Neutral citation [2011] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1140/1/1/09
1142/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

14 October 2011

Before:

THE HONOURABLE MR JUSTICE ROTH (Chairman)
MICHAEL DAVEY
DR VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

EDEN BROWN LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

(1) HAYS PLC
(2) HAYS SPECIALIST RECRUITMENT LIMITED
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

Hays' application was heard at Victoria House on 25 July 2011

JUDGMENT (COSTS)

APPEARANCES

Mr Paul Harris QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Hays plc, Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited.

Dr Mark Friston (instructed by Addleshaw Goddard LLP) and Mr Adam Aldred (solicitor advocate of that firm) made written submissions on behalf of Eden Brown Limited.

Mr Daniel Beard QC and Mr Alan Bates (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

I. INTRODUCTION

1. By a judgment handed down on 1 April 2011 ("the main Judgment"),[1] the Tribunal determined three appeals heard together against the decision by the Office of Fair Trading of 29 September 2009 in Case CE/7510-06 *Construction Recruitment Forum*. In this judgment, determining the question of costs, we use the same abbreviations as in the main Judgment. Two of the three appellants, Eden Brown and Hays, have applied for an order that the great majority of their costs should be paid by the OFT, on the basis that each of them was substantially successful in its appeal. The OFT contends that as a matter of principle there should be no order for costs in penalty appeals; in the alternative, it submits that the Tribunal should allow Eden Brown and Hays to recover only a much more limited part of their costs and that the amounts they have claimed are "grossly excessive". The third appellant, CDI, resolved the question of costs with the OFT and has not made any application.

2. The Tribunal's jurisdiction to award costs is governed by rule 55 of the Competition Appeal Tribunal Rules 2003,[2] which provides insofar as material:

> "(1) For the purpose of these rules "costs" means costs and expenses recoverable in proceedings before the [Senior Courts] of England and Wales ...
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> (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.
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> (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 [Senior Courts Costs Office]…"

II. THE TRIBUNAL'S GENERAL APPROACH

3. The approach to be adopted under rule 55(2), and the corresponding provision of its previous rules, has been considered by the Tribunal on a number of occasions. The

[1] [2011] CAT 8.
[2] SI 2003 No 1372.

provision is framed in broad and general terms. That reflects the varied forms of jurisdiction conferred upon the Tribunal and therefore the different nature of the proceedings that come before it. These categories were summarised by the Tribunal in its judgment on expenses in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*[3] at [16]:

> "(1) Appeals on the merits against decisions of the OFT or one of the other concurrent regulators brought under sections 46 or 47 of the Competition Act 1998 (as amended) ("the 1998 Act"). Such appeals are typically against findings of infringement or non-infringement of the Chapter I or Chapter II prohibitions or the [EU] competition rules and/or against the imposition or amount of a penalty for infringement.
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> (2) Appeals brought under the same sections in respect of certain other types of decision of the OFT or other regulators, where the Tribunal must determine the appeal on judicial review grounds rather than "on the merits". This is the case, for example, in third party appeals to the Tribunal against decisions by the OFT to accept or release commitments under section 31A of the 1998 Act.
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> (3) So-called "follow on" claims for damages or other monetary award under sections 47A or 47B of the 1998 Act in respect of losses caused by an established infringement of the Chapter I or Chapter II prohibitions (or [EU] equivalents).
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> (4) Applications under sections 120 or 179 of the [Enterprise Act 2002], which are in the nature of judicial review of decisions of the relevant competition authorities and ministers taken under Part 3 (mergers) or Part 4 (market investigations) of that Act.
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> (5) Appeals under section 192 of the Communications Act 2003 ("the 2003 Act") against specified decisions of the Office of Communications ("OFCOM") and other decision-makers. The types of decisions covered by section 192 are many and varied. Such appeals are "on the merits"."

