**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1279/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 January 2019

Before:

**MR ANDREW LENON QC**
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**PING EUROPE LIMITED** Appellant

- and -

**COMPETITION AND MARKETS AUTHORITY** Respondent

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Mr Robert O'Donoghue QC and Mr Tim Johnston (instructed by K&L Gates) appeared on behalf of the Appellant.

Ms M Demetriou QC (instructed by CMA Legal Service) appeared on behalf of the Respondent.

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# HEARING (COSTS)

MS DEMETRIOU: May it please the Tribunal, I appear for the CMA and Mr O'Donoghue and Mr Johnston are here for Ping. We are grateful to the Tribunal for fixing this short hearing to deal with the short point about the basis for the calculation of the CMA's costs.

May I just check whether you have read the written submissions and Mr Jones' witness statement?

THE CHAIRMAN: I have.

MS DEMETRIOU: In which case I think I can take things quite briskly. I intend to take my submissions in the following order. I will, first, very briefly summarise what the CMA says is the proper approach to the calculation of costs in this type of case. Second, I will take the Tribunal to the key relevant authorities. Thirdly, I will briefly address Ping's submissions, or at least say in a nutshell what our answer is to Ping's submissions.

In terms of the proper approach, the CMA, as the Tribunal is aware, has calculated its costs using the solicitors' guideline hourly rates set by the Courts and Tribunal Service. The question for the Tribunal is whether this is a permissible approach. The CMA contends that it is the proper approach and it is well established in the authorities that it is the proper approach.

Let me start by making clear that the CMA accepts that the indemnity principle applies to it when it conducts litigation, and there is a refrain in Ping's submissions that seems to be suggesting that the CMA does not accept that proposition and is seeking to make litigation into a profit generating industry, and that is not the position. The CMA accepts that the starting point is that it is entitled to recover the costs that it has incurred in conducting the litigation. The key question is how those costs are to be calculated in circumstances such as the present where the litigant is a public authority using in-house staff, and is not a private litigant who is simply charged an invoice by external lawyers.

We say that it is not possible - it is not possible in a case like this for the CMA simply to tot up invoices, because that is not how it works. It is not operating as a private party. The appropriate course is to use the guideline hourly rates, the GHRs, as the basis for calculating the costs incurred. They provide the rate, and that rate is multiplied by the hours expended by the various in-house personnel who have been involved in conducting the litigation. We say that the rates contained in the GHRs constitute an appropriate yardstick for calculation of the CMA's actual costs.

This approach is supported by the authorities, and we say in particular the authorities establish the following principles - and I will set out what we say the principles are before taking you, sir, to the authorities themselves.

THE CHAIRMAN: Yes.

MS DEMETRIOU: We say there are four principles: first, a public body may recover costs for the work done by its in-house team on the same basis and at the same rates as a party that has engaged external solicitors, and the conventional method for assessing those hourly rates is reflected in the GHRs.

The second principle is that there is a presumption which operates, and the presumption is that this method of calculation complies with the indemnity principle.

The third principle is that underlying this approach is a recognition by the courts that a detailed calculation of all of the in-house costs, both direct and indirect, is liable to be extremely complex and is therefore to be avoided if possible.

The fourth principle is that this approach, this pragmatic approach, should only be disapplied in special cases and exceptional cases where it is plain that the indemnity principle would otherwise be infringed.

So those are the principles that we say are to be extracted from the relevant authorities.

I will take you, sir, now to some of the key authorities to make those propositions good.

The key authority is the Court of Appeal's judgment in the *Eastwood* case, which has been applied on many occasions subsequently. Sir, you should have a bundle with both submissions and correspondence and authorities. That is at tab 25. The headnote - I do not know if you have read the headnote, sir, but it essentially summarises the factual background, and you can see that the date of the case, if it were not otherwise on the headnote, one could guess at it when you look at the amounts that were at issue. The question was whether an item for £75 was properly incurred and recoverable, or whether it should be taxed down or reduced to £45. The Taxing Master and Mr Justice Brightman held that it should be reduced because, in their view, the £45 represented the costs actually incurred by the relevant solicitor, and the £30 was what they called 'profit costs', which should be disallowed, because they were not being incurred because it was all being conducted in-house.

That was overturned by the Court of Appeal. If one turns to the Court of Appeal's judgment, which starts at page 129 (the bottom of page 129), you see there at G-H the question of principle that arose in the case:

> "The question of principle involved is whether the taxing master correctly approached the problem of taxation of costs awarded to the Crown, having regard to the fact that the Crown was represented on the originating summons not by an

> independent solicitor but by the Treasury Solicitor and his department. The question of principle would apply equally to [other public bodies]."

Then over the page at page 130 B-C, you see there that the Court of Appeal say:

> "[Of course] the employed solicitor or legal department renders no bill to the employer or organisation: he or it makes no professional charges. It is, however, quite clear on authority that it is not permissible to say that consequently the party is limited to disbursements specifically referable to the particular litigation on the ground that the salaries of employees and other general expenses of the department would have been incurred by the party in any event."

