Neutral citation [2009] CAT 26

**IN THE COMPETITION APPEAL TRIBUNAL**

Case Number: 1104/6/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

15 October 2009

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR JOHN PICKERING
MR. GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

**TESCO PLC**

Applicant

**-v-**

**COMPETITION COMMISSION**

Respondent

- and -

**WAITROSE LIMITED**

**MARKS AND SPENCER PLC**

**ASDA STORES LIMITED**

**THE ASSOCIATION OF CONVENIENCE STORES**

Interveners

**APPEARANCES**

Mr Nicholas Green Q.C., Mr. Mark Hoskins Q.C. and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Tesco Plc.

Mr. Peter Roth Q.C., Mr. Daniel Beard, Ms Valentina Sloane and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Competition Commission.

Mr. Tim Ward (instructed by Slaughter & May) appeared on behalf of Asda Stores Limited.

Ms Kassie Smith (instructed by Lovells LLP) appeared on behalf of Waitrose Limited.Mr. Robert O'Donoghue (instructed by SJ Berwin LLP) appeared on behalf of Marks and Spencer Plc.

---

**RULING ON COSTS**

---

*Introduction*

1. The background to this matter is contained in the Tribunal's judgment dated 4 March 2009: see [2009] CAT 6 ("the Main Judgment"). The abbreviations and terminology used in the Main Judgment are adopted in this ruling.

2. The Tribunal granted an application by Tesco, made pursuant to subsection 179(1) of the Enterprise Act 2002, for judicial review of the Commission's decision to recommend the introduction of a competition test as part of the planning process for larger grocery stores. The Tribunal upheld Tesco's contention that in deciding to make the recommendation in question the Commission had failed to consider certain relevant matters. The vast majority of the Report and its findings were not impugned (see paragraph 172 of the Main Judgment).

3. In the Main Judgment the Tribunal left open the question of relief, and invited submissions on that matter, which the parties provided both in writing and at a short further hearing held on 16 March 2009. By a further judgment dated 3 April 2009, the Tribunal resolved a number of issues which had arisen relating to the specific relief to be given, and decided to quash the Commission's decision to make the recommendation and to refer the relevant matter back to the Commission for reconsideration and a new decision pursuant to subsection 179(5)(b) of the Act: see [2009] CAT 9 ("the Relief Judgment"). On the same day the Tribunal refused Tesco's oral request for permission to appeal to the Court of Appeal in respect of the Relief Judgment: see [2009] CAT 13.

4. During the further hearing on issues relating to relief, we also heard argument on an application by Tesco for its costs of the proceedings. At that hearing Tesco stated that it was not yet able to produce a schedule of costs as it had not been finalised. The Commission resisted Tesco's application and submitted, in essence, that the Tribunal should make no order as to costs.

5. Immediately following the handing down of the Relief Judgment and the Tribunal's refusal of Tesco's application for permission to appeal that judgment, the Commission

applied for an order that Tesco pay its costs of the further hearings on 16 March and 3 April 2009 relating respectively to relief and permission to appeal. However, the Commission's application was contingent upon Tesco's existing application for costs being granted. At that stage neither party had provided any details of its costs.

6. None of the interveners has made any application or submissions on costs.

7. By a letter dated 9 June 2009 the Tribunal requested Tesco and the Commission each to supply to the Tribunal a schedule of their costs in these proceedings, broken down under these heads:

(a) Main proceedings:

- Solicitors' charges (including partners, associates, trainees and paralegals as appropriate).
- Counsel's fees.
- Witness costs (identifying the costs/fees in respect of each named witness).

(b) Issues relating to relief (including permission to appeal from the Relief Judgment):

- Solicitors' charges (including partners, associates, trainees and paralegals as appropriate).
- Counsel's fees.

These schedules were supplied by 30 June as requested.