4. While the Tribunal has emphasised that the width of discretion conferred by rule 55(2) enables it to retain flexibility in its approach and avoid rigid rules, it has over time developed guiding principles, for example by the adoption of specific starting points, that take account of the particular nature of the jurisdiction being exercised. Hence as regards appeals under section 192 of the Communications Act 2003 ("the 2003 Act") against decisions by OFCOM resolving disputes under section 185 of that Act,[4] the Tribunal has stated that the starting point is that OFCOM should not normally be the subject of an adverse costs order where it has acted reasonably and in

[3] [2009] CAT 19.
[4] For example, as regards the provision of network access.

good faith: *The Number (UK) Ltd v OFCOM (costs)*[5] at [5]. By contrast, for cases under section 120 of the Enterprise Act 2002 ("the 2002 Act"), the Tribunal has determined that the appropriate starting point is that the successful party should normally obtain a costs award in its favour: *Unichem (costs)*[6] at [17]; *Stericycle International LLC v Competition Commission (costs)*[7] at page 2, lines 8-9.

5. The Tribunal further observed in its judgment in *Merger Action Group* at [19]:

> "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."

Hence, the Tribunal has found it appropriate to award costs in the particular circumstances of a dispute determination under section 192 of the 2003 Act although there was no lack of good faith or unreasonableness on the part of OFCOM: *T-Mobile (UK) Ltd v OFCOM*.[8]

6. As regards appeals against decisions concerning the Chapter I or Chapter II prohibitions under the 1998 Act, the Tribunal summarised its general approach in *The Racecourse Association v OFT (costs)*[9] as follows (at [10]):

> "First, as in all cases, there is no immutable rule as to the appropriate costs order; and how the discretion will be exercised in any case will depend on its particular circumstances, one relevant consideration being whether any award of costs may be perceived as frustrating the objects of the Act. Second, subject to this, the starting point is that a successful appellant who can fairly be identified as a "winner" is entitled to recover his costs. Third, such an appellant will not necessarily be entitled to recover all his costs, and may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or which involved unnecessary prolixity or duplication, and he

[5] [2009] CAT 5.
[6] [2005] CAT 31.
[7] [2006] CAT 22.
[8] [2009] CAT 8.
[9] [2006[CAT 1.

> may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part. Fourth, 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."

7. Prior to that passage, the Tribunal referred to the guidance on costs which it had set out following the very first appeal to the Tribunal in the *GISC* decision,[10] including the observation that cases involving penalties would require particular consideration as regards costs as against losing parties.[11] Neither *The Racecourse Association* case nor *GISC* itself was a penalty appeal, and this observation was clearly *obiter*. However, the OFT submits that an appeal only against the penalty imposed for breach of the Chapter I or Chapter II prohibitions (and/or Articles 101 and 102 TFEU) should receive a different approach from that now established for an appeal against a finding of liability for such a breach.

8. The OFT contends that for penalty-only appeals, the starting point should be that costs lie where they fall. It does not argue for an asymmetric approach (i.e. that only a successful appellant should normally not recover costs): its primary case is that there should, in the absence of particular circumstances, be no order for costs. Thus if an appeal against a penalty imposed by the OFT was unsuccessful, on this approach the OFT equally could not recover its costs. The OFT argues that unlike a decision finding an infringement, assessment of the penalty to be imposed once an infringement is found is much more an exercise of judgment. Moreover, in its written submissions on costs, the OFT stated:

> "In particular, it is important that there is not an undue burden on the OFT and the wider public purse by reason of the OFT taking penalty decisions conscientiously and in good faith. It is integral to the proper functioning of the competition regime that the OFT makes infringement decisions and, thereafter, applies penalties. The system of statutory appeals to the Tribunal may not function properly if the OFT is discouraged from enforcing decisions made in pursuit of the public interest, by fear of exposure to undue financial prejudice if the decision is successfully challenged. Furthermore, any costs order against the OFT will necessarily result in a reduction of the resources available to investigate infringements of the competition regime and its enforcement in the United Kingdom as costs orders would be funded from the public purse. This will of course be of detriment not only to the functions of the OFT but also, ultimately, to consumers."

[10] [2002] CAT 2.
[11] See at [8].