One can see there, and you will have seen from Ping's submissions, at least some of its earlier submissions, that Ping is arguing that even the overheads of the CMA attributable to these staff should not be recoverable because they would be incurred in any event. That particular argument was knocked on the head in *Eastwood* and has not been accepted by the courts since. That is not the appropriate way to approach costs incurred by a public body.

Then further down the page you see at E-H a summary of the taxing master's approach, which was upheld by Mr Justice Brightman. Sir, you see there reference to the £30 being declined, and the reason for that is that that represented what was called "profit costs", although the Court of Appeal say:

> "we cannot think it was intended to suggest that had it been an independent solicitor he would have been making a pure £30 profit in an item of profit costs of £75: 'profit costs' of course is a phrase to denote items in a bill of costs which are not disbursements. It was the view of the taxing master that since there was no element of solicitor's profits in cases such as the present, item B was not allowable: for otherwise the party would be making a profit contrary to the well established principle that taxed costs should not be more than an indemnity."

So, sir, in our submission, the kind of argument that was accepted by Mr Justice Brightman in that case, and which is summarised here, is precisely the argument that Ping is making in this case, and it was rejected by the Court of Appeal.

We see the rejection of that principle over the page, and there is a long passage at 131 C-G, and I am not going to read it all out, but, sir, you will see at 131C that the Court of Appeal refers to the approach of the taxing master as a fallacy. Essentially, what the Court of Appeal is saying is that if you are going to embark upon this exercise of the A and B costs - we know that they have subsequently been replaced by the GHRs, that is simply a method of calculation, but if you are going to embark on this A and B exercise you cannot disallow

the B costs for a public body because the whole exercise becomes meaningless. The Court of Appeal is saying if, in fact, you take the view that it is inappropriate to use the A-B method for public bodies, you cannot simply apply it in a half-hearted way, you have got to have some other method altogether which does not exist. What the Court of Appeal is saying, and you see the conclusion at G, is:

> "This example seems to us to demonstrate that there must be something wrong in an approach which uses only the A of the A-B conventional method."

Then at the end of the page:

> "It was contended before us that in any event there was an onus upon the party with its own legal department to produce figures to demonstrate that the operations and expenses of that department analysed and broken down and apportioned would throw up a figure properly attributable to the litigation in question, which would be not less than the figure of reasonable costs to be allowed had it been a case of the use of an independent solicitor."

Then the Court of Appeal say this in response to that submission, which is that you need to go away and produce a forensic analysis of all the direct and indirect costs borne by the public body, the Court of Appeal say that in the first place it is a perfectly sensible presumption as a starting point that the costs would be the same for a public body and for a private litigant. Then secondly, they say this:

> "we view with horror the immensity of the complication which would be introduced into an already complicated system of taxation. It may be said that without such an added complication there may be rare cases in which the taxed costs of a successful party will exceed what is needed to indemnify him. Even so, this is preferable to requiring the successful party to prove in all cases in detail the contrary, that is to say, that the other party has not obtained a fortuitous benefit by the use by the successful party of a salaried solicitor and not an independent solicitor. In our view, the system of direct application of the approach to taxation of an independent solicitor's bill to a case such as this has relative simplicity greatly to recommend it, and it seems to have worked without it being thought for many years to lead to significant injustice in the field of taxation where justice is in any event rough justice in the sense of being compounded of much sensible approximation."

Then you have the principles summarised by the Court of Appeal in the subsequent passage, and the first principle is that the proper method is to deal with the costs of a public body as

though they were the bill of an independent solicitor. The second principle is that there is a presumption that this is the appropriate method. The third principle is that there is a presumption that this will not infringe the indemnity principle. The fourth principle is that:

> "There may be special cases in which it appears reasonably plain that that principle will be infringed if [this method is applied]: but it would be impracticable and wrong in all cases of an employed solicitor to require a total exposition and breakdown of the activities and expenses of the department with a view to ensuring that the principle is not infringed, and it is doubtful, to say the least, whether by any method certainty on the point could be reached."

They go on to say that this would be elevating, pushing an abstract principle to a point at which it ceases to give results consistent with justice.

We say that that is clear, that the principles are clearly stated, and that the CMA has complied with them in this case.

Pausing there, the Tribunal has read the witness statement of Mr Jones and he explains why the costs to the CMA of this litigation are by no means confined to the pro rated salaries of the staff that were directly involved in the case. A sizeable element of the CMA's costs is attributable to what was referred to in *Eastwood* as the 'B element'.

Sir, if you could just turn up - it may be a convenient moment just to highlight some passages in Mr Jones' witness statement which is at tab 2 of this bundle. At paragraph 17 on page 4, Mr Jones makes clear that when the CMA was referring in correspondence and in previous submissions to a profit element, what it meant was the profit costs as defined in *Eastwood*. It certainly was not saying that it is entitled to charge a pure profit and turn CMA public litigation into some kind of profit making activity. That is not the CMA's case at all.

