an objection raised in that case to the costs incurred in drafting a bill of costs where it was one discrete issue and the court there are saying:

> "In my judgment there is no need for the claimant to prepare a bill of costs dealing with just one item. The parties had agreed that the only dispute related to the ATE policy."

And therefore the costs were disallowed. It is quite clear in this case that the overriding objective has prevailed. The only item in dispute was the ATE premium and it is a very discrete point. However, the bill of costs seems to contain all items and disbursements that had actually already been agreed.

MR McDONNELL: In response to that, sir, what this decision does not go on to determine is how exactly you go about commencing assessment proceedings without a bill. The Rules provide for a bill. The Rules do not provide for the parties to agree.

DISTRICT JUDGE SWAN: Well, Mr McDonnell, in my experience what happens very frequently is that the Part 8 proceedings are started and the paying party, or the receiving party rather, attaches to the Part 8 claim a draft order which says, "Costs having been agreed save for the premium under the ATE policy. Permission to dispense with bill of costs. Set down for one hour to consider that item," or something along those lines.

MR McDONNELL: As I say, sir, the Part 8 proceedings, in my submission, are not the commencement of the assessment proceedings. The Part 8 proceedings are merely to obtain the order requiring a party to commence assessment proceedings. The actual commencement of assessment proceedings themselves are by service of a notice of commencement, Form N252, which the Rules provide must have a bill. The Rules, in my respectful submission, sir, do not provide the parties the scope to agree to dispense with service of the bill so the only way round that, I submit, sir, would have been to make an application for assessment proceedings to have been commenced without the need of serving a bill. Once proceedings have already been issued that application would need to have been made separately. The costs of the bill I would submit, sir, are certainly reasonable and far less than the costs of such an application.

DISTRICT JUDGE SWAN: What are you actually claiming? £57?

MISS JARRETT: £121.63 including VAT and the success fee.

MR McDONNELL: It is £57 for preparing the bill and £35 for checking the bill, 2 units for checking the bill plus VAT. There is a success fee on that as well of 12½%, sir.

DISTRICT JUDGE SWAN: So what is the total amount?

MISS JARRETT: £121.63.

DISTRICT JUDGE SWAN: £121.63?

MISS JARRETT: Yes.

MR McDONNELL: The application fee alone, sir, would be £75.

DISTRICT JUDGE SWAN: Yes. I cannot see it would have made a huge amount of difference. I mean Master Howarth says:

> "On transfer from the County Court application could and should have been made to me simply to determine the one outstanding issue …. and for permission to dispense with the bill,"

which I think would have cost almost exactly the same.

Miss Jarrett, I am afraid I am not persuaded that - I am not bound by Master Howarth's decision and whilst it is possible that an application could have been made to dispense with the bill and for the one outstanding issue to be argued without the bill, I do not consider that in fact it would have saved any or any significant money over the £121.63 so I allow that item as well.

MR McDONNELL: Sir, that brings us to the costs of assessment, these proceedings, sir.

DISTRICT JUDGE SWAN: Yes.

MR McDONNELL: If I can pass up a schedule of costs. If I could just advise, sir, that the schedule pleads a 100% success fee, it should actually be a 12½% success fee.

DISTRICT JUDGE SWAN: How long is this element going to take because I have a full list this afternoon starting at 2 o'clock?

MR McDONNELL: The base profit costs claimed are £1,582 plus 12½% success fee which is fixed and then a small amount of disbursements.

DISTRICT JUDGE SWAN: Can you answer my question? How long is it going to take? I have got a telephone conference at 2 and I do need to eat something before I start the afternoon.

MR McDONNELL: I think the defendant would be best to answer that question.

MISS JARRETT: There are no huge issues. I think it is just small elements of time. I

think we could have this wrapped up within 5 minutes.

DISTRICT JUDGE SWAN: Okay.

MISS JARRETT: There is no issue with the hourly rate claimed. There is issue with regards to attendances on the claimants. Clearly this was pursued really for the benefit of the solicitors and 15 routine communications would be claimed is excessive. The claimant's solicitors delegated the matter at the outset to Just Costs who are a firm of solicitors and are very experienced costs draftsman so that the continual back and forth is argued.

DISTRICT JUDGE SWAN: The client I suppose needs to be kept in touch, doesn't he?

MR McDONNELL: We are not on record for the claimant. We effectively are solicitor agents, sir, and need to take instructions and liaise with our client, who is JB Law, their client being the claimants.

DISTRICT JUDGE SWAN: The claimant is JB Law is it?

MR McDONNELL: No, sorry, the claimant is Mr Rodgers.

DISTRICT JUDGE SWAN: It is still Mr Rodgers.

MR McDONNELL: But our client, we are their solicitor agents for the cost proceedings only.

DISTRICT JUDGE SWAN: I appreciate that but why does Mr Rodgers need to have 15 letters, emails and telephone calls to him when I don't suppose it makes a blind bit of difference to him, does it?

MR McDONNELL: These are letters to Mr Rodgers. These are letters from us as solicitor agents to JB Law. It says "claimants" sir, but it is actually---

DISTRICT JUDGE SWAN: What I meant to say was did you mean JB Law via claimant?

