Neutral citation [2011] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1114/1/1/09
1119/1/1/09
1127/1/1/09
1129/1/1/09
1132/1/1/09
1133/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

21 October 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

KIER GROUP PLC
KIER REGIONAL LIMITED
BALLAST NEDAM N.V.
BOWMER AND KIRKLAND LIMITED
B&K PROPERTY SERVICES LIMITED
CORRINGWAY CONCLUSIONS PLC
THOMAS VALE HOLDINGS LIMITED
THOMAS VALE CONSTRUCTION LIMITED
JOHN SISK & SON LIMITED
SICON LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

JUDGMENT ON COSTS

I. INTRODUCTION

1. In a composite judgment handed down on 11 March 2011 ([2011] CAT 3) ("the Main Judgment") the Tribunal determined six appeals. In the present judgment, which is unanimous, the Tribunal adopts the abbreviations and terminology used in the Main Judgment, except that we will refer here simply to "the Appellants" and "the Appeals" instead of "the Present Appellants" and "the Present Appeals". The background to the Appeals is set out in the Main Judgment.

2. The Appeals were against penalty only and in each case resulted in a substantial reduction in the penalties imposed on the Appellants by the OFT in the Decision. The Appellants have now applied for orders that the OFT should pay the costs of their respective appeals, pursuant to rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) ("the Tribunal Rules"). If the amount to be recovered is not agreed some seek a detailed assessment by a costs judge, others seek a summary assessment.

3. Each of the Appellants has provided details of its costs in the form of a schedule, broken down as between solicitors' fees, counsel's fees and other disbursements. The costs sought are as follows:

   (a) Kier claims a total of £427,113.24, inclusive of the costs of the present application (exclusive of VAT).

   (b) Ballast claims a total of £290,299.86 (exclusive of VAT).

   (c) Bowmer claims a total of £250,310.42, inclusive of the costs of the present application (exclusive of VAT).

   (d) Corringway claims a total of £249,190.64, inclusive of the costs of the present application (exclusive of VAT).

   (e) Thomas Vale claims a total of £142,129.24 (exclusive of VAT).

(f) Sisk claims a total of £559,014.42 (exclusive of VAT).

4. The OFT submits that there should be no order for costs in each of the Appeals, both as a matter of principle and in view of what the OFT submits was the Appellants' lack of success on significant issues. Alternatively the OFT contends that for the same reasons any costs award should be in the form of a modest lump sum not exceeding £30,000.

5. All the Appellants and the OFT have lodged detailed written submissions on the costs issue, and none has requested an oral hearing. The Tribunal does not consider that an oral hearing on any of the applications is necessary. In the interests of brevity we do not propose to refer expressly to each of the many points made in these documents. We have, of course, considered them all.

II. RULE 55 OF THE TRIBUNAL RULES

6. Rule 55 of the Tribunal Rules covers all proceedings which come before the Tribunal (see rule 3) and provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
>
> (2) The Tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session….."

7. The Tribunal has on numerous occasions emphasised the width of the discretion and the flexibility afforded by rule 55. For example, in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19

the Tribunal, referring to its various jurisdictions (including appeals against penalty such as the present) said:

> "Given the fundamental differences between these jurisdictions, as well as the differences between individual cases even within a single jurisdiction, the discretion afforded to the Tribunal under rule 55(2) and (3) is necessarily wide. Apart from a reference in rule 55(2) to its discretion to "take account of the conduct of all parties in relation to the proceedings", the rule leaves it to the Tribunal to develop the relevant principles to be applied. As the Tribunal has emphasised on numerous occasions, the width of the discretion enables the Tribunal to deal with cases justly and to retain flexibility in its approach, avoiding the risk of guiding principles evolving into rigid rules (see for example *Emerson Electric Co & Ors v Morgan Crucible Co plc & Ors (costs)* [2008] CAT 28, [2009] CompAR 7, at [35] and [44]). As the Tribunal said in that case at paragraph [44], there is no inconsistency between the wide discretion, and an approach to its exercise which adopts a specific starting point. Without this there may be an increased risk of discordant decisions…
>
> …It is axiomatic that all such starting points are just that – the point at which the court begins the process of taking account of the specific factors arising in the individual case before it – and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly. The Tribunal's decision in relation to costs/expenses can be affected by any one or more of an almost infinite variety of factors, whose weight may well vary depending upon the particular facts. Beyond recognising that success or failure overall or on particular issues, the parties' conduct in relation to the proceedings, the nature, purpose and subject-matter of the proceedings, and any offers of settlement are always likely to be candidates for consideration, the factors are too many and too varied to render it sensible to attempt to identify them exhaustively." (Paragraphs 17 to 19)