9. We are not persuaded by these arguments. We fully accept that an effective competition regime requires the OFT, and the sectoral regulators, to investigate infringements and take decisions, including the imposition of appropriate penalties. However, we do not consider that there is such a fundamental and general distinction between the part of a decision finding an infringement and the part of a decision imposing a penalty. Both aspects may require a determination to be made on complex facts. Moreover, although the decision as to penalty may involve an evaluative assessment, so also can economic determination of the relevant market or a finding of the potential effect of particular conduct or arrangements, which can be part of the establishment of an infringement. If an appeal against a penalty decision is unsuccessful, we see no reason why the OFT should not, as a general principle, recover its costs of resisting that appeal which may have caused it considerable work and expense (see for example the order that the OFT should be awarded its costs in *Sepia Logistics Ltd v OFT (costs)*[12], an unsuccessful penalty-only appeal). But if, on the other hand, a penalty-only appeal succeeds, we consider that the appellant should equally be able to recover its reasonable and proportionate costs of challenging an excessive penalty.

10. Furthermore, we do not consider that having this principle as the starting point should deter the OFT from imposing appropriate penalties. The OFT does not contend that its potential liability for the costs of a successful appeal deters it from taking decisions finding infringements of the 1998 Act and Articles 101 and 102 TFEU. So far as we are aware, it has never been suggested that the European Commission's liability for costs of successful appeals against its decisions in the General Court, where the costs rule is the same for penalty-only appeals as for appeals against liability,[13] has deterred it from imposing what can be very substantial penalties on undertakings found to violate the EU competition rules, and we consider that the OFT should be able to fulfil its role as the primary enforcer of competition law in the United Kingdom with equal vigour. However, if the potential liability to costs should deter the OFT from

[12] [2007] CAT 14.
[13] This arises under Article 87(2) of the Rules of Procedure of the General Court that provide that the successful party to an appeal is entitled to its costs as of right if they have been applied for in its pleadings.

imposing excessive and disproportionate penalties, as were imposed in the present cases, that would be a benefit to result from this general principle.

11. We have recorded that the OFT is not seeking an asymmetric rule as to costs, although some of its submissions related more specifically to its own position. In that regard, as the Tribunal noted in *The Racecourse Association* case, the OFT is not entitled to any special protection from vulnerability to costs. In the Administrative Court, the general rule is that public authorities that are unsuccessful in upholding their decisions will have to pay the applicant's costs. Although there the position is governed by the particular costs rules in the CPR Rule 44.3, which do not apply here, in *Tesco v Competition Commission (costs)*[14] at [28] the Tribunal quoted, as equally applicable to cases before this Tribunal, the rationale for that approach as expressed by Dyson J (as he then was) in *R v Lord Chancellor, ex p Child Proverty Action Group*:[15]

> "36. I accept the submission of Mr Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.
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> 37. The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases."

12. In similar vein, in *R (Bahta and ors) v Home Secretary*[16], when ordering costs as against the respondent of proceedings which led to immigration decisions of (in effect) the UK Border Agency ("UKBA") being set aside by consent, Pill LJ (with whom Sullivan LJ and Hedley J agreed) stated, at [60]:

[14] [2009] CAT 26.
[15] [1998] EWHC Admin 151, [1999] 1 WLR 347.
[16] [2011] EWCA Civ 895.

> "Notwithstanding the heavy workload of UKBA, and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled."

13. The OFT also referred to the observations of Lord Bingham in his judgment in the Divisional Court in *City of Bradford MDC v Booth.*[17] That case concerned an appeal against the decision of justices to award costs against a local authority on a successful complaint against its decision not to renew a vehicle operator's licence. The statutory discretion given to the magistrates' court under section 64 of the Magistrates' Courts Act 1980 was to make such order for costs "as it thinks just and reasonable". In setting out the proper approach to be adopted under this provision, Lord Bingham said that the court may think it just and reasonable that costs should follow the event but need not think so in all cases. He continued:

> "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."

