



Neutral citation [2019] CAT 6

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

6 March 2019

Before:

ANDREW LENON Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 11 January 2019

RULING (COSTS & INTEREST ON PENALTY)

APPEARANCES

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

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

A. INTRODUCTION

1. In its judgment dated 7 September 2018 ([2018] CAT 13) (the “Judgment”), the Tribunal dismissed Ping Europe Limited’s (“Ping”) appeal on liability but reduced the penalty imposed on Ping from £1.45 million to £1.25 million. The Competition and Markets Authority (“CMA”) has applied for an order that its costs should be paid by Ping, on the basis that the CMA was substantially successful in defending the appeal. Ping argues that there should be no order as to costs or, alternatively, that Ping is entitled to 50% of its costs or that the CMA should get no more than 50% of its costs.
2. In its costs schedule dated 24 September 2018 the CMA sought to recover the costs of its internal salaried staff at Government solicitors’ guideline hourly rates (“GHRs”). By a letter dated 15 November 2018 the Tribunal directed that the CMA file a revised costs schedule providing an assessment of the hourly rate for its internal salaried staff taking into account the annual cost of each individual including salary and attributable overheads. The CMA filed its revised costs schedule on 30 November 2018. At the CMA’s request, a hearing was convened in order for the CMA to make further oral submissions on the issue of the appropriate rates to be used in the calculation of its in-house legal costs.

B. LIABILITY FOR COSTS

3. The Tribunal’s jurisdiction to award costs is governed by rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648) (the “Tribunal Rules”). Rule 104 provides insofar as material:

“(1) For the purposes of these rules “costs” means costs and expenses recoverable before the Senior Courts of England and Wales [...]

(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 in respect of the whole or part of the proceedings.

[...]

(4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—

- (a) the conduct of all parties in relation to the proceedings;
 - (b) any schedule of incurred or estimated costs filed by the parties;
 - (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
 - [...]
 - (e) whether costs were proportionately and reasonably incurred; and
 - (f) whether costs are proportionate and reasonable in amount.
- (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be –
- (a) assessed by the President, a chairman or the Registrar; or
 - (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales [...]"

4. Rule 104 gives the Tribunal a wide and general discretion in relation to costs: see *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [12] and [37] and *HCA International Ltd v CMA* [2015] EWCA Civ 492 at [101].

5. Whilst rule 104 confers a wide and general discretion on the Tribunal, the starting point in appeals brought under the Competition Act 1998 (the “1998 Act”) is that costs follow the event. As the Tribunal explained at [18] of its ruling on costs in *Eden Brown Limited v OFT* [2011] CAT 29:

“[...] 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. [...], 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.”

6. This principle was repeated by the Tribunal in *Skyscanner Limited v CMA* [2014] CAT 19 at [9] and *Ping Europe v CMA* [2018] CAT 9 at [7] and [10].

7. In *FIPO v CMA* [2015] CAT 10 the Tribunal stated at [3]:

“Although the Tribunal has a wide discretion in relation to costs [...], the starting point in these circumstances is an expectation that the losing party

should pay the costs of the successful party [...]. Although there is no general *rule* to this effect, unlike in Civil Procedure Rules rule [44.2(2)(a)], there are strong reasons relating to fairness as between the parties and the need to promote a properly disciplined approach to complex litigation why the wide discretion as to costs should be exercised in this way, absent good reason being made out to justify a departure from that approach on the facts of an individual case.”

8. The Tribunal Rules allow the Tribunal to take into account whether a party has succeeded on part of its case, even if it has not been wholly successful (Rule 104(4)(c)).

(a) *The parties’ submissions*

9. The CMA applies for an order for the summary assessment of its costs in the amount of £1,137,587.18, comprising in-house legal fees in the sum of £779,573.57 and disbursements in the sum of £358,013.61. Ping raised no objection to the costs being summarily assessed.