8. The position revealed by the schedules, which in each case show the costs incurred exclusive of VAT, is as follows.

9. Tesco's costs of the proceedings not including the relief issues are £1,391,904.89. This sum includes £239,541.27 in respect of the costs of three expert witnesses and £711,156.12 counsels' fees. These sums are exclusive of copying charges (£75,727.79) and the costs of preparing the costs schedule (£12,088.90). On the assumption that the bulk of the copying charges, say £70,000, are in connection with the main hearing, Tesco's costs of that hearing are £1,461,904.89. Tesco's costs of the relief hearing amount to £197,862.60. If one adds the balance of the copying charges (£5,727.79) the total for that hearing is £203,590.39 including counsels' fees.

10. The Commission's costs of the main hearing are £131,525.51. This sum includes copying charges of £3,558.73 and counsels' fees of £91,978.78. To this sum should be added £111,079.61, being the sum paid to Dr Benoit Durand for his assistance in preparation for and attendance at the hearing. This results in a total sum of £242,605.12 for the Commission's costs of the main hearing. As for the relief hearing, the Commission incurred costs of £30,464.20, inclusive of counsels' fees.

11. Therefore in round figures Tesco incurred approximately six times the costs incurred by the Commission in respect of the main hearing. (In relation to the relief hearing the factor is nearer to seven.)

*Summary of the parties' arguments*

12. Tesco submits that it should receive its costs of this application for judicial review on the basis that it has been entirely successful on the main issues – namely in establishing that the Commission failed to conduct a sufficient analysis of the benefits or the costs which would result from the application of the competition test - and has obtained the relief which it sought. If there were to be any reduction at all (which Tesco argues there should not) in order to reflect certain arguments upon which Tesco lost, this should amount to no more than 10%.

13. In resisting Tesco's application for costs and submitting that the appropriate order is "no order for costs", the Commission contends that the Tribunal should take account in particular of (a) the fact that in conducting the market investigation the Commission

was acting in the public interest and (b) certain aspects of Tesco's conduct of the proceedings.

14. In relation to the first point the Commission refers to the Tribunal's rulings in *The Number (UK) Ltd and Conduit Enterprises Ltd v OFCOM* [2009] CAT 5 and *Vodafone Ltd v OFCOM* [2008] CAT 39, and also to certain decisions of the Administrative Court on appeals by way of case stated from costs decisions of magistrates in licensing cases, cited in *Vodafone*; it argues that, provided it acts reasonably and in good faith, the Commission should be able to carry out its statutory tasks without fear of an adverse costs order; that in a market investigation under the Act the Commission's position is quite different from that of a private party engaged in litigation and indeed from that of a Government department or local authority in the context of a judicial review; the Commission is required to bring together and weigh a considerable body of evidence, discharge wide-ranging functions, make factual findings (often involving complex questions of economics and commerce), apply legal principles and, if necessary, devise remedial action to address an AEC that will necessarily affect large numbers of individuals; the present case was a good example, concerning as it did the supply of groceries in the UK, and affecting every citizen to some degree; the Commission accordingly fulfils a role as a guardian of the public interest; since there was no suggestion that the Commission had not acted reasonably or in good faith in recommending the competition test, in accordance with the approach the Tribunal has taken in analogous cases in the past (such as *The Number* and *Vodafone* above), the Commission should not have an order for costs made against it.

15. In relation to the other contention, the Commission submits that it would be unjust if a costs order were made against it having regard to the approach Tesco has taken to its challenge, which in the Commission's contention caused the Commission to incur costs unnecessarily. Under this head the Commission makes a number of points. First it submits that, in relation to Tesco's argument that the Commission had incorrectly applied the proportionality principles, it failed to persuade the Tribunal that the Commission should have deployed any specific formal method of cost/benefit analysis, and that this was one of Tesco's key arguments on Ground 2. Next, the Commission argues that Tesco abandoned a ground of challenge contained in its Notice of

Application which asserted that in failing to address the main barrier to entry, namely the planning regime, the competition test was insufficiently related to the identified AEC and therefore *ultra vires*. Thirdly the Commission points to the fact that another of Tesco's submissions on Ground 2 was unsuccessful, namely that relating to the robustness of the AEC and the limitations of the margin concentration analysis, and that the Commission expended a great deal of work on this argument. Finally, in relation to the proportionality ground, the Commission argues that Tesco's contentions in the Notice of Application went a good deal further than the points ultimately relied upon, yet the Commission was obliged to consider and plead to all the points made and to obtain the assistance and evidence of Dr Durand. The Commission was also obliged to consider and deal with the complex material contained in the evidence of the three economic experts engaged by Tesco, and upon which Tesco did not ultimately rely. The Commission argues from this that a large part of the preparation time and cost incurred by Tesco must be attributed to matters which either it did not pursue or upon which it did not succeed. The only just order in the present case is therefore no orders as to costs.