8. In relation to appeals under the 1998 Act the Tribunal stated in *The Racehorse Association and Others v OFT* [2006] CAT 1 (applying principles set out in *The Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2002] CAT 2 that the appropriate starting point is that an appellant who can fairly be identified as a "winner" is likely to receive an award of costs, but will not necessarily be entitled to recover all his costs. Such an appellant may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or which involved unnecessary prolixity or duplication, and he may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part. The Tribunal went on to say that:

> "… the OFT is not entitled to any special protection from vulnerability to costs orders in favour of successful appellants save such protection as it may obtain by appropriate case management of the appeal directed at ensuring that the costs of the appeal are kept within proportionate bounds." (See paragraph 10 of the judgment.)

9. In the present applications all the Appellants submit that as they have achieved very substantial reductions in the penalties imposed on them they are clearly to be identified as "winners" and, in accordance with the principles set out above, should be awarded their costs of the Appeals.

III. OFT'S ARGUMENTS OF PRINCIPLE

A. Appropriate starting point

10. The OFT submits that the Tribunal should review its approach to costs in appeals against penalty. In particular, it should have regard to the fact that the Tribunal and the OFT are part of a single system of competition law enforcement, and that there should not be an undue burden on the OFT and the wider public purse where the OFT has taken decisions conscientiously and in good faith. Penalty decisions are integral to the proper functioning of the competition regime which, in the OFT's submission, may be jeopardised if the OFT is discouraged from taking such decisions by fear of exposure to undue financial prejudice as a result of an appeal. Further, a costs order would reduce the OFT's resources available to investigate and pursue infringements of the competition rules, which will ultimately be to the detriment of consumers.

11. In the light of this the OFT contends that the Tribunal should follow what it suggests was the approach of the Divisional Court in *Bradford Metropolitan District Council v Booth* 164 JP 485 and apply a general rule that costs should lie where they fall unless the OFT has acted unreasonably or in bad faith. In this regard the OFT also refers to the costs principles considered by the Tribunal in *The Number (UK) Limited v OFCOM* [2009] CAT 5, and *T-Mobile (UK) Limited and others v OFCOM* [2009] CAT 8, in the context of appeals against decisions of OFCOM under section 192 Communications Act 2003. The OFT submits that if the approach in those cases were to be applied here none of the Appellants should be awarded any costs. It points to the fact that each of them was found to be an infringer of the competition rules; none challenged that finding of liability, or the

imposition a penalty *in principle*; nothing in the OFT's conduct of the litigation was unfair or unreasonable.

12. We consider that the OFT's reliance upon the *Booth* decision is misconceived. That case involved an appeal to the magistrates court from a licensing decision by the local authority where the court in effect conducted a *de novo* re-hearing, and was entitled to reach a different decision without finding that the local authority had erred in any way in the original decision. The court had a wide statutory discretion to make such order for costs "as it thinks just and reasonable". The Divisional Court (the Lord Chief Justice (Lord Bingham) and Silber J) held that the magistrates had misdirected themselves on costs by applying a principle that costs should follow the event without considering a number of relevant factors. The Lord Chief Justice said:

> "What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.
>
> Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

13. The Tribunal has recently examined the Booth case and related jurisprudence in *Eden Brown Limited and Hays Plc and others v OFT* [2011] CAT 29. The Tribunal referred there to the detailed consideration of the scope of the principles in *Booth* carried out by the Court of Appeal in *R (Perinpanathan and ors) v City of Westminster Magistrates Court* [2010] EWCA Civ 40, an authority to which our attention was not drawn by any party. Having carefully reviewed the case-law Stanley Burnton LJ, with whom the other two members of the Court essentially agreed, found that *Booth* principles applied in licensing proceedings in the magistrates' court and the Crown Court, and also to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest.