14. This approach has been applied in subsequent cases concerning licensing appeals involving the costs provisions of other statutes, including gaming club decisions under what is now the Gambling Act 2005 and decisions concerning licensed premises under the Licensing Act 2003. They have also been followed in the separate sphere of proceedings before professional disciplinary tribunals brought by a professional body or regulator: see the decision of the Court of Appeal in *Baxendale-Walker v The Law Society.*[18]

15. The Court of Appeal recently and comprehensively reviewed this line of authority in *R (Perinpanathan and ors) v City of Westminster Magistrates Court,*[19] a case to which

[17] [2000] 164 JP 485.
[18] [2007] EWCA Civ 233, [2008] 1 WLR 426.
[19] [2010] EWCA Civ 40, [2010] 1 WLR 1508.

neither side in the Hays appeal referred. In the leading judgment (which also referred to a costs judgment of this Tribunal under the 2003 Act), Stanley Burnton LJ concluded that Lord Bingham's principle applies to licensing proceedings and also to disciplinary proceedings "before tribunals of first instance brought by public authorities acting in the public interest", where the CPR do not apply. Lord Neuberger MR similarly considered that the principle applies where a regulatory authority or the police (as in *Perinpanathan* itself) were carrying through what was essentially an "administrative decision", meaning the performance of one of its regulatory functions: see at [65]; and that the approach applied also where a regulatory body was carrying out its functions of seeking a sanction, whether those proceedings were brought before a disciplinary tribunal or a court (unless the CPR applied): see at [71]. But the latter case is to be distinguished from an appeal to a separate court or tribunal against the sanction imposed by a disciplinary body. Hence in *Walker v Royal College of Veterinary Surgeons*,[20] referred to by Stanley Burnton LJ at [38], on an appeal that concerned only the penalty, the Privy Council set aside an order made by the Disciplinary Committee of the College and held that the successful appellant should recover his costs of the appeal, expressly distinguishing the principle derived from the *City of Bradford* case.

16. 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,[21] 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,[22] 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.[23] Hays and Eden Brown are

[20] [2007] UKPC 20.
[21] See *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2001] CAT 1, at [93] and [98]. See also Case 43509/08 *A. Menarini Diagnostics SRL v Italy*, judgment of the European Court of Human Rights of 27 September 2011.
[22] See s 31 of the 1998 Act.
[23] See s 36 of the 1998 Act.

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.

17. Finally, we are not impressed by the argument that the fact that the *level* of costs is asymmetric, with the OFT incurring far lower costs than private parties, may serve as an incentive to private parties to bring appeals since their exposure to the costs of the other side is less than that of the OFT. The private appellant is indeed likely to incur higher costs, but if its appeal fails, it will have to shoulder that burden.

18. Accordingly, we consider that the starting point for a penalty-only appeal, as for an appeal against liability for infringement of the Chapter I or Chapter II prohibition, is that the successful party should recover its reasonable and proportionate costs. However, we emphasise that this approach addresses only the starting point. As indicated above, there may in any particular case be specific considerations that justify departure from this starting point. Furthermore, the question of "success" should generally be considered on an issues basis, by analogy with the approach under CPR 44.3(4). Where a party has failed on part of its case, that will generally lead to the making of an appropriate deduction of a proportion of the costs that it can recover.

III. HAYS

19. Hays achieved a very substantial reduction in the level of penalty imposed, as a result of the success of two of its grounds of appeal: the gross/net issue and the MDT. The gross/net issue concerned the appropriate evaluation of the facts in the light of the policy of the *Guidance*, and as regards the MDT we found that the OFT had adopted an inappropriately mechanistic and narrow approach that led to the imposition of penalties that were manifestly too high. This was not an appeal that succeeded only on a narrow ground of subjective judgment and we see no reason why the general starting point for appeals under the 1998 Act should not apply.

20. Hays failed on the other grounds pursued, and one ground concerning liability was abandoned. Before addressing what proportion of Hays' costs should therefore be awarded, it is necessary to consider the objections raised by the OFT to two elements within Hays' costs: (A) the use of two QCs; and (B) the instruction of an expert accountant. Each of these occasioned very substantial costs.