10. The CMA submits that:

- (a) it is the clear “winner” in this appeal as the Tribunal dismissed Ping’s appeal on liability and each of the five grounds that it advanced in support of its appeal (the CMA’s defence on liability therefore succeeded in its entirety);

- (b) it was substantially successful on penalty (both of Ping’s grounds on penalty were rejected by the Tribunal thus, whilst the Tribunal went on to conclude that a “small reduction” was appropriate, the penalty was substantially upheld); and

- (c) there is no good reason why the Tribunal should depart from its usual starting point in the present case that the CMA, as the successful party, should be awarded its costs of defending the appeal.

11. The CMA acknowledges that in certain cases it may be appropriate to reduce a successful party’s costs if its success was qualified. Although the Tribunal

found against the CMA on two discrete points, it submits that no such reduction is warranted in the present case for the following reasons.

12. First, in its conclusions on the legal framework, the Tribunal held that the CMA had erred in law by conducting a full proportionality analysis as part of its assessment of whether Ping's Ban was an object infringement (Judgment at [98]-[99]). The Tribunal nevertheless found that the CMA's analysis was a necessary component of two other relevant legal issues, and that the findings and conclusions that it had reached in that analysis were correct (Judgment at [202] and [211]). Thus, the CMA's legal error made no difference to the Tribunal's overall conclusions and was not a ground for quashing the CMA's decision (Judgment at [100] and [102]).
13. Second, although the Tribunal rejected both of Ping's primary and alternative cases on penalty, the Tribunal applied a small reduction in order to reflect its finding that the involvement of Ping's managing director was not an aggravating factor (Judgment at [254]). However, this ground accounted for only a very small part of the hearing and written submissions.
14. Ping submits that the appropriate order is: (1) no order as to costs; (2) an order that Ping is entitled to 50% of its costs; or (3) an order that the CMA should receive no more than 50% of its costs.
15. In summary, Ping argues that the CMA should not recover all of its costs, given the Tribunal's findings that:
 - (a) the CMA erred in its understanding of the key legal test, a question that consumed a significant proportion of the substantive hearing and written submissions;
 - (b) the Decision was upheld on a basis different to that advanced by the CMA at trial;
 - (c) the CMA erred in respect of the fine imposed;

(d) the arguments advanced by Ping in its appeal have helped to clarify the law in an important area; and

(e) Ping should not be penalised in costs for being the subject of a CMA test case and a *fortiori* since Ping is effectively an SME.

16. In support of its case, Ping refers to *Quarmby Construction Company Limited v OFT* [2011] CAT 34 for the proposition that where, as respects an infringement decision, a party is unsuccessful on liability but successful on penalty, no order as to costs may be appropriate.

(b) *The Tribunal's analysis*

17. In my view, the clear “winner” in this case is the CMA: its defence on liability succeeded in its entirety and the penalty was substantially upheld (the Tribunal having rejected each of Ping’s main arguments on penalty).

18. I am not persuaded that the analogy with *Quarmby Construction Company Limited v OFT* [2011] CAT 34 is apposite. In that case, the Tribunal rejected each of the Appellants’ five grounds of appeal on liability, but upheld certain of the Appellants’ grounds of appeal on penalty. The penalty was reduced by more than 75%, a reduction of more than £660,000. As noted by the Court of Appeal in its Judgment [2012] EWCA Civ 1552 at [31], it was reasonable for the Tribunal to take the view that there was no overall winner: the Appellants won by reducing the penalty substantially but the Office of Fair Trading (the predecessor of the CMA) won by holding the finding of infringements.

19. The assertion that Ping succeeded on a major issue of liability is incorrect. The legal error found by the Tribunal made no difference to the outcome of Ping’s grounds of appeal. Moreover, the Tribunal decided ground 2 in the CMA’s favour. We accepted that the CMA carried out a detailed analysis of the content, objectives and context of Ping’s Ban (Judgment at [143]); rejected Ping’s challenges to that analysis (Judgment at [145]-[146]); and concluded that the CMA had been correct to find that the Ban revealed in itself a sufficient degree of harm to competition to constitute an object restriction (Judgment at [148]).