So we are *ad idem* with Ping on this point, because if you turn to Ping's submissions, which are in the next tab, they say at paragraph 11(b) on page 4 that the CMA has misunderstood the references in *Eastwood* to profit. The profit element was not a pure profit. It was the element of costs sought that were attributable to the overall costs. We agree with that, so we have not misunderstood the reference in *Eastwood*. We are *ad idem* on what *Eastwood* means.

Going back to Mr Jones' witness statement, you then have an exposition in the witness statement of all the other indirect costs borne by the CMA in conducting litigation, which are not covered if one simply asks, "What's the salary of this and that in-house lawyer, and

how many hours did they work, and let's pro rate the salary", even if you add to it a share of the overheads of the institution. That is all explained in detail in his witness statement.

THE CHAIRMAN: The issue, it seems to me, is whether, given the magnitude of the B element, for want of a better expression, I can say that the indemnity principle has been infringed - that is what it really boils down to, is it not?

MS DEMETRIOU: I think that is what it boils down to, and we say that what the authorities establish is that there is a presumption that it is not infringed - that is clear on the authorities - and the principle only gives way if it is plain that it has been infringed. I will take you to an authority now, sir, because you have, with respect, hit the nail on the head, that is the key issue. That is dealt with in the *Cole* case, which is at tab 28.

Before moving to that, I am not going to go through the witness statement because I know, sir, that you have read it, but you will have seen there that there are substantial indirect costs that are all to do with recruitment, supervision, training of staff, to make them ready and able to conduct this kind of litigation; not only that, but also opportunity costs.

Can I just raise one point to give that some flavour? In this case, the Tribunal knows that Ping consciously did not engage with the CMA at the administrative stage and as a result produced fresh evidence during the appeal. The Tribunal is aware that the CMA made an application to exclude that evidence and that application was rejected, although the Tribunal did note that the additional costs caused by Ping's action was something that could be borne in mind at a later stage.

Sir, the reason I raise that is because that choice on Ping's part made it much more expensive for the CMA to conduct this litigation than it otherwise would have been, because if it had used its compulsory powers during the administrative stage it would have been cheaper and quicker for it to obtain evidence. It did not have that opportunity. The reason I refer to this is to give some sort of concrete flavour to what Mr Jones means when he talks about an 'opportunity cost'. What was necessitated in this case was that the case team that had been working on the case during the administrative phase, during the appeal then had to do a lot more work than they ordinarily would have had to have done in terms of analysing the new evidence and seeing whether they could find and speak to witnesses to rebut that evidence. Those staff in a case in which there had not been fresh evidence would not have been employed so significantly at the appeal stage. What it meant in practice is that those staff had to be taken off other inquiries, so other matters which the CMA has to conduct to fulfil its statutory functions, and the gap that they left had to be filled by other people, whether by training them up or recruiting them, and it is that kind of imponderable

cost which is significant which cannot be measured easily. That is what Mr Jones means. That is the kind of thing he means when he talks about opportunity costs. You cannot arrive at that, which is a substantial thing, simply by looking at the hourly rates or the salaries of the people actually involved in the case.

Sir, turning to the *Cole* judgment, which is again the Court of Appeal, tab 28, the Court of Appeal reaffirmed the principles in *Eastwood*. At page 311, can I just ask you to note that the argument advanced by the claimant was the same really as that advanced by Ping in the present case.

THE CHAIRMAN: I see the amount is 60 per cent there for what it is worth.

MS DEMETRIOU: Yes, that is right. And you see the kind of argument that is being put. They say if you gross up - if you look at the hourly rates that are produced, that are submitted, and you multiply that by the hours that the solicitor would be expected to work, you would get an annual cost for his services of £300,000, which cannot possibly be right. That is much more than their annual salary, and that is exactly the argument that Ping is making in the present case, and it was rejected by the Court of Appeal as being not the correct approach. They say that that shows that the indemnity principle was infringed. Then if you move to the bottom of page 313, you see the principle from *Eastwood* again affirmed by the Court of Appeal. They say:

> "The judgment of this court in *In Re Eastwood* establishes that the conventional method appropriate to taxing the bill of a solicitor in private practice is also appropriate for the bill of an in-house solicitor in all but special cases where it is reasonably plain that that method will infringe the indemnity principle."

Then this, and this is the important bit:

> "Such a special case will arise where a sum can be identified different from that produced by the conventional approach which is adequate to cover the actual cost incurred in doing all the work done."

They say:

> "Such a sum may be identified by concession …"

We certainly do not have any concession here -

> "… or presumably by the factual assessment of the taxing tribunal itself: but that possibility does not justify a detailed investigation in every case."

So that is the proper approach. Then they go on to say that there was no concession in that case, and then you see at the bottom of the page:

> "The conclusion of the Judge and assessors that the present is not a special case concludes this appeal. Mr Cole's complaint that the figures in the hourly rate table show that the indemnity principle has been infringed is misconceived, first because the hourly rate table is insufficient to demonstrate that as a matter of fact…"

We say the same applies here. So if you look at the pro-rated salaries of the solicitors, just looking at that is insufficient to demonstrate as a matter of fact that the costs that the CMA is claiming breach the indemnity principle.