Whether the principle should be applied in other contexts would, he stated, depend on the substantive legislative framework and the applicable procedural provisions. The principle did not apply in proceedings to which the CPR apply. (See paragraph 40 of the judgment of the Court of Appeal.) In *Eden Brown* the Tribunal, after considering *Perinpanathan*, stated:

> "The imposition of sanctions for breach of the Chapter I or Chapter II prohibition under the 1998 Act, which constitute criminal penalties for the purpose of Article 6 of the European Convention on Human Rights, cannot be regarded as remotely comparable to licensing decisions of a more administrative nature. And although the OFT is a competition authority acting in the public interest, under the regime of the 1998 and 2002 Acts it does not bring proceedings before this Tribunal in order to obtain the imposition of a sanction. The OFT puts the allegations of infringement to the parties involved, receives submissions from them in response and then itself takes a decision as to whether an infringement occurred and, if so, whether to impose a penalty and what the amount of that penalty should be. Hays and Eden Brown are not entitled to recover, nor have they claimed, any of the no doubt significant costs of contesting these issues before the OFT at that administrative stage. In our judgment, the approach set out in the *City of Bradford* case, as considered and explained by the Court of Appeal in *Perinpanathan*, should have no application to an appeal before this Tribunal against a decision of the OFT finding infringement and imposing a penalty with regard to the Chapter I or Chapter II prohibitions (and/or Articles 101 and 102 TFEU), irrespective of whether or not that appeal concerns only the question of the penalty." (Paragraph 16, footnotes omitted)

(See also *Tesco Plc v Competition Commission* [2009] CAT 26, at paragraphs 30 to 32 for the Tribunal's observations on *Booth* and on the Communications Act 2003 cases relied upon by the OFT.)

14. We agree with what the Tribunal said in *Eden Brown*. We do not consider that in dealing with appeals under the 1998 Act (whether against a finding of infringement or against a penalty) the Tribunal should adopt the approach which the OFT purports to derive from the *Booth* case. In our view the principles identified by the Tribunal in *The Racehorse Association* and *The Institute of Independent Insurance Brokers* decisions (above), including the starting point specified in those cases, are equally appropriate in relation to appeals such as the present, as they are where the appeal is against a finding of infringement. We do not believe that the interests of justice or the proper functioning of the competition regime are in any way inconsistent with those principles, which allow the Tribunal a wide discretion to make a costs order which is just and proportionate in the light of the particular

circumstances, and which takes due account of the extent of an appellant's success or failure in challenging the decision. To adopt a starting point that a successful appellant should receive an award of costs only where the OFT can be shown to have acted unreasonably or in bad faith would be unduly restrictive and would not serve the interests of justice or the fair administration of the competition regime. The fact that an appellant has established that a penalty is excessive and disproportionate should in our view be a central consideration for the Tribunal when the question of costs of the appeal comes to be determined. To insulate the OFT in the way suggested from the costs discipline to which all public bodies are subject in the context of ordinary judicial review would not be conducive to the effective enforcement of the competition rules. That discipline is as desirable in a public law context as in private law cases: see, for example, *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347, per Dyson J (as he then was), at paragraph 37.

15. Nor does it advance the OFT's submission that the Appellants have all been found to be "wrongdoers" and that none has challenged that finding or the imposition of *some* penalty. It was necessary for the Appellants to bring these appeals in order to reduce the penalties to a level appropriate to the transgressions in question. Moreover, it can hardly disadvantage an appellant that he has limited his challenge to matters on which he has thereafter achieved success.

B. Extent of success

16. Next the OFT submits that the success of each Appellant was only partial and that each advanced a plethora of arguments which failed. This, it is submitted, justifies no order as to costs or at best a very small award.

17. Success or failure on particular issues can of course be a relevant factor when considering the appropriate order for costs, but it is more convenient to examine such matters in relation to individual Appellants. We will therefore return to this aspect in due course.