20. Given my view that the CMA was the “winner” in this appeal, the various cases cited above lend support to an award of costs in favour of the CMA. In the circumstances, my starting point is therefore that Ping should pay the CMA’s costs. However, Ping’s success on the penalty reduction and the fact that the CMA erred in law by conducting a full proportionality assessment under Article 101(1) of the Treaty on the Functioning of the European Union of whether Ping’s internet policy was “objectively justified” should be fairly reflected in a reduction in the amount of costs award the CMA receives.
21. In my view, an appropriate reduction is 10% of the costs otherwise payable to the CMA i.e.:
- (1) disbursements: $£358,013.61 - £35,801 = £322,213$.
 - (2) internal costs: $£779,573.57 - £77,957 = £701,617$.
 - (3) total costs: $£1,137,587 - £113,758 = £1,023,829$.

This takes into account the relative importance of both issues and the amount of time taken up at the hearing and in written submissions. I reject Ping’s submission that its size should have any bearing on the Tribunal’s order for costs.

C ASSESSMENT OF THE CMA’S IN-HOUSE LEGAL COSTS

(a) *The parties’ submissions*

22. In calculating its in-house costs of £779,573.57, the CMA applied the GHRs based on the applicable geographic location (London 2 – central London) and fee-earner bands (A-D). The CMA’s costs schedule sets out the categories of work done under various headings, such as attendances on clients, attendances on witnesses and work on documents, listing the members of the CMA’s staff involved in the particular category work and states in relation to each one how many the hours were spent, specifying an hourly rate.

23. Ping took issue with the basis on which the CMA had calculated its in-house legal costs. It contended that the GHRs claimed by the CMA greatly exceeded the true cost of employing the relevant individuals and that recovery of costs at these rates would be in breach of the indemnity principle which provides that a litigant may only recover the cost that have actually been incurred in the course of the litigation.
24. By way of example:
- (1) The CMA proposed to recover over £170,000 for work carried out by its Assistant Legal Director. This was equivalent to two and half years of that individual's salary. This was despite the fact that, according to the CMA's schedule, the CMA Assistant Legal Director spent less than 5 months working on the Ping case.
 - (2) The CMA proposes to recover over £150,000 for work carried out by its Legal Adviser. This was equivalent to almost three years of that individual's annual salary based on 20 full time weeks spent by him on the Ping appeal.
 - (3) The annualised cost of its staff members working on the Ping case would amount to, for example, (i) £532,000 for the Director of Litigation (ii) £406,000 for the Assistant Legal Director (Litigation) (iii) £329,000 for a Legal Adviser and (iv) £211,000 for a paralegal. Ping submitted that these rates far exceed the annual salaries of most equity partners in most international law firms and that if the CMA's approach to costs were allowed, the result would be that its litigation department would become a profit centre, generating income far in excess of its true costs.
25. Ping referred to the judgment of the Tribunal in the case of *BT and Others v Ofcom* [2012] CAT 30. In that case, the Competition Commission (the "Commission") claimed the costs of successfully defending before the Tribunal its determination of certain price control matters questions had been referred to it in accordance with section 193 of the Communications Act 2003. The Tribunal held that the Commission was never a "party" to the proceedings

within the meaning of Rule 55(2) of the 2003 Tribunal Rules and that therefore the Tribunal did not have jurisdiction to make any order in relation to its costs. The Tribunal went on to consider what costs order it would have made, had it had jurisdiction to do so. It made the following observations with regard to the Commission's in-house costs:

“37. Apart from these submissions, EE's and Vodafone's objections related to the amount of the Commission's costs.

38. But for the jurisdictional question addressed in Section II of this Ruling, we would have found that there was nothing to displace the starting point that the Commission is entitled to its costs, and we would have ordered that the Commission have its costs, payable equally by EE and Vodafone. Such an order would have directed that those costs should be subject to a detailed assessment on the standard basis by a costs judge of the Senior Courts, if not agreed.