A. Two QCs

21. We acknowledge that this was an important case for Hays and that very substantial sums of money were involved. That can certainly justify the instruction of leading counsel along with a junior. However, the distinct issue of proportionality and the MDT on which Hays chose to instruct a second QC was not one involving an abstruse field of law. Hays was of course entitled to engage the services of another QC to present this particular part of its case if it so wished, but it can recover its costs of doing so from the OFT only so far as they were reasonable and proportionate. The rest of Hays' appeal was presented by a leading counsel of broad experience in EU and competition law and a senior junior (who has himself subsequently taken silk), who can both be assumed to be well familiar with the basic principles of public law. In our view, it was not proportionate to use also a second QC, however distinguished, for this appeal. We accordingly disallow the costs associated with the instruction of Lord Pannick QC. That covers not only his own fees, but all the solicitors' costs associated with instructing him in the case.

22. It was submitted that if Lord Pannick had not been instructed, the brief fee for Mr Brealey QC would have been higher to reflect the additional work he would have had to carry out, and that some allowance should be made on that score. However, having regard to the overall level of fees charged by Mr Brealey, which we have seen and which will in any event be subject to detailed assessment, we do not consider that any further specific adjustment is necessary and we shall, in any event, take account of this in the overall determination of the proportion of its costs that Hays can recover: see paragraph 32 below.

B. Expert accountant

23. Hays instructed Mr Martin Hall as an expert accountant. In the first of two very full reports that he prepared for the hearing, he stated that the two questions which he had been instructed to consider were the following:

> "1. Having regard to the definition of "applicable turnover" in the 2000 Order, and interpreting that term in accordance with GAAP, do you consider that "Gross Turnover" or "Net Fees" are amounts "derived" by Hays from the provision of services within Hays' ordinary activities?
>
> 2. Do you consider that Hays could, consistently with GAAP, have chosen to report "Net Fees" as its turnover figure in its statutory accounts rather than "Gross Turnover"?"

24. On the first of those questions, the Tribunal rejected Hays' case: see paragraph 42 of the main Judgment. As regards the second question, the Tribunal did not find that this was appropriate or relevant to determination of the gross/net issue and we expressly found that the accountancy evidence was of no real assistance: see paragraphs 58-59 of the main Judgment.

25. Since the OFT instructed an expert accountant (Mr Timothy Allen) to prepare a report in response to Mr Hall's evidence, the two accountants produced an experts' joint statement in the usual way. Hays points to the fact that in the main Judgment at one point we referred to a paragraph in that joint statement as strongly supportive of Hays' case on the gross/net issue: paragraph 45 of the main Judgment. To that very limited extent, the use of accountants was therefore of some assistance to Hays' case. But that paragraph in the joint statement simply records the approach generally used by the market and in the industry, a matter on which Hays called other evidence and

which was of its nature not a significant part of the expert accountancy evidence. It cannot possibly justify the very significant expense of using an expert for this appeal.

26. Hays also relied on the fact that the OFT responded to Mr Hall's evidence by itself instructing an expert accountant, instead of simply dismissing Mr Hall's evidence as irrelevant. However, the response of the OFT does not of itself determine whether the introduction of expert evidence by Hays was proportionate and whether Hays' costs of doing so should be paid by the OFT. For the OFT to have instructed its own expert in reaction to the evidence of Mr Hall was understandable in the circumstances, even if, in the event, unnecessary and the OFT will have to pay its costs of instructing Mr Allen. We do not find Hays' argument in this regard convincing.

27. For these reasons, we conclude that Hays should not be entitled to recover the costs associated with the use of an expert accountant in this case. As with Lord Pannick, those costs cover not only Mr Hall's own fees but the lawyers' costs associated with instructing him and reviewing any drafts of his reports.

C. The balance of Hays' costs

28. Hays submitted that it succeeded in its primary objective of achieving a reduction of the penalty to a realistic and proportionate level and that only a relatively small proportion of its costs should be disallowed on account of the issues on which it had failed. In its written submissions Hays contended that 80% was the appropriate proportion to be recovered but in oral argument, having regard to the off-setting of the OFT's costs of those issues, Mr Harris accepted that the recoverable proportion might come down to 70-75%.