C. Case management

18. Another argument raised by the OFT relates to the fact that the Appellants, or most of them, opposed its suggestion that certain points of legal principle of general application in the appeals be determined by way of preliminary issues and/or a test case, prior to and separate from the determination of the individual appeals. The OFT submits that had this course been adopted considerable duplication and unnecessary expense could have been avoided, and that the OFT should not be held liable for costs which were occasioned by the approach ordered by the Tribunal, involving separate representation and separate hearings for the Appellants.

19. There is no merit in this argument. The OFT's suggestion was carefully considered by the Tribunal (in a panel consisting of the President and two Chairmen) at a joint case management conference held on 25 January 2010, in the light of written and oral submissions of all the parties. The Tribunal concluded

> "that the appellants (or the vast majority of them) are right in saying that increased costs and delay are likely to be the result of trying to identify and decide individual points of principle for a number of cases. Therefore in our view each case will need to be separately heard and resolved in its entirety." (See [2010] CAT 2, at paragraphs 2-3.)

20. Experience shows that preliminary issues can all too easily increase rather than save costs and they frequently cause delay. In the present panel's estimation additional cost and delay would have been the result for the construction appeals generally if the OFT's suggestion had been adopted: a judgment on preliminary issues or in a "test case" would almost certainly not have obviated the need for subsequent individual hearings at which each appellant would have urged its specific circumstances, and made submissions as to how if at all the so-called test case should be applied to them. As it was, each penalty-only appellant was confined to a single half day hearing.

D. Disparity in amount of costs claimed

21. The final general point made by the OFT concerns the disparity in the amounts claimed as costs by the Appellants and by other undertakings who have appealed

against the penalties imposed in the Decision. The OFT submits that since each of the relevant hearings was listed for the same length of time (half a day) and since the issues in the Appeals overlapped to a significant extent, there can be no justification for the difference in magnitude of the costs claims. The OFT points to the amount of costs claimed in another appeal heard by a differently constituted panel; this was an appeal against both liability and penalty, and was listed for a full day. The costs claimed in that case were £32,702. In the light of this the OFT submits that if, contrary to its primary submission, there is to be an award at all, a sum of that order should represent a cap on the costs recovered by any of the Appellants.

22. The disparity in the amounts claimed is certainly striking. They range from £142,129 (Thomas Vale) to £559,014 (Sisk). There is an even greater disparity if one has regard to the amounts claimed by penalty-only appellants whose appeals were heard by other panels. Some of these are referred to in the OFT's written submissions here. They include figures of £46,105 (Interclass) and £64,931 (Barrett).

23. Under rule 55 the Tribunal is entitled to make an award in the form of a lump sum rather than sending the matter for detailed assessment by a costs judge. This power has been exercised on several occasions (see, for example, *Tesco v Competition Commission*, cited at paragraph 13 above, and *T-Mobile v OFCOM*, cited at paragraph 11 above). We consider that it is appropriate to adopt that approach here, notwithstanding that the majority of Appellants have asked for detailed assessment, and one (Corringway) has submitted that we should not summarily assess its costs.

24. We have also come to the conclusion that in arriving at the lump sum to be awarded, we should apply a cap on the amount of costs recoverable by any of the Appellants. However, we do not accept that a cap of about £30,000 would be fair, as urged by the OFT.

25. It does not follow that because appellant X has incurred costs of only £50,000 appellant Y's costs of £150,000 are necessarily unreasonable or disproportionate.

There are many possible reasons for disparities in costs, and what is reasonable or proportionate is likely to be represented as a range. We are better able to form a view of what a fair and proportionate ceiling on that range should be, than if we were dealing with only a single case. As noted, we have available to us the various amounts expended by the Appellants.

26. We also have the benefit of the Tribunal's judgment in *GF Tomlinson Group Limited and Others v OFT* [2011] CAT 32 in which a differently constituted panel dealt with the costs applications in six other similar penalty-only appeals against the Decision. The Tribunal there also took the view that a cap on a successful appellant's costs was appropriate, and fixed the cap at £200,000. That figure accords with our own view as to an appropriate ceiling for recoverable costs in the cases before us. We consider that it would not be fair or proportionate to require the OFT to pay more than that figure in respect of any of those cases, including the ones which involved the highest penalties (and where the challenger therefore had a lot at stake) and where the particular appellant was successful in all its arguments. All six cases were of a similar nature, in the sense that the issues were similar and in some respects the same, and none reflected a significantly different degree of complexity from the others; all the oral hearings were of course of the same duration.