39. We would only add this as regards the costs of the Commission's internal solicitors, which it seeks to recover:

(1) In principle, we consider that such costs should be recoverable by the Commission, although we quite accept the note of caution sounded by the Tribunal in *National Grid v Gas and Electricity Markets Authority* [2009] CAT 24.

(2) We consider that a fair approach would involve (as regards each in-house lawyer whose costs are sought to be recovered) an assessment of:

(i) A realistic hourly rate for the lawyer in question. This involves assessing:

(a) the annual cost of that lawyer (taking account not merely the gross salary paid, but other costs, such as pension contributions, health insurance, etc); and

(b) the annual number of hours that the lawyer is contractually obliged to work (again, taking account of not merely the number of hours per week that are expected, but holiday entitlement, etc); In this way, an average hourly rate can be obtained.

(ii) The number of hours actually worked on the case.”

26. At Ping's request, the Tribunal directed the CMA to file and serve a revised costs schedule providing an assessment of a realistic average hourly rate on the basis proposed in *BT and Others v Ofcom*.

27. In response, the CMA produced a revised costs schedule which took into account (i) each individual's total average salary, calculated by reference to the individual's grade plus statutory benefits, and (ii) the average overhead cost per person, calculated by dividing the CMA's total operating cost by the number of frontline staff (excluding for example corporate service and IT staff whose salaries were included in the total operating cost). The total monetary cost for each individual (gross salary plus overheads) was divided by the average number of working days per year then divided by the number of contracted working hours.
28. The internal legal costs set out in the CMA's revised schedule were £317,695.70, i.e. some 41% of the internal legal costs claimed in the original cost schedule.
29. In response to Ping's objections to its use of GHRs, the CMA referred to the Court of Appeal decision *in Re Eastwood (dec'd); Lloyds Bank Ltd v Eastwood and others* [1975] Ch 112, the leading case on the correct approach to the assessment of internal legal costs. In that case, a taxing master had disallowed the profit costs element in a bill of costs submitted on behalf of the Attorney General on the basis that the Crown was not represented by an independent solicitor but by the Treasury Solicitor and his department and that a different method of assessment should be applied to a bill of costs of a party represented by a salaried solicitor. Brightman J upheld the taxing master's decision but the Court of Appeal allowed the appeal.
30. *Re Eastwood* establishes the following propositions:
- (a) A party can recover costs for an in-house lawyer to include both a cost element and a profit element (referred to as the A and B costs) (p 130F-G; 132D);
 - (b) The approach to assessment of the costs of in-house lawyers is the same for independent lawyers. There is a presumption that A plus B costs allowable for an in-house lawyer will not be less than the amount allowable for an independent lawyer (p 131H – 132E);

(c) There is in general no need to prove the in-house lawyer's activities and actual costs thereof in order to prove that the indemnity principle is adhered to. There may be special cases in which it appears reasonably plain that that principle will be infringed if the method of taxation appropriate to an independent solicitor's bill is applied but it would be impractical to require a complete breakdown of all the activities and expenses of an employed solicitor in every case with a view to ensuring that the indemnity principle is not infringed. The Court expressed the view that such an approach would be unworkable and inconsistent with justice (p 132E-F).

31. Russell LJ, giving the judgment of the Court, stated as follows:

“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. In the first place, we should have thought it a perfectly sensible presumption as a starting point that it would not be less. Secondly, 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.”

32. The conventional A/B method of assessment referred to in *Re Eastwood* entailed the identification of an ‘A’ figure to represent the reasonable “direct cost” of the work carried out. This figure consisted of a rate per hour “sufficient to cover the salary and appropriate share of the general overheads” of the solicitor concerned, and was based on the taxing master's knowledge and experience of the average solicitor in the local area: *Leopold Lazarus v Secretary of State for Trade and Industry* [1976] Costs LR 62 (“*Leopold Lazarus*”). The ‘B’ figure was a percentage uplift applied to the A figure in order to cover “matters which

could not be calculated on an hourly basis”: *Leopold Lazarus*. Such matters consisted of “indirect expenses” and “imponderables” such as the cost of supervision, the novelty of the matter and the degree of skill and complexity.