16. The Commission states if the Tribunal were minded to accede to the Commission's suggestion and make no order for costs on the main part of the case then the Commission does not seek an order for costs in relation to the relief issues. If, however, the Tribunal is minded to make an order for costs in Tesco's favour on the main issues then the Commission asks for its costs in relation to relief.

17. Tesco disputes the Commission's submissions.

18. Tesco contends that the fact that the Commission is carrying out a market investigation under the Act does not justify a rule or principle that the Commission should be immune from an adverse costs order unless it has acted unreasonably or in bad faith; the position is no different from any other public law case: each matter must be determined on its own facts just as costs applications are routinely considered, and where appropriate granted, against public bodies in the Administrative Court. The case law relied upon by the Commission dealt with different circumstances and should not be applied by analogy in a case such as this; a much closer precedent was *Interbrew SA*

*& another v the Competition Commission and another* [2001] EWHC Admin 367 where costs were awarded against the Commission. Further, in the present case the Commission was obliged to carry out the market investigation which had been referred to it, so there was no question of its being deterred from doing so by the possibility of an adverse costs order. There was, moreover, a public interest in Tesco bringing its challenge, as otherwise a flawed recommendation would have gone to ministers.

19. As to the Commission's contentions about Tesco's conduct of the proceedings, Tesco responded as follows.

20. *Cost/benefit analysis:* At no stage did Tesco suggest that the Commission ought to apply the Green Book or any specific method of cost/benefit, or similar, analysis; its contention in the Notice of Application was at a "high level", namely that no proper assessment had been carried out, and this approach was maintained throughout; Tesco merely noted in a footnote that the Commission's analysis fell far short of satisfying Treasury guidance; however the Commission in its Defence chose to take a stand on the Green Book, asserting compliance with it; but the Commission did not repeat this assertion in the face of Mr Johnson's evidence that it was plainly wrong.

21. *Abandonment of the ultra vires ground:* Tesco submits that it was in response to this ground that the Commission advanced for the first time the contention, entirely absent from the Report, that the competition test would facilitate new entry into highly concentrated markets; this new point, which on the face of it responded to the *ultra vires* argument, had to be dealt with by Tesco; therefore the change of position was by the Commission, not Tesco.

22. *Robustness of the AEC finding:* Tesco was making a legal point based solely on the material in the Report, and therefore did not file any witness evidence with its Notice of Application; contrary to the Tribunal's guidance in *Somerfield Plc v Competition Commission* [2006] CAT 4, the Commission served two substantial witness statements with its Defence, including the economic evidence of Dr Durand supplementing the reasoning in the Report in relation to margin concentration analysis; had the Commission not sought to go beyond what was in the Report it would not have been

necessary for Tesco to submit Messrs Gaysford's and Hausman's statements; thereafter the Commission did not rely upon Dr Durand's statement nor seek to respond to Messrs Gaysford and Hausman; rather it met Tesco's submissions with legal arguments as Tesco had originally envisaged would be the case prior to the introduction of Dr Durand's statement; the costs of arguing the point would have been much less had the Commission not inflated them by filing evidence unnecessarily; although Tesco lost this argument it won on the ground to which the argument was directed.

23. Further, Tesco submits that the Commission introduced, by way of Mr Freeman's statement, a new justification for its failure properly to assess the benefits of the competition test, namely that it was impossible to do so; Tesco considers that it was entitled to answer this point and did so in the witness statement of Mr Gaysford; absent these new points and the supplementary evidence introduced by the Commission it would not have been necessary for Tesco to file evidence at all.