> "and second, and more fundamentally, because *In Re Eastwood* requires it to be assumed that, except in a special case, the indemnity principle is not infringed by the application of the conventional approach."

So we rely on that also. Then they go on to say:

> "That latter assumption may, in some cases, strain logic, as Mr Cole says it does in the present case: but as this case emphasised in *In Re Eastwood* it has the merit of simplicity and of avoiding the burden of detailed inquiry in any but a special case."

What we say in summary on the basis of those clearly established principles is that this is not a special case. It is not a case in which it is plain that the costs submitted by the CMA breach the indemnity principle. There is no basis on which - there is no other calculation of costs on the basis of which it can be said those are sufficient to meet the indemnity principle, because there is no concession by the CMA that some lesser amount of costs would be sufficient, because the CMA do not believe it would be.

Secondly, the second schedule that the CMA produced at the request of the Tribunal, it is certainly not sufficient to cover all of the indirect costs that Mr Jones has identified. Sir, we say that this is an *Eastwood* and *Cole* case, it is not a special case, and as the Court of Appeal recognised in *Cole*, there is an element of pragmatism to all of this, which is that if there is no ready means of identifying the precise costs – and in the case of a public authority operating this kind of complex litigation there simply is not, you would have to get a forensic accountant in to really break down all the direct and indirect costs – the pragmatic approach is to treat this as though it were a private firm conducting the work and use the GHR.

Those are our submissions. Very briefly, on Ping's submissions, and I can return to this if necessary in reply, I will say what our points are. Ping in its written submissions for this hearing says it makes six points. The first four points are all, in fact, one point. They say the indemnity principle applies and the CMA have breached it. In a sense, I have answered

that in making my submissions in opening. Their submissions are at tab 3. They say at paragraph 7 that the common law principle of indemnity is clear. We agree. It does apply. Two, there must not be a breach of the indemnity principle - again, we agree with that.

I say in passing that these two old authorities relied on in these paragraphs by Ping, they were the authorities on which Mr Justice Brightman based his judgment, and you will see that by going back to his judgment, which was then overturned by the Court of Appeal.

Then you see at paragraph 11, public authorities are not exempt from the indemnity principle. Again, we agree with that. The key question is how you calculate the costs that have been incurred, and we say that according to *Eastwood* and *Cole*, and numerous other authorities, some of which you have in the bundle, you calculate them in the same way as you would private costs.

You see at paragraph 12 a reference to the *BT v Ofcom* 2012 judgment. There we say that Ping is placing much too much weight on that because the *Eastwood* point was never argued, and it was all *obiter* because the costs were not awarded anyway, because it was held that they were not a party. So that is not an authority which helps them.

Then at paragraph 13 you have a submission about proportionality. Ping says that even if the Tribunal was against Ping on all of these points of principle, the costs are disproportionate. Again, we say in relation to that that it is difficult to see how Ping can make that submission with a straight face in circumstances where its own costs were higher.

We would note at paragraph 14 that there is a rather odd reference to net expenditure by the CMA of £135.5 million for the year to 2017. That puzzled us because the CMA's budget for that year was £65 million. Once we had a look more carefully at it we worked out that the remaining figure was not expenditure, that was a formal amount that the CMA had to - it is an accounting provision to reflect potential liability if it had been required to repay fines in the *Tobacco* litigation. So it is not actual expenditure.

In any event, none of this is relevant to whether or not the costs are proportionate.

Ultimately, Ping appealed against the CMA's decision. The scope of the appeal and the scope of the evidence and submissions were all determined by Ping's notice of appeal. The CMA, as I have said, was put to additional expense as a result of Ping's misconceived, misguided tactical decision not to engage with the CMA during the administrative stage, and the tax payer should not be made to pay for Ping's lost appeal - should not be out of pocket.

Finally, at paragraph 15 Ping makes a submission about public policy relying on *BT v Ofcom*. That is a judgment in which the Court of Appeal remitted a costs award to this

Tribunal, and the decision is currently pending, but the Court of Appeal said that there should be no presumption where a public body carries out its statutory duties and does not behave unreasonably, there should be no starting presumption that if it loses there should be a costs award against it. Whatever happens to that, if the CAT accepts that and takes that into account - it has to accept the principle, but if it decides the principle applies in that case, that is not inconsistent with the submissions I am making now. It is perfectly consistent because, even if it is held that in certain cases where a public body such as a regulator loses an appeal, if it is held that it should not have a costs award made against it because it has nonetheless acted reasonably, the rationale for that is that it has no choice other than to conscientiously carry out its public functions, and the tax payer should not be left out of pocket. That is exactly the same kind of consideration that underlies the pragmatic approach to the calculation of costs where the regulatory authority is the winning party. So there should not be an unduly rigid approach to costs, which is apt to exclude the substantial costs which cannot be encapsulated by pro rating the salaries of the regulator's employees.