29. Hays advanced and argued three further grounds of appeal on which it was unsuccessful: (i) that the OFT had determined an excessive seriousness percentage; (ii) that there was no involvement of senior management in the infringement so that the increase in penalty on that account should be set aside; and (iii) that Hays' extensive compliance measures merited a greater deduction than was given by the OFT. Further, in its Notice of Appeal Hays advanced a distinct ground of appeal on liability contending that the OFT had been wrong to find an infringement relating to a

particular construction company, Atkins ("the Atkins ground"). The Atkins ground was abandoned only after the OFT filed its defence.

30. A significant part of the evidence of fact filed by Hays concerned grounds (ii) and (iii) above. Moreover, in determining the proportion of discount from Hays' costs, it is necessary to take account of the fact that the OFT would in principle be entitled to its costs as against Hays of those grounds on which the OFT succeeded (see paragraph 18 above). However, rather than making cross-orders for costs to be set off against each other, it is clearly desirable to reflect that factor in a single, overall discount from Hays' recoverable costs. But in that regard, we bear in mind that the OFT incurred the costs of considering and drafting its defence to the Atkins ground, although that ground was subsequently abandoned. We also recognise that the scale of costs incurred by the OFT is generally less than that of a private or commercial party and take account of the factor referred to in paragraph 22 above.

31. We approach the question of discount on a somewhat broad brush basis having regard to the impressions we formed in hearing Hays' appeal. We do not find that analysis on the basis of counting paragraphs in the skeleton arguments or pages in the transcript, as was put forward on behalf of Hays, to be particularly helpful. Equally, we do not accept the OFT's submission that as Hays succeeded on only two of its six grounds of appeal, that provides a basis for apportionment: in our view, that would be a wholly unrealistic reflection of what this case involved, since those two grounds took up much the greater part of the argument.

32. Having regard to all the factors set out above, we determine that, after deduction of the costs associated with the second QC and the expert accountant, Hays should recover 65% of its remaining costs, such costs to be subject to detailed assessment if not agreed. We emphasise that this does not mean that we consider that Hays succeeded on no more than 65% of its appeal: the proportion relates only to costs and is reached having regard also to the costs which the OFT would otherwise be entitled to recover from Hays with regard to the grounds of appeal on which Hays failed: see paragraph 29 above.

33. Since detailed issues on costs will therefore be for the costs judge, it would not be appropriate in this judgment to enter into examination of the costs schedule produced

by Freshfields of Hays' costs. We would only observe, for the assistance of the costs judge, that having regard to the issues involved in this appeal and the facts that the proceedings before the Tribunal involved no disclosure and the hearing lasted only four days, we find some of the figures in that schedule remarkably high. We are also unclear that all the costs there listed as being incurred post-judgment should properly be considered to be costs of the appeal.

34. We should add that we reject Hays' contention that the OFT behaved unreasonably in adopting the stance which it took on the gross/net issue. The issue was of some novelty and involved serious arguments both ways. Although we concluded that the OFT was wrong here to have used gross fees, there was nothing unreasonable about the position which the OFT adopted, and thus its defence of that position before the Tribunal. Further, we do not think that discussions which an undertaking has about early resolution of an investigation, prior to the OFT taking any decision, are relevant to the question of the costs of an appeal against a decision once made, save perhaps where an undertaking offers to make a formal admission of liability on a basis which the OFT rejects but which the Tribunal subsequently finds to have been correct.

35. Since its costs are to be subject to detailed assessment, Hays has requested an order for a payment on account of its costs. We agree that such an order should be made, by analogy with the practice of the High Court under CPR 44.3(8) and as the Tribunal has ordered in the past: see *Albion Water Ltd v Water Services Regulation Authority*[24] at [62]. The total in Hays' schedule of costs is £2,343,449. From that figure, pursuant to this judgment, a significant part is disallowed as attributable to the instruction of a second QC and the expert accountant. The 65% of the balance that is recoverable is subject to detailed assessment, which we anticipate will result in further reductions. In those circumstances, we consider that the appropriate amount to be paid on account is £200,000. We received no submissions from the OFT as to time for payment and accordingly order that this sum is to be paid within 21 days.