MR McDONNELL: Yes.

DISTRICT JUDGE SWAN: Answer yes. Right. Miss Jarrett, I am sorry.

MISS JARRETT: Going down to time, the only dispute I have is 10.11.08 preparation of replies. The replies are very sparse. The hour and a half seems excessive, particularly as this is a duplicate case of others that we have between our firms and there are standard points of dispute and standard replies so the hour and a half seems excessive.

DISTRICT JUDGE SWAN: I have not seen the points of dispute or replies actually.

MISS JARRETT: They weren't really used. They are expanded on for the skeleton argument.

MR McDONNELL: They are in the court file, sir.

DISTRICT JUDGE SWAN: I am sure they are.

MISS JARRETT: And then over the page the 3 hours just to prepare the skeleton argument and then in addition to that an hour and a half to prepare for the detailed assessment, I would argue that that is clearly duplication. In preparing skeleton argument you are preparing for the hearing. I do not really take issue with the travel and waiting or the attendance. It is just those two, the replies to the points of dispute an hour and a half and the four and a half hours for skeleton argument and preparation.

DISTRICT JUDGE SWAN: Yes.

MR McDONNELL: In response to that, we have unfortunately gone beyond the one hour for the hearing and are approaching one and a half hours, so if you would take that into account, sir.

The only other comment I would make is that the preparation for the hearing, the whole point that I made with regard to exceptional circumstances did not form part of the skeleton argument so there was additional work beyond that which was contained in the skeleton argument that was used by way of submissions today, sir.

DISTRICT JUDGE SWAN: Yes. Thank you very much.

1. When I look at this bill of costs I see that the profit costs are £1,582. This is a matter which has taken an hour and a half for fairly dense argument and on the face of it that seems to me to be a reasonable and proportionate amount but out of deference to Miss Jarrett I will consider the specific points she made in relation to the claimant's schedule which I summarily assess now.

2. She takes issue firstly with the number of letters written to the claimant, although it appears really that that means in fact to the solicitors who act as costs solicitor's agents for JB Law, the principal solicitors, written by them to JB Law, as opposed to the claimant Mr Rodgers, and in those circumstances it seems to me that the 15 letters to keep them abreast of matters is reasonable.

3. As for the other matters raised by Miss Jarrett, 1½ hours preparation of replies to points of dispute, there may be some automatic generation of those points of dispute in that they are to some extent standard. Nevertheless, it is a substantial document and one which is necessary and I will allow 1½ hours.

4. As for the point that Miss Jarrett makes about preparation of skeleton argument and preparation for today's hearings, those were separated by only a few days and it seems to me that 4½ hours in total must have an element of duplication in it and I will allow 3½ hours in total for those two items.

5. Other than that I do not think there was any dispute but I think that the success fee needs to be?

MR McDONNELL: It is 12½%, sir. It has been claimed at 100%.

DISTRICT JUDGE SWAN: 12½% as opposed to 100%. So will you tell me what the effect of my small alteration is please?

MISS JARRETT: I have got base profit costs at £1,457. Success fee of £182.13. VAT of £245.87.

MR McDONNELL: I have just got a global sum for the whole lot.

MISS JARRETT: £2,249.32.

MR McDONNELL: I have got 31. I will give you the penny. £2,249.31.

DISTRICT JUDGE SWAN: This is the global sum?

MR McDONNELL: Global sum for the costs of assessment, sir.

DISTRICT JUDGE SWAN: So costs of today's assessment summarily assessed at £2,249.31.

MR McDONNELL: Thank you very much, sir.

DISTRICT JUDGE SWAN: All right. Well, thank you very much indeed. That was very interesting.

MISS JARRETT: Obviously I would be instructed to ask for leave to appeal the decision on the basis that the exceptional circumstances applied to the full deconstructive approach and not to simply the question of whether commission is recoverable or not, sorry, whether there was commission recovered or not and the extent of that commission.

DISTRICT JUDGE SWAN: Say that again if you would? I got the permission to appeal bit.

MISS JARRETT: On the basis that the deconstructive approach which was obviously discouraged by the Court of Appeal in relation to exceptional cases---

DISTRICT JUDGE SWAN: Save in relation to exceptional cases.

MISS JARRETT: With relation to a full deconstruction of the premium itself and not in relation to simply the question of whether commission has been recovered and the extent of that commission, if that makes sense.

DISTRICT JUDGE SWAN: Thank you for that. It does make sense, but I think I have covered it in my judgment in that I was persuaded by Mr McDonnell that it would not be

possible to separate out the commission and simply say that is reasonable or not without indulging in a full deconstructive approach, because clearly the amount of commission must depend upon all the other elements within the premium. And, furthermore, that it will require a market wide analysis and for that reason, and indeed because the amount at stake here today is very small indeed, it would be, it seems to me, wholly disproportionate. Even if there are 100 of these cases, it still only amounts up to £5,000, so disproportionate to allow permission. Okay.

MISS JARRETT: Thank you very much, sir.