33. In *Maes Finance Ltd v WG Edwards & Partners* [2000] 2 Costs LR 198 Elias J (as he then was) upheld a decision in which the costs judge had approached the assessment of in-house legal costs “*in precisely the same way as he would have done if the in-house firm was an independent firm of solicitors*” (p.199). In doing so, he expressly rejected the argument that the ‘B’ element ought not to be given where an in-house solicitor had done the work, holding that, since there was nothing special about the case, such argument was precluded by the “*very clear*” decision in *Eastwood* (pp.200-204).
34. In *Cole v British Telecommunications plc* [2000] 2 Costs LR 310 (“*Cole*”) BT had produced an ‘hourly rate’ for its in-house solicitor, calculated by dividing the total pay and associated expenses attributable to all solicitors in that solicitor’s grade by the chargeable hours expected of such a solicitor. This produced a rate that was lower than the rate that had been allowed by the costs judge applying the conventional A/B method. The Court of Appeal nevertheless upheld the judge’s award, endorsing his conclusion that the hourly rate provided by BT reflected merely the ‘A’ figure ([10]), and rejecting as “*misconceived*” the argument that the 60 per cent “*mark-up*” demonstrated a breach of the indemnity principle.
35. The A/B method of calculating costs has now been superseded by the use of composite charging rates but this does not affect the principle that the costs of in-house solicitors are to be assessed on the same basis as those of independent solicitors.
36. In *R (on the Application of Mazanov Bakhtiyar) v The Secretary of State for the Home Department* [2015] UKUT 519 (IAC) and *Sidewalk Properties v Twinn and others* [2016] 2 Costs LR 253 this principle was applied by the Upper Tribunal (as opposed to High Court). The Upper Tribunal concluded that the

Government Legal Department was entitled to claim costs calculated in the same way as costs of litigation would be calculated in the private sector.

37. In the present case, the CMA adduced a witness statement from Mr John Simon Jones, a director of litigation employed by the CMA, in which Mr Jones set out the background to the CMA's adoption of the GHRs as the most appropriate hourly rate when calculating its costs and gave an explanation as to why the revised hourly rates provided by the CMA in its revised costs schedule do not cover the full costs involved in the appeal.
38. Mr Jones' evidence was that the CMA gave careful thought to the basis on which the in-house costs should be calculated. The decision to use the GHRs was made by senior executives of the CMA in 2016 following a review by the Litigation Group of the law and the practice of other public authorities relating to cost recovery. As part of that review, the CMA consulted costs experts, the Senior Costs Master at the Senior Courts Costs Office, Her Majesty's Revenue & Customs, the Civil Aviation Authority, the Office of Communications and the Office of Gas and Electricity Markets. Mr Jones also consulted with an informal cross-governmental group of senior litigators, called the Government Litigators Group, as to their views regarding costs recovery. The conclusion reached by the CMA was that the GHR applicable to the CMA's office location (that is, London - Grade 2) would be most appropriate to adopt when calculating the CMA's internal costs. The CMA mapped the pay bands in the GHR (listed A-D) on to the most closely corresponding civil service grades.
39. Mr Jones gives details of the various direct and indirect costs associated with the CMA's in-house litigation function that are not captured by the revised hourly rates set out in the CMA's letter of 30 November 2018. Such costs include:
 - (1) extra costs resulting from the need to divert resources away from other work streams, resulting in a form of "opportunity cost" because the CMA is unable to deploy those resources in other work which might otherwise have helped markets work well for consumers, businesses and the economy; this diversion of resources creates a need for additional

management and supervision to support and retain staff under increased workloads and to costs of recruitment and employment of new staff on either a temporary or permanent basis;

- (2) the cost of time spent by in-house advisors on ‘non-chargeable’ work such as administration tasks, file maintenance and time recording, legal learning and development, sharing expertise with colleagues and management activities, supervision and leadership of those carrying on litigation;
- (3) the cost of training to equip the CMA lawyers to enable them to assist with litigation; some of this training is provided externally through postgraduate qualifications or through training events at which outside speakers give talks on issues of immediate importance;
- (4) the cost of time spent by other lawyers and advisors (who are not included in the costs schedule) providing both case-specific input and general supervision and leadership; and
- (5) the cost of the risk taken by the Government when it self-insures its legal departments.