[24] [2009] CAT 12.

IV. EDEN BROWN

36. During the first months following the OFT's Decision, Eden Brown's solicitors acted on a standard, fully funded basis, but as from 26 November 2009, a few days before Eden Brown's Notice of Appeal was filed, its solicitors were instructed under a conditional fee agreement ("CFA"). Eden Brown's application for costs includes the 100% success fee which it is liable to pay under that agreement. It is appropriate to consider, first, the question of Eden Brown's recovery of costs before any "uplift" by way of success fee; and secondly, the question of the CFA.

A. Basic costs before uplift

37. By its Notice of Appeal, Eden Brown formally advanced six grounds of appeal:

    (1) That the overall penalty was excessive.

    (2) That the seriousness percentage applied was too high.

    (3) That the relevant year for turnover for the purpose of step 1 of the Guidance should be the year preceding the ending of the infringement.

    (4) The gross/net issue.

    (5) That the penalty exceeded what was necessary for deterrence (including by the use of the MDT).

    (6) That the deduction of 5% for compliance measures that it was given at step 4 of the Guidance was too low.

38. Of those grounds, Eden Brown succeeded on (1), (3), (4) and (5) and it failed on (2) and (6). It should be noted, however, that ground (1) above was essentially a "catch-all" ground that overlapped in particular with the argument under ground (5). As with Hays, we consider that the general starting point should apply, and Eden Brown should therefore recover, having regard to those grounds on which it succeeded, a proportion of its reasonable costs from the OFT.

39. In comparison with Hays, Eden Brown advanced a distinct ground of appeal concerning the relevant year, on which it was successful. Further, it did not advance, and thus cause the OFT to incur costs, of any appeal on liability or challenge the uplift for the involvement of a senior executive in the infringement. Accordingly, we consider that Eden Brown should clearly receive a higher proportion of its costs than we are awarding to Hays. However, we do not accept the submission that consistency requires that there is some equality as regards the proportion of recoverable costs as between Eden Brown and the third appellant, CDI, on the basis of the settlement of its costs which CDI reached with the OFT. Many factors come into play as regards a settlement on costs, and an agreement reached with another party, which is not the subject of determination by the Tribunal, is of no assistance to the resolution of a question of costs that has been argued before and requires considered determination by the Tribunal.

40. Taking again a somewhat broad brush approach, based on the view we formed in the hearing, we consider that Eden Brown should recover 80% of its costs, such costs to be subject to detailed assessment if not agreed.

B. The CFA

41. This appears to be the first occasion on which the question of an award of costs under a CFA falls for consideration by the Tribunal, although to the knowledge of the chairman it is not the first occasion on which an appellant before the Tribunal has been represented under a CFA. We consider that there is no reason in principle why a party before the Tribunal, whether on an appeal concerning the Chapter I or Chapter II prohibition or in any other case, should not arrange its representation under a CFA. Whether it is open to a party to make such an arrangement is of course an entirely different question from whether he should be entitled to recover any increased expense which results, and whether such recovery should depend upon whether it was really necessary for him to enter into a CFA. However, those matters have effectively been determined.

42. Section 58A(6) of the Courts and Legal Services Act 1990 ("the 1990 Act"), which enables a costs order to include provision for payment of a success fee, applies to the Tribunal since it is a "court" under the definition in section 207(a) of the Legal Services

Act 2007: see section 119 of the 1990 Act. Contrary to the submissions of the OFT, it is not appropriate for the court to consider whether the entry into a CFA was necessary to enable Eden Brown to bring its appeal: *Campbell v MGN (No. 2)*;[25] see also *Sousa v Waltham Forest LBC*.[26]

43. Since the costs will be going to detailed assessment, it will be for the costs judge to decide whether any, and if so what, success fee is reasonable. Indeed, such matters can normally only be determined on a detailed assessment, when the circumstances surrounding the setting of the success fee can be scrutinised. In this judgment, we make only some general comments for the assistance of the costs judge.