So those are my submissions, sir, unless there is anything further that I can assist the Tribunal with at this stage.

THE CHAIRMAN: No, thank you very much.

MR O'DONOGHUE: Sir, at the risk of sounding like 'teacher's pet', I think you have hit the nail on the head in terms of the critical issue. Ms Demetriou's submissions, with respect, have an air of unreality and involve tilting at windmills. The factual position before the Tribunal is that following the Tribunal's direction, the CMA had given a breakdown of hourly salaries, and it has given a breakdown or an allocation of overheads, and we now see from Mr Jones that that partially includes some of the imponderables which he mentions.

Now, the issue faced by the CMA is, having done that detailed allocation exercise, which does not seem to have been unduly problematic or as horrific as the Court of Appeal seemed to think, there is a massive gulf between the guideline hourly rate figure and the revised hourly costs of almost £500,000.

The issue for the Tribunal is essentially a numerical one. In the light of the explanation provided by Mr Jones as to what might potentially explain this delta, the CMA, in my submission, faces an uphill struggle. Having allocated all of the salary costs and having allocated most of the important overheads, including to some extent these imponderables, they cannot begin to explain how they get from a typical mark-up of 60 per cent to 145 per cent.

Sir, what I want to do with your permission is go through Mr Jones and some of the explanations he gives for things that might plug the gap. My submission, sir, will be that on the evidence before you it does not amount to a row of beans, and in fact most of these things are not costs at all.

THE CHAIRMAN: Sorry to interrupt, why do you say a "typical mark-up of 60 per cent"?

MR O'DONOGHUE: Well, we saw in the *Lazarus* case that there was a reference to the B component being 60, and there was a further reference saying, "Well, this doesn't seem to us excessive". What we know, in fact, is that the mark-up in this case is extremely high, 145 per cent, and the question really is: can you be satisfied on the facts of this case, particularly in the light of Mr Jones' evidence, that there is a gulf that can be reasonably explained or approximated?

In my submission, it is not a question of straining logic, it is a question of evidence, it is a question of numbers. You have numbers before you from the CMA's earlier breakdown. They include overheads, and nonetheless there is a dramatic gulf between these actual figures, including overheads, and the claimed guideline figures.

Sir, if I can turn up Mr Jones, Ms Demetriou rather cantered through this, I want to highlight a number of points. Can I first start at paragraph 18. Before I get into this, we are grateful for Mr Jones at paragraph 17 and Ms Demetriou this morning confirming that the CMA does not regard itself as a profit centre. I think there was some ambiguity in that, at least from our perspective, but that is their position and we obviously accept that.

Can I start, sir, at paragraph 18. The first cost item advanced by Mr Jones is opportunity costs, and he says in the middle of 18:

> "When the CMA's resources divert into litigation this results in a form of opportunity cost."

He talks about additional support, and so on, and in particular he talks about the inability of the CMA to pursue other cases for consumers and markets if they are tied up in litigation. He says:

> "These costs occasioned directly by litigation are costs to the organisation (as well as to the public more generally)."

And: "They are not compensated by [the hourly rates]."

Sir, in my submission, this is not a relevant cost at all, and it certainly is not a recoverable cost in the context of litigation.

What the CMA is essentially addressing here is supposed delayed or deferred benefits to markets or consumers. How are these remotely recoverable as costs incurred in the context

of litigation in order to avoid the CMA being out of pocket? The CMA, of course, is anxious to make the analogy with a law firm. A private law firm claiming a costs bill could not say to the Taxing Master, "Well, had I not been involved in this litigation, I would have been able to sue other people and I would have made even more money and I would have been able to sue Google and bring benefits to consumers, and all of these opportunity costs which I incurred are part of my tab for the litigation." It is wholly unrealistic. These are not costs in any relevant sense of the word when it comes to litigation.

Where would all this end? Ping is an SME. Could the CMA say, "If only we had the bandwidth to tackle Amazon, that would afford billions of benefits", and that opportunity cost becomes recoverable against Ping?

THE CHAIRMAN: I think it is more the following sentence, is it not, as I understood Ms Demetriou. It is the cost of having to recruit new staff to take the place of lawyers involved in the litigation.

MR O'DONOGHUE: That is also an opportunity cost for the same reason. Mr Jones is rather shy on numbers. There is not a single number in here. There is no indication of how many staff were recruited because of Ping, and there is no suggestion, in fact, that any staff were recruited because of Ping.

The second point, sir, is at paragraph 22. This is training, and one of the examples given is some CMA staff engaged with post-graduate studies, and Mr Jones says:

> "This also involves an opportunity cost for the CMA because of staff absences."

This is irrelevant for the same reason as the other opportunity costs. If they're not in the office because they are studying hard, why should Ping, in the context of this litigation, be expected to pick up the tab for that. It is wholly unrelated. In any event, how are these imponderable? Everybody knows what a degree costs. It would have been very, very easy indeed to give these figures if they were remotely relevant. It really does not amount to a row of beans, in my submission. It is gruel of the thinnest variety.