24. As for the relief issues, Tesco argues that apart from the point concerning the Tribunal's power to refer the challenged decision back for reconsideration, the Commission has not succeeded; the Commission wanted a large number of passages in the Report quashed whereas the Tribunal took a different course.

*The Tribunal's decision*

25. The Tribunal's jurisdiction to award costs is governed by rule 55 of The Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) ("the Tribunal Rules"). It provides, so far as is relevant, as follows:

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

> pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session."

26. Rule 55 covers all the proceedings which come before the Tribunal. In the Tribunal's recent decision on expenses in *Merger Action Group v Secretary of State for Business Enterprise and Regulatory Reform* [2009] CAT 19 the Tribunal listed, at paragraph [16] of its judgment, the main categories of cases which fall to be determined by the Tribunal. One such category includes applications under sections 120 and 179 of the Act. These two provisions are structured and worded in virtually identical terms *mutatis mutandis*. In each case an application may be brought by "any person aggrieved by a" relevant decision, and the application is to be determined by applying "the same principles as would be applied by a court on an application for judicial review."

27. The *Merger Action Group* case was an application made pursuant to section 120 of the Act, which provides for challenges to relevant decisions of the Commission and other public bodies in the context of the Act's merger regime. There the Tribunal, whilst emphasising the width of the discretion afforded to the Tribunal by rule 55, confirmed that the appropriate starting point where an application for costs was made in such a case was that a successful party would normally obtain a costs award in its favour. The Tribunal stated:

> "17. …..As the Tribunal has emphasised on numerous occasions, the width of the discretion enables the Tribunal to deal with cases justly and to retain flexibility in its approach, avoiding the risk of guiding principles evolving into rigid rules (see for example *Emerson Electric Co & Ors v Morgan Crucible Co plc & Ors (costs)* [2008] CAT 28, [2009] CompAR 7, at [35] and [44]). As the Tribunal said in that case at paragraph [44], there is no inconsistency between the wide discretion, and an approach to its exercise which adopts a specific starting point. Without this there may be an increased risk of discordant decisions….
>
> 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.
>
> 20. Cases such as the present … are in the nature of applications for judicial review (see subsections 120(4) and 179(4) of the Act). However, the Tribunal has stated that whilst subsection 120(4) requires the substance of any application for review to be determined in accordance with the principles which would be applied by a court in an ordinary judicial review, the subsection does not apply to an issue of costs (see *IBA Health (costs)* at [37]). It follows that in relation to applications for review under sections 120, as in all other categories of proceedings before it, the Tribunal exercises its discretion under rule 55 in accordance with the principles which it has developed. (It is difficult to see how the same would not also apply in relation to subsection 179(4).)
>
> 21. The Tribunal has identified as the appropriate starting point in section 120 applications that a successful party would normally obtain a costs award in its favour (see for example *Unichem (costs)*, at [17]; *Stericycle International LLC v Competition Commission (costs)* [2006] CAT 22, [2007] CompAR 322, page 2, lines 8-9; and *Co-operative Group (CWS) Limited v Office of Fair Trading (costs)* [2007] CAT 25, [2007] CompAR 954, at [4]). However in those cases and in others of the same kind the Tribunal has reiterated the need to retain flexibility in order to reach a just result on the specific facts of the case."

28. In the *Merger Action Group* case and in the Tribunal's recent decision *British Sky Broadcasting Group plc* [2009] CAT 20 (another section 120 application) the Tribunal also took note of the approach adopted by courts in the other jurisdictions in the United Kingdom when dealing with analogous judicial review proceedings. Whilst noting that so far as the Tribunal's jurisdiction under rule 55 was concerned there was no "general rule" such as existed in CPR Rule 44.3(2)(a), the Tribunal referred to the following passage from the judgment of Dyson J (as he then was) in *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347 as reflecting the rationale for the Tribunal's own starting point when considering applications for costs in judicial review cases:

> "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.

> 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."