44. There are three elements to the recovery of a success fee. First, the CFA must be enforceable, having regard to the provisions of section 58(3) of the 1990 Act and the Conditional Fee Agreements Regulations 2000. Secondly, the requirements of "success" as defined in the contract must be fulfilled. Thirdly, the level of uplift must be reasonable and proportionate, having regard to the risks involved.

45. We have not seen a copy of the CFA entered into by Eden Brown with its solicitors in this case, but several of its provisions are quoted in the written submissions of Eden Brown in support of the present application. It is a so-called "guaranteed" CFA (as opposed to a "no-win, no-fee" CFA), whereby the solicitors would be paid a reduced fee in the event of the appeal being lost. The reduced fee under the CFA here was £40,000. The definition of "success" in the agreement is as follows:

> "…Obtaining, in relation to any work carried out under this agreement…a final judgment, order or award by the CAT under which the penalty imposed under the Decision of £1,072,069 is reduced by a minimum of 5%..."

46. As we have already stated, the uplift for success is 100%, of which 2% is ascribed to what are termed "Financing Factors" (i.e. that when the case is a "success" the solicitors will nonetheless only recover costs above the reduced fee after the end of the case) and 98% is attributable to "Risk Factors." In its written submissions, Eden Brown emphasises in particular the risk that the appeal would fail in its entirety.

[25] [2005] UKHL 61, [2005] 1 WLR 3394.
[26] [2011] EWCA Civ 194, [2011] 1 WLR 2197.

Inevitably, as in almost any case, there was such a risk. However, given the very narrow definition of "success", we observe that even if the appellants had failed on the gross/net issue, success on the distinct ground challenging the OFT's approach to deterrence as disproportionate would have led to a reduction in the calculation of Eden Brown's penalty after step 3. (Eden Brown was not subject to the MDT since its relevant turnover was more than 15% of its total turnover, but the adjustment made at step 3 was by reference to the application of the MDT approach to other addressees of the Decision.) In that regard, a reduction by the Tribunal of only £80,000 from the OFT's determination of over £1.57 million at step 3 would have produced a final penalty, after attenuating factors and leniency were taken into account, that constituted a "success" within the definition in the CFA. In those circumstances, we have reservations as to whether a full 100% (or 98%) uplift was reasonable.

V. COSTS OF THIS APPLICATION

47. Both Hays and Eden Brown also apply for the costs of their respective applications for costs.

48. As regards Hays, while it has succeeded in rebutting the OFT's primary objection that there should be no order for costs, the OFT has been successful in its arguments that very significant elements in Hays' costs should be disallowed. Overall, in the light of this outcome, we consider that there should be no order for costs on Hays' costs application.

49. As regards Eden Brown, it has similarly succeeded in rebutting the OFT's primary objection and the OFT's arguments, albeit brief, for resisting the success fee have not been accepted. The fact that we have not awarded Eden Brown quite as high a proportion of its costs as urged in its submissions has no bearing on the costs of this application. In principle, therefore, we consider that Eden Brown should recover its costs of the application for costs insofar as determined by the Tribunal. However, much of Eden Brown's detailed submission on costs goes to justifying the level of costs in various elements of its costs schedule. We have made no determination on those points, which will be matters to be pursued before the costs judge on detailed assessment and as to which we cannot anticipate the outcome. In those circumstances,

with the indication given above, we therefore reserve the costs of Eden Brown's application for costs to the costs judge.

VI. FINAL OBSERVATION

50. In this case, Hays, but not Eden Brown, asked for an oral hearing of its application for costs. Since the OFT raised an issue of principle regarding the approach to costs of penalty-only appeals, the Tribunal acceded to that course. However, despite the quality of the advocacy, we have to say that we did not find the oral hearing of particular assistance given the very full written arguments that the parties had submitted in advance. We consider that only in the most exceptional circumstances would the Tribunal agree in future to holding an additional oral hearing of an application for costs.

Mr Justice Roth Michael Davey Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

Date: 14 October 2011