The critical concession of course within paragraph 22 is that at least some of these costs have been included in the revised hourly rates which include overheads. So, to some extent, these are included in the detailed breakdown. Again, I repeat the point, notwithstanding their inclusion we have this massive gulf of 145 per cent that cannot begin to be explained by the small beer set out here.

Sir, just to make that point good, because I want to be very, very clear, Ms Demetriou, with respect, only mentioned salary costs. That is not the exercise the Tribunal directed. If we go to tab 8, sir, which is the CMA's letter and replies to schedules, and it is the second page

of the letter under (c). We have the salary costs and then we have the overheads, and it says:

> "The cost of overheads per person was calculated by dividing the CMA's total operating cost for [the year in question] by the number of front-line staff (for example, excluding corporate services and IT staff, who salaries are included in the total operating cost)."

So, as a result the total costs of the entire CMA training budget has been divided in these figures between the relevant staff and assigned on an hourly pro rata basis to them, and each hour claimed by the CMA in respect of work on this case by these individuals therefore includes an element of training costs.

To go back to Mr Jones, the only other item of training which is identified with any specificity is a conference after the Ping case had concluded in November of last year for judicial review where he says that some barristers were, for once, paid small fees in relation to this training. Again, it is the same point. He says at paragraph 22 there is a:

> "much more significant opportunity cost for the CMA and the tax payer."

That is a bad point, with respect, for the purposes of today for the same reason as the other opportunity costs are as well. With respect, sir, these are the sort of archetypes, these are the lead examples he gives of the imponderable costs, and again it really is something that requires careful scrutiny. It is thin beyond belief.

A third point, and we can pick this up in paragraph 23, he says that the litigation team have a weekly meeting lasting one hour in which they discuss issues arising in practice, including thinking about Brexit. Ping, of course, is surprised and concerned that Mr Jones is suggesting Ping should have to pay a surplus in costs to cover academic discussions by CMA employees, but the suggestion that one hour a week for the duration of this litigation makes all the difference in terms of the 145 per cent is, with respect, risible.

The fourth point, paragraph 25, he mentions resources, online resources such as the Government Legal Profession database, and he says that the database concerns cross cutting issues of public law - it is hard to see what that has to do with the Ping case - but the critical point is that these are not CMA costs, these are costs to the Government of setting up and running this database. Again, what on earth has that got to do with Ping and this litigation.

A fifth point at paragraph 26, he mentions know-how which seems to involve other training. Two points: the CMA has in its revised schedule claimed significant costs for five paralegals in this case. Sir, for your reference, that is tab 8, page 3 of the schedule. The only actual example he gives is the *Npower v Ofgem* case in paragraph 26 where the CMA

instructed counsel to intervene. I do not know if counsel, in fact, recovered the costs of their intervention, but it would be highly unusual if she did. Again, what on earth has that got to do with Ping and this litigation and the CMA's costs in this litigation?

A sixth point, paragraph 27, these are management and supervision costs. Again, he accepts that at least the human resources costs are included in the revised hourly rates submitted by the CMA. That is paragraph 27, sir, for your reference.

A seventh point, he mentions at paragraph 30 costs that have to do with the CMA being a public body, such as the need to comply with public procurement law. If that is the case the CMA cannot claim, as it does in paragraph 31, that such costs would be incorporated in the hourly rate of a law firm which does not need to comply with public procurement law. This is yet another example of the CMA wanting to be a public body when it suits it, and wanting to be a private litigant when it does not.

The final item of Mr Jones is paragraph 28. These are the costs of the chief economist's team. We are surprised that this has been mentioned - this is paragraph 28, sir - because the CMA is already claiming £100,000 for in-house economic adviser input, and for your reference, sir, that is tab 20, pages 3 to 5. Of course, this is in a case where the CMA filed no economic evidence in response to Ping's expert report. The suggestion that on top of this £100,000, which we do object to for other reasons, there are significant further economic costs that should be added to the Ping bill, with respect, is unacceptable.

Sir, drawing these points together, in my submission, we are very, very far removed from the *Eastwood* territory for a simple reason. *Eastwood* concerns a case on which the court has no factual information before it, particularly in terms of detailed breakdowns of salaries and overheads, and therefore has to apply a rule of pragmatism and simplicity.

This is a case in which the CMA has complied with a direction and submitted a detailed breakdown, apparently without difficulty, of its salaries and overheads, which include significant elements of its most important overhead costs and includes some component of imponderable costs as well.

In my submission, sir, the issue before you today is essentially a forensic one. Based on the evidence and the numbers before you, can you be satisfied that the 145 per cent delta between the *circa* £317,000 revised rates and the *circa* £800,000 GHR rates is something which can be acceptable in the context of the indemnity principles. In my submission, it is manifest, based on the figures you have seen and the explanations which have been given and in the light of Mr Jones witness statement, that the CMA cannot even begin to bridge that gap.