29. Whilst there are of course differences (for example, as to scale, timing and analysis) between market investigations and merger references, we do not consider that decisions made in the context of market investigations are necessarily, by their nature, so different from decisions under the Act's merger regime that they call for a different approach to the award of costs where applications challenging their validity are made under section 179. It is true, as the Commission has urged, that in a market investigation it is required to bring together and weigh a considerable body of evidence, make factual findings which will often involve complex economic and commercial questions, and apply legal principles to those findings, devising if necessary remedial action to address any AEC identified in the investigation. Typically a report by the Commission following a market investigation will contain a variety of findings and decisions. A market investigation exercise may well have wide and profound effects on the economic and other interests of many citizens and businesses. This can, however, also be the case in a merger assessment. The same can equally be true of many decisions made by Government and other public bodies susceptible to judicial review. Moreover, although the volume and scope of decisions in a single Commission report may render the Commission vulnerable to a legal challenge, neither this nor the existence of wide-ranging powers to investigate possible AECs and devise remedies which can significantly affect many people represents a compelling reason for applying in such cases *as a matter of principle* (as opposed to on the specific facts of a particular case) a distinct and more indulgent approach to the award of costs against the decision-maker. Generally speaking, no question of such an award would arise unless the exercise of such powers had been shown to be impaired in some respect. Where that occurs the rationale for the Tribunal's starting point in section 120 cases, referred to in the previous paragraph, applies just as much in relation to applications under section 179.

30. Nor are the Tribunal's rulings in *The Number* and *Vodafone Limited* in point in the present case. In those matters the Tribunal was considering what the starting point on an application for costs against OFCOM should be where there was a successful appeal

under section 192 of the Communications Act 2003. In *The Number*, where the appeal was from OFCOM's resolution of a dispute between different telecommunications operators pursuant to section 185 of that Act, the Tribunal, referring to OFCOM's "unique position as regulator", indicated that in resolving such disputes the starting point should be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. The Tribunal, however, emphasised that where the facts justified it a costs order could be made against OFCOM even where it had acted reasonably and in good faith. (See paragraphs 5 and 6 of the judgment.) Just such a case was *T-Mobile (UK) Ltd & Ors v OFCOM* [2009] CAT 8, where the Tribunal made a costs order against OFCOM although there was no unreasonable conduct. Cases of that kind, involving as they do an appeal on the merits against an OFCOM decision resolving a dispute between commercial operators, can be distinguished from challenges by way of judicial review alleging unlawful or invalid action on the part of the decision-maker.

31. Similarly, the case stated appeals cited in *Vodafone* and relied upon by the Commission in its submissions to us are very far from the present case. Each involved an appeal to the magistrates from a licensing decision by the local authority where the justices in effect conducted a re-hearing. They were entitled to reach a different decision without finding that the local authority had erred in any way in the original decision, and had a wide statutory discretion to make "such order as to costs as it thinks fit." In *City of Bradford Metropolitan District Council v Booth* [2000] EWHC Admin 444 the Divisional Court (the Lord Chief Justice and Silber J) held that the magistrates had misdirected themselves on costs by applying a principle that costs should follow the event without considering a number of relevant factors. It is difficult to read much more into the case than that. As the Lord Chief Justice said:

> "What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection."

32. In the subsequent *R (Cambridge City Council) v Alex Nestling Limited* [2006] EWHC 1374 case the Administrative Court, reiterated the approach in *Booth* and held that although the power of the court to award costs in such statutory appeals from the

licensing decisions of local authorities was not limited to cases where the authority had acted unreasonably or in bad faith, the fact that it had acted reasonably and in good faith in discharge of its public function was an important consideration (see per Toulson J, with whose judgment Richards LJ agreed, at paragraph 11). Such licensing cases are different in nature from an application for judicial review, which concerns the lawfulness or validity of the decision being challenged, and which does not constitute a merits appeal by way of re-hearing. It is perhaps worth noting that where there is an application for costs in a judicial review in the Administrative Court the "loser pays" principle enshrined in CPR Rule 44.3(2)(a) applies as a general rule, although it is liable to be displaced in the light of the circumstances of specific cases.