40. The CMA points out that the total amount of costs which it seeks to recover (£1,137,587.18) is lower than the costs recorded as having been incurred by Ping (£1,548,182.82) which demonstrates the reasonableness of the rates applied in the CMA’s costs schedule.
41. In response, Ping submits that the CMA has failed adequately to explain the 145% uplift or “*delta*” between the rates as calculated in its revised schedule and the GHRs claimed in the original costs schedule. Ping described Mr Jones’s evidence as “*thin gruel*”. It submits that some of the cost items referred to by Mr Jones to justify the 145% uplift, such as costs of training, were already included in the CMA’s revised hourly rates. Other cost items, such as the cost of a weekly meeting lasting one hour to discuss issues arising in practice such as Brexit, are relatively trivial. It submits that, unlike a law firm, the CMA does

not, by working on one case, forego the opportunity to earn money from other cases and the loss of opportunity does not translate into a right to recover costs.

(b) *The Tribunal's analysis*

42. It was common ground between the parties that the Tribunal is bound by the principle established in *Re Eastwood* and applied, that is to say:

(1) The approach to the assessment of costs is the same for independent lawyers as for in-house lawyers in that costs are to be calculated taking into account both the reasonable direct costs of doing the work and the cost of matters which cannot be calculated on an hourly basis.

(2) There is a presumption that costs calculated on this basis do not infringe the indemnity principle unless, in a special case, it is reasonably plain that the indemnity principle is infringed.

43. The dicta in *BT and others v Ofcom* on which Ping relied were *obiter*. To the extent that they suggest that the recoverable costs of an in-house solicitor are limited to direct costs, they were made without reference to or consideration of the principles in *Re Eastwood* and are inconsistent with them.

44. The essential issue for the Tribunal in this case is whether the disparity between, on the one hand (i) the revised hourly rates set out in the CMA's revised schedule representing the salary and overhead costs attributable to each individual working on the case and, on the other hand (ii), the GHRs claimed in the CMA's original cost schedule, which take into account other "imponderable" costs referred to in Mr Jones' evidence, makes it "*reasonably plain*" that the indemnity principle is being infringed.

45. The disparity between the two sets of rates (£317,695.70 versus £779,573.57) is, on the face of it, striking. The GHRs are higher than the revised hourly rates by a factor of 145%. It follows, on the CMA's case, that the bulk of the internal legal costs which it is seeking to recover from Ping are attributable, not to the time spent by the lawyers working on the case or to the overheads directly

attributable to those lawyers, but to other “imponderable” costs not directly connected with the case, such as general administration and training costs. The CMA has to assert that additional imponderable costs of this magnitude were incurred in order to explain the difference between the direct costs and the GHRs.

46. Consistently with *Re Eastwood*, the CMA has not embarked on a detailed investigation of its internal costs but relies on the presumption, supported by the evidence of Mr Jones, that its internal legal costs are approximately the same as those of an independent legal firm. Mr Jones, understandably, does not say that the CMA has actually incurred the costs claimed but it is far from clear how the cost of the types of activities described by Mr Jones, such as training and administration, fairly allocated, could be greater than the direct costs of the lawyers involved. The “uplift” of 145% sought by the CMA is to be compared with the significantly lower uplifts applied in the reported cases to the “A B” method of assessment when assessing internal legal costs (66% in *Re Eastwood*, 50% in *Leopold Lazarus* and 60% in *Cole*).
47. These considerations give rise to a concern that ordering payment of the CMA’s costs based on the GHRs would result in the CMA receiving more than the costs which it incurred in defending its appeal and therefore to an infringement of the indemnity principle.
48. That concern is not in itself sufficient for the Tribunal to conclude that this is a “*special case*” in which recovery of costs calculated in line with independent solicitors’ rates would infringe the indemnity principle. In *Cole* the Court of Appeal held that a “*special case*” would arise when a sum can be identified which is adequate to cover the actual costs incurred in doing all the work done. No such sum has been identified in this case: the Tribunal is not in a position to postulate an alternative uplift rate to apply to the CMA’s revised cost schedule. Any such rate would be completely arbitrary.
49. The policy justification for the *Re Eastwood* approach is that, whilst there may be uncertainty as to whether the indemnity principle is being infringed by an assessment of in-house legal costs on the conventional basis, attempting to