27. In applying a cap we should not be taken to be holding that any party was necessarily acting unreasonably by choosing to *incur* costs above that cap. What costs a party may choose to incur will depend on any number of factors, including the depth of its pocket, and the importance which it ascribes to the issues involved in the litigation. However, a party's entitlement to incur what costs it sees fit is one thing, but whether it is fair and consistent with principles of proportionality to require the losing party to pay all of those costs is a quite separate question.

IV. INDIVIDUAL APPLICATIONS

28. We now therefore proceed to examine arguments raised in respect of the individual applications for costs. In each case we will adopt as a starting point that a party

identifiable as a clear "winner" should receive an award of costs in its favour, subject to the cap and subject to any specific factors which affect the starting point or the amount of any award within the cap. Where an award of costs is appropriate and the costs claimed exceed the cap, we will apply the cap before applying any further disallowance in respect of, for example, unsuccessful arguments.

Kier

29. Kier's appeal resulted in a reduction in its penalty from £17,894,438 to £1,700,000. Kier was successful in virtually all the arguments which it raised. It is clearly identifiable as a "winner". This is not affected by the fact that Kier also benefitted from the Tribunal's conclusions on two other issues, one of which was only relied upon by Kier after the oral hearing (the "year of turnover" point), and the other of which was not relied upon at all (the percentage starting point). Even had Kier not been afforded the benefit of these arguments, the reduction in its penalty would still have been substantial enough to establish the undertaking as completely successful in the appeal. There is therefore no justification for imposing any discount on that account.

30. Accordingly, as the amount of costs claimed exceeds the cap, the OFT will pay to Kier a sum of £200,000 in respect of costs.

Ballast

31. Ballast's appeal resulted in a reduction in its penalty from £8,333,116 to £534,375. Ballast was essentially successful in the case it argued. The OFT is correct in stating that the Tribunal did not accept Ballast's submission on one point of construction (see paragraph 182 of the Main Judgment). However the Tribunal did accept the major argument to which this point was directed, namely that the OFT had placed undue reliance upon worldwide group turnover. Ballast was a clear "winner", and it would in our view be unfair to apply any disallowance to reflect that one unsuccessful submission on a narrow point or because certain other arguments were rendered academic by the Tribunal's conclusions about the appropriate year to assess relevant turnover. Accordingly, as the amount of costs

claimed exceeds the cap, the OFT will pay to Ballast a sum of £200,000 in respect of costs.

Bowmer

32. Bowmer's penalty was reduced from £7,574,736 to £1,534,000. As regards Bowmer's success on the points it raised, the position is not so clear cut as in the cases of Kier and Ballast. Its overall submission was that the penalty imposed on it was excessive, disproportionate and discriminatory. In that regard Bowmer relied on a number of points which commended themselves to the Tribunal: it challenged the percentage starting point for "simple" cover pricing, the absence of individual assessment, the mechanistic application of the MDT, and the undue reliance on total worldwide group turnover.

33. On the other hand, as the OFT submits, a not insignificant part of the written and a good deal of the oral submissions of Bowmer were devoted to arguments which did not find favour. These included, in particular, the argument that application of a higher (7%) Step 1 percentage in respect of an infringement involving a compensation payment did not make proper allowance for what Bowmer described as its position as victim of a fraud carried out by its employee. Another unsuccessful contention was that the OFT had been guilty of unfairness or discrimination by terminating leniency opportunities and replacing them with the less advantageous FTO in circumstances where only those companies who were "dawn-raided" had the chance to apply for leniency.