33. We therefore consider that the cases referred to do not provide us with much assistance in identifying an appropriate starting point for dealing with costs of a judicial review under section 179 of the Act, and in the present case the Tribunal approaches the costs issue in the same way as in proceedings under section 120.

34. Tesco has established that the Commission's decision to recommend the adoption of the competition test is invalid, and has done so in the face of a vigorous defence of its position on the part of the Commission. The decision in question has been quashed and has been referred back to the Commission for reconsideration and a new decision. We therefore start from the position that an award of costs in favour of Tesco is likely to be appropriate.

35. We have considered carefully the Commission's further arguments against such an order (or in support of a reduced award) as well as Tesco's response to those arguments.

36. *Cost/benefit analysis*: This point does not assist the Commission. Whilst the Tribunal thought it right, in view of the submissions made by both main parties, to make clear in the Main Judgment that no specific cost/benefit, or similar, method was required to be applied when considering the proportionality of the Commission's recommendation, the Tribunal had not understood Tesco to be arguing that any particular methodology must be used. Tesco was entitled to point to various methods of analysis in use in different

contexts and did so. There may well be force in its point that some of the heat in this issue was caused by the Commission's suggestion that it had in fact complied with a specific method. However Tesco's key argument was not that the Green Book or any other specific method should have been used by the Commission but rather that *some* appropriate analysis enabling relevant consequences to be evaluated should have been carried out. On this point Tesco was wholly successful.

37. *Abandonment of the ultra vires ground*: This ground was not pursued as such beyond its inclusion in the Notice of Application. Tesco argues that this was because, in response to the point, the Commission in its Defence raised for the first time the assertion that the competition test would address barriers to entry because the test would facilitate entry into existing concentrated markets, and that Tesco had to deal with this new point. There may well be some force in that analysis. As we found, the facilitation point was essentially absent from the Report and was only developed by the Commission in the course of the proceedings. In the Main Judgment we expressly did not come to a conclusion as to whether the *ultra vires* ground had been abandoned or simply subsumed into other issues. We do not feel that criticism of Tesco's approach has been substantiated.

38. *Robustness of the AEC finding*: Although Tesco's argument on this was not in our view a good one, it was one of several arguments supporting a ground on which Tesco succeeded (namely ground 2); further, Tesco did not originally attempt to support the argument with expert evidence, only doing so in response to the expert evidence of Dr Durand introduced by the Commission at the time it lodged its Defence. Again we feel there is force in Tesco's argument that the Commission provoked that response from Tesco by seeking to supplement the reasoning in the Report upon which Tesco was apparently willing to take its stand on the point. In the same way, the Commission's argument, advanced for the first time in Mr Freeman's witness statement, that it was impossible to make a useful estimate of the effectiveness of the test, elicited expert evidence to the contrary from Tesco.

39. Be this as it may, so far as the main hearing is concerned no specific aspect of Tesco's conduct of the proceedings, before or during the hearing, has been identified which

would justify making no order for costs or (particularly given the approach which the Tribunal proposes to take in relation to the assessment of the quantum of the costs award) reducing any order for costs which we would otherwise make. Essentially Tesco was successful on the main grounds upon which it relied.

40. The position is different so far as the argument on relief is concerned. In that respect Tesco sought unsuccessfully to prevent the Commission from having an opportunity to reconsider the recommendation in question by arguing that the Tribunal either could not or should not refer the matter back to the Commission. There were also issues as to the form of the order quashing the decision and referring back. For the most part these matters were not argued orally but dealt with on paper. Although it could be said that the Commission was not entirely successful in relation to them, in large measure the form of order made by the Tribunal favoured the Commission's position. In all the circumstances it is appropriate that an order for costs relating to the relief issues should be made in favour of the Commission.

41. We now turn to the assessment of the costs to be paid by the parties. The Tribunal has a very wide discretion under rule 55 not only in relation to whether to make an order for costs but also in relation to the amount of any costs to be paid. The Tribunal proposes to deal with this itself rather than sending the matter to a costs judge for detailed assessment. Indeed, we do not consider that a detailed assessment is necessary or appropriate here.