produce a comprehensive analysis of all the costs attributable to the work of in-house solicitors would entail an immensely complex investigation. The Court of Appeal in *Re Eastwood* took the view that embarking on such an investigation would be a greater evil than assessing costs on the conventional basis albeit with the attendant risk that the indemnity principle was being fortuitously infringed. It is for this reason that the Courts have consistently allowed in-house legal costs to be calculated at the same rate as external solicitors’.

50. The Tribunal, despite misgivings as to the CMA’s reliance on the GHRs, does not consider that it is so plain that the indemnity principle would be infringed by assessment of costs calculated on the basis of the GHRs as to require the CMA to carry out a comprehensive analysis and allocation of its internal costs. As was noted in by the Upper Tribunal in *Sidewalk Properties Ltd v Twinn* in relation to the assessment of in-house legal costs:

“... in almost all cases ... disbelief must be suspended and strained logic must be tolerated “for the merit of simplicity and of avoiding the burden of detailed enquiry”.”

51. In conclusion the Tribunal finds that, subject to the issue of reasonableness considered below, the CMA is entitled to recover its internal legal costs calculated on the basis of the GHRs as set out in its costs schedule.

D. REASONABLENESS

52. Ping submits that the CMA’s costs are excessive, for the following reasons:
- (1) The CMA’s costs exceeded its costs estimate in January 2018 by 20%. No good reason has been put forward to explain the excess. The costs estimate was prepared not that long before the trial. The CMA has advanced differing reasons to explain the excess.
 - (2) The number of individuals on the CMA team (twelve solicitors plus an economic adviser, compared with Ping’s team of six) and the hours they spent in total on the case (3,370 compared with Ping’s 2,400) was excessive.

- (3) The CMA seeks to recover £57,886 for the work of the Assistant Project Director, Ms Aspinall, even though she was in the position of client instructing the CMA legal team, equivalent to the Ping's client representatives whose costs were not sought to be recovered; she was also a witness of fact at the trial. No attempt has been made to explain what work she has carried out.
- (4) The CMA's claim to recover £94,746 in respect of the costs of its economic adviser is ill founded. These costs are not recoverable or, if recoverable, are disproportionate. The CMA submitted almost no economic evidence.
- (5) The CMA's costs schedule is so general and unparticularised that it was very difficult to scrutinise it properly.

53. In response, the CMA submits as follows:

- (1) The reason why its costs exceeded the estimate is that it did not fully anticipate the costs that it would incur to defend Ping's appeal. The estimate was produced before the CMA had filed its Defence and responsive evidence, before it had received Ping's further evidence in the Reply and before the number of witnesses giving oral evidence at trial was known.
- (2) Ping is incorrect to state that it had twelve solicitors working on the case. Five of the individuals were paralegals and the number of different individuals named reflects changes in staff over the course of the appeal. One of the remaining eight individuals was a legal advisor in the litigation group who assisted with discrete tasks relating to the preparation of the CMA's responsive evidence for a short time only. The other seven named individuals reflect an appropriate range of seniority and experience.