34. Bowmer should have an order for costs having clearly achieved a successful result on the basis of arguments which were included in its grounds of appeal. However we consider that the order we make should in fairness reflect the submissions on which it did not succeed, on which more than trivial time and treasure were spent. The order for costs should not only take account of the fact that an element of Bowmer's costs are not properly recoverable, but should also reflect the expense likely to have been incurred by the OFT in responding to these unsuccessful arguments. Rather than making a cross-order for costs in favour of the OFT, we

have taken account of the OFT's cross-entitlement in arriving at an appropriate discount to be applied to Bowmer's award. In our view a reduction of 25% in the costs otherwise allowable should be applied to reflect these considerations, with the majority of that reduction reflecting Bowmer's lack of success in relation to the appropriate starting point. The costs claimed by Bowmer exceed the cap. The OFT should therefore pay Bowmer a sum of £150,000 in respect of costs.

Corringway

35. The penalty imposed on Corringway was reduced from £769,592 to £119,344 on appeal. Like Bowmer, Corringway raised a number of arguments which did not assist its otherwise successful appeal. These included the leniency versus FTO point mentioned above, an argument about the relative culpability of different undertakings, and a complaint that Corringway was entitled to a greater discount for financial hardship than the OFT had allowed. These submissions took up time and effort, and no doubt increased expense. Although we do not consider that they are sufficient to deprive Corringway of an order for costs, we agree with the OFT that their lack of success should be reflected in the order we make. Again, we propose to make a single award in favour of Corringway rather than cross-orders, and to apply a discount on the costs otherwise recoverable by Corringway which reflects the costs incurred by both Corringway and the OFT in relation to these submissions. In our view a 15% reduction in the amount which would otherwise be ordered is appropriate. Corringway's claimed costs exceed the cap. Corringway will therefore benefit from an order for costs in the amount of £170,000.

Thomas Vale

36. Thomas Vale's original penalty of £1,020,473 was varied to £171,000 on appeal. The arguments upon which it relied were upheld by the Tribunal save for the point made about the market definition, which did not in the event need to be determined having become academic in the light of the Tribunal's conclusion on the relevant year for assessing turnover. We do not agree with the OFT that this point should weigh against Thomas Vale because of how similar points were treated by other

panels of the Tribunal – that would require us to determine the point now as part of a costs application. Nor do we consider that there should be a disallowance because Thomas Vale stated that the OFT could and should have adopted an alternative remedy rather than embarking on the Decision. That argument was made in order to underline the mitigation of penalty which was being urged by Thomas Vale, and the Tribunal did not understand it to be any part of the company's case to argue that the OFT was not in principle entitled to impose penalties if it saw fit.

37. Therefore Thomas Vale is a clear "winner" and it is fair that it should have an order for costs in its favour. The amount of costs claimed is £142,129.24, and we will make an award of costs in that sum.

Sisk

38. Sisk's appeal resulted in the original penalty of £6,191,627 being reduced to £356,250. The scale of that reduction renders untenable the assertion that Sisk was not a "winner". We do accept that some time was taken up in arguments which were found to be unconvincing. These included the leniency versus FTO point, and a point about relative culpability. In addition some new arguments were sought to be raised in written submissions lodged after the hearing; these involved issues of fact which were not appropriate to be raised at that late stage. None of these factors is in our view such as should deprive Sisk of an order for costs in its favour. However we propose to reduce the amount recoverable by 15% to reflect them. As in the cases of Bowmer and Corringway, the level of this discount takes account also of the fact that the OFT might otherwise be entitled to a cross-order for its costs in relation to the issues in question. The costs claimed by Sisk are very considerably in excess of the cap. The order for costs will therefore be in the sum of £170,000.

V. CONCLUSION

39. For the foregoing reasons, the Tribunal unanimously orders as follows:

40. Within 28 days of the date of this judgment, or such other period as the Tribunal may fix, the OFT pay to the Appellants the following sums in respect of costs of the Appeals (including the costs of these applications for costs):

(a) Kier: £200,000;

(b) Ballast: £200,000;

(c) Bowmer: £150,000;

(d) Corringway: £170,000;

(e) Thomas Vale: £142,129.24;

(f) Sisk: £170,000.

The President Andrew Bain Peter Clayton

Charles Dhanowa
Registrar

Date: 21 October 2011