42. We deal first with the payment of costs to Tesco. The amount incurred (nearly £1,500,000) is, by any standards, very large in the context of a judicial review the hearing of which occupied the Tribunal for 3 days (so far as the main hearing is concerned). Of course it must be recognised that in a case of this complexity and importance the actual time in court represents the tip of the iceberg: a great deal of submissions are in writing, and for every day in court there will inevitably be many days of preparation by a good number of people on each side. Nevertheless the amount is very large.

43. Some confirmation of this is to be found when one compares Tesco's costs with the amount incurred by the Commission. As we have said, Tesco's costs are approximately *six times* as large. One needs, of course, to exercise a certain amount of caution in making such comparisons; there are many reasons why different parties' costs may differ. In particular there is nothing surprising about a judicial review claimant's costs being higher than a respondent's: for example, a claimant may have to examine a whole range of arguments before fixing upon the ones to be pursued; more investigative work may be required in order to discover the factual matrix for the challenged decision; overall a claimant has to make the running. A respondent, by contrast, may have certain advantages which could reduce his costs: by the time he begins to incur costs he will often know a great deal about the case he has to answer because the claim will normally be formulated and supported in some detail in the claimant's opening pleading and evidence; as decision maker a respondent is likely to know already, or have ready access to, much of the background material to the decision under challenge; also it is a frequently observable fact that a government or other public body's litigation costs are very often somewhat lower than those of a private sector opponent. However, even allowing for these considerations the extent of the disparity in the present case is considerable. Nor is there any reason to believe that the Commission cut corners in any respect – both sides were represented to the highest standards by distinguished counsel and solicitors.

44. The issue involved in the case is clearly one of considerable commercial importance for Tesco, and Tesco was entitled to spare no expense. The question for us is whether in all the circumstances of this case (including the amount of costs expended by the Commission in competently and vigorously defending the proceedings) it is just to impose costs at this level on the Commission. We have come to the conclusion that it is not.

45. The Tribunal should ensure that any sum awarded in respect of costs is fair, reasonable and proportionate as between the parties and generally. The size of some of the individual items of costs is such as to cause a sharp intake of breath and we would expect them to have come under a good deal of scrutiny on a detailed assessment. However, in the absence of such assessment (which would add considerably to both

parties' expense, and would be very time consuming for those involved) what we are left with is the striking disparity between Tesco's costs and those of the Commission. There is certainly a lack of proportionality as between the two sets of costs and, in a case such as the present where the parties have been well- matched in terms of forensic effort and firepower, this disparity could also be said to have some bearing on whether the receiving party's costs are proportionate to the issues involved.

46. We have come to the conclusion that, with some adjustment, the amount incurred by the Commission in defending Tesco's challenge provides us with a useful benchmark for the costs which it would be fair and proportionate in all the circumstances for the Commission to pay to Tesco in respect of the substantive issues. We apply an uplift to take account (inevitably in a rather rough and ready way) of the distinct possibility that as respondent the Commission had certain cost advantages of the kind to which we have referred. A fair uplift for this purpose would in our view be in the order of £100,000. With appropriate rounding, that results in a costs award in Tesco's favour of £342,000. As against that we propose to award the Commission its costs in relation to the relief issues and permission argument in the sum of £30,000. The Tribunal's order will provide for the Commission to pay Tesco the net amount.

47. We should not be taken to be suggesting that an opponent's costs would necessarily be an appropriate benchmark for a lump sum costs award in other cases. As the Tribunal has often said, rule 55 gives the Tribunal considerable flexibility to achieve a just result in the circumstances of each case.

*Conclusion*

48. For the foregoing reasons the Tribunal unanimously:

**ORDERS THAT:**

> The Commission pays to Tesco a sum of £312,000 in respect of its costs, such payment to be made within 28 days of the date of this ruling

The President | Graham Mather | John Pickering

Charles Dhanowa
Registrar

Date: 15 October 2009