THE CHAIRMAN: So what do you say the Tribunal should do?

MR O'DONOGHUE: Well, we say - let me develop the point, sir, in a more structured way?

THE CHAIRMAN: Yes.

MR O'DONOGHUE: We know, sir, as I said, that the gross salaries have been included on a pro rata basis, we know that the attributed overheads, which are the most significant non-salary costs, have been included, we know this was done on the basis of total operating cost, and we know that some at least of the imponderables are included in those figures as well, and that gives you £317,000. The only explanation you have been for the delta is Mr Jones. In my submission, just to bring the points together, most of the costs he mentions are not costs at all, still less recoverable litigation costs. In relation to the small rump that is left, he admits, as I said, that some of them are included already in the overhead figures, as well as in the direct salary costs, for example, of paralegals. Some of these costs are manifestly *de minimis*, this judicial review conference, and the remainder are not costs to the CMA at all, but costs resources paid for by Government that the CMA may, if it wishes, use. We suggest that it is manifest on the face of the evidence submitted by the CMA and in the detailed breakdown they have given that there has been a breach of the indemnity principle. In my submission, the answer is very simple: the CMA should be limited to the £317,000 figure, because, frankly, the delta to £800,000 is pie in the sky.

Ms Demetriou, with respect, she prayed in aid pragmatism and the whole show and simplicity, and so on, but we are not in that territory. This is a case, unlike any of the 15 authorities before the Tribunal today, in which the Tribunal has, at its direction, a detailed breakdown provided by the CMA. Frankly, if these imponderable costs are as big as Mr Jones would have us believe in his latest witness statement, it is striking that these imponderables were not mentioned at the point they submitted the original schedule. If these were massive costs items that stuck out like a sore thumb, it is extraordinary, in my submission, that when the revised hourly rates were put in this was not flagged up in lights. It has come at the eleventh hour, we are grown-ups, we were content to deal with it, but when one goes through Mr Jones with any measure of rigour and forensic scrutiny, it really does not amount to a row of beans. It is speculative, it is thin gruel, it is unquantified, and on cursory analysis it is obvious these are tiny figures or figures that are not costs at all. Sir, that is the essence of what Ping wishes to say.

There is a small handful of points I wish to pick up on the case law, but essentially, sir, my point is that the case law in terms of where we are at in this case does not actually assist, because not one of these cases was addressing a situation in which a public body has

provided the detailed breakdown, apparently without difficulty, and the result of that exercise shows a huge delta between the claimed costs and the proxy costs, and none of these cases involve an attempt by the public body of its own volition to explain, or try to explain, the delta where it is obvious that the explanation really does not withstand any serious scrutiny. So to the extent I need to show that this is a case where the indemnity principle would, on the facts and the numbers, be breached we say we can easily demonstrate that, and the CMA's own voluntary evidence in this case, which is the evidence the Tribunal should assess, shows that beyond any question.

So praying in aid a hypothetical case where, sir, you had none of this information, you would have to be simple and pragmatic and not horrific, it really does not get the CMA anywhere, because it is not this case.

So, sir, that, in a nutshell, is my submission on the legal principles.

THE CHAIRMAN: So they are stuck with element A basically, and get nothing in respect of B?

MR O'DONOGHUE: Well, sir, with respect, two points: I think, technically, there is an element of B in their A, if I can put it that way, because the overheads refer to total operating cost, and therefore I think there is an argument that some of that is A. But there is a more fundamental point, which I should have mentioned, and I am glad you raised it, sir, the CMA has now made clear that it is not and cannot seek a pure profit in the way that a law firm would. The other reason why it is manifest that the guideline rate for the CMA is a poor proxy is that the guideline rate for private law firms includes profits for the partners. The CMA is saying, "We are not a partnership in the business of making money for equity partners", and therefore, on its face, the guideline rate with that pure profit component cannot apply, at least in toto, to the CMA.

Sir, those are Ping's submissions unless I can assist further.

THE CHAIRMAN: Thank you very much.

MS DEMETRIOU: Sir, I would like to make three short submissions in reply. The first relates to the very final point Mr O'Donoghue made. He said that an important reason why the GHRs should not apply is because they include a profit element to the private solicitors, and therefore it is not apt to apply to a public body. The fundamental difficulty he faces in advancing that submission is that it is a root and branch attack on *Eastwood*, because the same applied to the A and B element in *Eastwood*, but what the Court of Appeal has said on now numerous - the courts have said on numerous occasions, and the Court of Appeal has said at least a couple of times, is that the starting point, the presumption is that the same approach applies to both, so the same method of calculation should apply both to private

litigants as well as to public bodies. So that argument may be a good argument in the abstract, but it is one that has now been defeated on numerous occasions and it is not really open to Mr O'Donoghue to try and run it now because the Tribunal is bound by *Eastwood* and by *Cole*.