- (3) The difference in hours recorded by the CMA in-house team and those recorded by Ping's legal team can to some extent be explained by Ping's reliance on external advisers.
 - (4) Ms Aspinall was not a client and her involvement was not limited to being a witness. She carried out substantive work as a member of the team.
 - (5) It was appropriate for the CMA to obtain economic evidence to assist it in analysing the new material relied on by Ping the appeal and also to provide advice regarding the expert economic report put forward by Ping.
54. In the Tribunal's view, there is force in Ping's submissions that the hours claimed by the CMA are excessive and that there has been some overstaffing. The CMA has not explained satisfactorily the significant exceeding of its costs estimate. The total of 380 hours spent on attendances on Counsel, nearly 600 hours spent on attendances on CAT hearings and 2,223 hours spent on documents are, in the Tribunal's view, all unreasonably high. The claim in respect of the economic adviser is manifestly excessive, given that the expert did not prepare a report. The Tribunal agrees with Ping that the position of Ms Aspinall as Project Director and witness is different from that of the lawyers working on the case and that the sum claimed in respect of her time should be reduced. The schedule provided by the CMA is not detailed but it is sufficient to enable the Tribunal to carry out a summary assessment.
55. Taking into account the points mentioned above, the Tribunal summarily assesses the CMA's internal legal costs in the sum of 70% of the sum claimed (subject to the 10% reduction referred to above) (i.e. $70\% \times \pounds 701,617 = \pounds 491,132$).

E. PING’S OBLIGATION TO PAY THE PENALTY IMPOSED BY THE CMA

56. Ping’s obligation to pay the penalty imposed by the CMA was suspended as a result of its appeal to the Tribunal by virtue of sections 37 and 46(4) of the 1998 Act. Following the dismissal of Ping’s appeal, the CMA seeks an order that Ping pay the penalty, as varied by the Tribunal, within 28 days of the order. The CMA also applies for interest on the penalty.

57. Pursuant to Rule 105 of the Tribunal Rules, where the Tribunal confirms or varies any penalty under Part 1 of the 1998 Act, it may, in addition, order that interest be paid on the penalty from such date (being no earlier than the notice of appeal) and at such rates as the Tribunal considers appropriate.

58. The Tribunal’s Guide to Proceedings 2015 states that:

“8.13 The Tribunal considers that appeals under the 1998 Act should not be brought merely to delay payment: an undertaking upon which a penalty has been imposed in respect of an infringement of the 1998 Act and which obtains the automatic suspension of the obligation to pay the penalty by appealing to the Tribunal, should not obtain any benefit from the delay inherent in the appeal process.

8.14 [...] The rate of interest which the Tribunal will normally apply is the Bank of England base rate plus 1%, although that presumption can be displaced in an appropriate case where evidence is adduced showing that such a rate would be unfair to one party or the other.”

59. The Tribunal’s normal approach is therefore to award interest on penalty at 1% above the Bank of England base rate, from the date on which the appellant would have been obliged to pay the penalty, but for the appeal, until the date of payment of judgment under section 37 of the 1998 Act: see *Napp v DGFT* [2002] CAT 13 at [13]-[16], *Aberdeen Journals v DGFT* [2003] CAT 13, *Apex v OFT* [2005] CAT 11 at [23], *Price v OFT* [2005] CAT 12 at [18], [24]-[25], and *National Grid v GEMA* [2009] CAT 14 at [229].

60. In my view, the approach taken in the cases cited at paragraph 59 above is also relevant here. I therefore award interest on penalty at 1% above base rate from 25 October 2017 until the date of payment of the penalty or judgment under section 37(1) of the 1998 Act.

F. CONCLUSION

61. In light of the above reasoning my decision is as follows:

(a) Ping to pay the CMA the sum of £813,345 in respect of its costs (internal costs of £491,132 plus disbursements of £322,213), such payment to be made within 28 days of the date of this Ruling.

(b) Interest on the penalty shall run at 1% above the Bank of England base rate from 25 October 2017 until the date of payment of the penalty or judgment under section 37(1) of the 1998 Act.

Andrew Lenon Q.C.
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 6 March 2019