A similar flaw attaches, and this is my second point, to his answer to the Tribunal's key question which is, well, what is the Tribunal supposed to do. Mr O'Donoghue says the CMA is stuck with the £317,000 figure, but we say again that is wholly inconsistent with the Court of Appeal's judgments in *Eastwood* and *Cole*, because essentially that figure is the A element. Essentially it is the A element. Mr O'Donoghue says, "That is very simple to produce, and it is not a horrific exercise", which is what the Court of Appeal was anxious about. Of course it is simple to produce because it is the A element, but what the Court of Appeal was saying was that A element is not enough to reimburse the public authority for its costs, because its costs will extend beyond the A element, and it is the B element which is very complicated to calculate. That is the position we are in here, which is why the CMA has used the GHRs as the appropriate yardstick to calculate its overall costs, including the B element.

It is also very odd that Mr O'Donoghue says that it is extraordinary that these costs were not included at the outset. Of course they were, because they were included by relying on the GHR rates. So in relying on the GHR rates, the CMA was saying that we are relying on these rates because they are apt to capture all of our costs, both the readily calculable A costs, including a share of the overheads, which we could do very easily; but also the non-readily calculable B costs, which *Eastwood* has firmly shown us are also recoverable. That is my second point.

The third point relates to the submissions that Mr O'Donoghue made in relation to Mr Jones' witness statement. Sir, the key point here is that in order to equip the CMA in-house lawyers and in-house staff with the skills and experience necessary to conduct this type of complex litigation to a standard to which the public authority should conduct this litigation, it is necessary not only to recruit appropriate people and to pay them salaries, but also to train and supervise and develop internal know-how in order to equip the staff to conduct the litigation. It is that which is very difficult to calculate, and it is no good for Mr O'Donoghue to pick at some examples that Mr Jones gives as illustrative examples of the type of training and supervision and know-how development that goes on and say this has nothing to do with the Ping. That is not the point. That completely misses the point. The point is that it is the accumulation of the training exercises, including the diversion of

staff who have to attend training and the need to equip other staff to carry out the statutory duties which do not go away, which is all necessary in order to enable the CMA to have at its disposal these staff which are capable of conducting this type of complex litigation without going and seeking external assistance. That is what is needed. That cannot be calculated by looking at salaries and shares of overheads. To take one example that Mr O'Donoghue gave, he said that some of the training costs are included in the overhead costs. That is true, some of them are, but a whole swathe of training costs are not included in the overhead costs which go into the £317,000 figure. For example, where one has a big judicial review conference, which is one of the examples that Mr Jones gave, and you have 100 CMA employees attending that for a day, there is an opportunity cost in the fact that all of those staff are attending that conference. That is a cost which is a cost to the institution, and it is entitled to recover part of that when it is conducting litigation.

It is precisely that kind of exercise that the Court of Appeal has said, we cannot on taxation go into that because it would be entirely disproportionate to start forensically breaking down----

MR O'DONOGHUE: I hope I have made clear that the judicial review conference was after----

THE CHAIRMAN: I am sorry, I did not catch that.

MR O'DONOGHUE: The judicial review conference was in November last year, which is after the Ping case.

MS DEMETRIOU: It is an annual event. I think that Mr Jones is giving that as an example of the type of training. He is not saying we are seeking to recover the costs of this particular conference in this case. What we are endeavouring to do is convey a flavour of all of the costs which are immeasurable which go into equipping the staff with the necessary skills and experience and supervision needed to carry out this type of litigation, and those are costs which are recoverable and which are very, very difficult to measure. The conventional way of doing it has been to approach this, as the courts have said, on the basis that this is private litigation. That is why we have used the GHRs, and it is on that basis that we say that it is not plain at all - so contrary to Mr O'Donoghue's submissions it is by no means plain in this case that the indemnity principle has been breached. There has been no concession by the CMA that it has been breached because the CMA does not believe it has been breached, and there is no other readily available method for calculating the actual costs incurred. So, in accordance with the authorities, it is legitimate to use the GHRs as the yardstick for calculating those costs.

To say, as Mr O'Donoghue does, that we are stuck with the £317,000 figure is completely contrary to authority. That is seeking to re-argue *Eastwood* and *Cole*, which he is not entitled to do before this Tribunal.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: So, unless there is anything further, those are my submissions in reply.

Sir, yes, I am reminded by Mr Jones that of course it is in the CMA's interests to keep costs down in this type of litigation, and one thing that happened in a case in which I was instructed last term, for example, was that the parties agreed a costs cap. That was endorsed by the Tribunal and there was costs capping in that case. Now, at no stage has Ping approached the CMA in this case and said, "Let's agree to costs capping", no doubt because if it had won it would have wanted to have recovered all of its costs.

The CMA is not here arguing for - it is not in the CMA's interests to have litigation which is very, very costly. The CMA's only interest in making this argument today is to recover the costs that it genuinely has incurred so that the tax payer is not left out of pocket.

Sir, those are my submissions in reply unless you have any questions.

THE CHAIRMAN: Thank you very much. I am going to reserve judgment. Thank you very much for your submissions.

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