IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1142/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 July 2011

Before:

THE HONOURABLE MR. JUSTICE ROTH
(Chairman)

MICHAEL DAVEY
DR.VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Applicants

– and –

OFFICE OF FAIR TRADING

Respondent

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Mr. Paul Harris QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

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

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H E A R I N G

THE CHAIRMAN: We have been given a confidential copy of the OFT's submission but, as we understand it, the only thing that is said to be confidential are the actual total figures claimed as costs by the parties and ingredients therein and nothing else is confidential, and so I think we will avoid mentioning particular figures, that is our understanding of it, but apart from that we have no problems over confidentiality.

MR. HARRIS: Sir, thank you, yes. As regards confidentiality, I do propose at one point to mention our total costs figure (that is to say Hays'). I shall be making a short submission in due course. We do not regard that as confidential vis-à-vis the world – I appreciate this is an open hearing. However, I hope the Tribunal received an updated letter; there is a short passage on p.8 of the reply skeleton that we submitted containing one matter that does remain confidential.

THE CHAIRMAN: I am not aware of that so can you just take me to the passage?

MR. HARRIS: Yes, in the document entitled "Appellants' Further Submissions on Costs", that is on p.8 at para. 21(vi). In the middle of that indented citation from Mr. Venables ----

THE CHAIRMAN: "It may …"

MR. HARRIS: "It may …" until the next set of ----

THE CHAIRMAN: Yes, I have seen that.

MR. HARRIS: That should not prove a problem because first of all we are all now alert to it and I shall only make passing reference.

THE CHAIRMAN: Yes.

MR. HARRIS: In terms of other housekeeping matters I hope, Sir, members of the Tribunal you have the cross-application. Then there was the OFT's skeleton argument, and then there was the document we have just been to, namely "Appellants Further Submissions on Costs", so that is the full set of written submissions.

THE CHAIRMAN: Yes, and there is your summary schedule of costs.

MR. HARRIS: Correct. I hope you have an authorities bundle?

THE CHAIRMAN: Yes.

MR. HARRIS: Plainly the underlying judgment we will need to refer to and I hope that will be sufficient. I was informed that the Tribunal had at least available to it should it be necessary the underlying pleadings such as the notice of appeal, but I for my own part do not propose to ----

THE CHAIRMAN: And the witness statements.

MR. HARRIS: Precisely. Those are the only remarks I have by way of housekeeping.

THE CHAIRMAN: You will have received our timetable.

MR. HARRIS: Yes, I do not anticipate any problem with that, Sir, at all, especially in light of the Appellants' further submissions which were deliberately put in to cover the territory. So unless there are any preliminary queries, by way of introductory remarks ----

THE CHAIRMAN: Apparently there is a problem with the microphones. The transcribers are not hearing and we have been asked to rise for a couple of minutes. If it is not sorted out we will just continue because we do not need a transcript. We will rise for five minutes.

(Short break)

THE CHAIRMAN: You may have been told this, the microphones are not working and there is a small tape recorder. We have been asked to speak up!

MR. HARRIS: Yes, I will keep my submissions brief in accordance with the Tribunal's directions in its letter. It is a pleasure to be here again making these submissions almost a year to the day after the trial in the last week of term last year. You will know from our written submissions, Sir, members of the Tribunal that we are here to claim a high proportion of our costs of that hearing a year ago. We say in essence that we vindicated our rights as regards the penalty to the tune of some £25 million. We believe that to be the biggest ever costs victory in terms of reduction in fine in the Tribunal. Of course, a reduction in our penalty of that magnitude was our target. You have no need to turn it up but it is no accident that the very first paragraph of our skeleton argument in the trial read that:

> "We present this appeal to the Tribunal in an effort to correct what Hays regards as a serious injustice in the penalty which had been levied upon it by the OFT."

Then at the end of the introduction to the skeleton again we return to that theme by saying that:

> "The overall outcome of £43.3 million has lost touch with proportion and reality. The Tribunal is invited to bring the penalty down to a realistic, proportionate level in accordance with the detailed grounds of appeal presented below."

It is important as well to recognise that Hays always appreciated that it had committed unlawful behaviour and that there would be a fine. There was bound to be a fine of several million pounds, so when it talks about bringing the fine down it does not mean to zero, it means what it says, namely to a realistic proportionate level. Indeed, if the Tribunal has had the opportunity to read the witness evidence of Mr. Lawrence filed in support of the original costs application – again no need to turn it up – you may recall that in para. 5 he says that he had indicated at the time that something that led to an overall fine in the region of a few million pounds would be reasonable and proportionate. He goes on in para.8 to say:

"I have no doubt that had the OFT taken the approach that the Tribunal took on the appeal, the case could no doubt have been settled without any need for any appeal at all."

The point there being that we set out to achieve a very significant reduction in fine but one that would leave at least several millions and, of course, that is exactly what has happened. We say, with great respect to the Office of Fair Trading that it is frankly churlish not to recognise that as being a victory. That is what we set out to achieve and that is precisely what we achieved. We say that amongst all the matters that the Tribunal has to consider for the purposes of this costs application the fact that we achieved completely the aim that we set out to achieve is the single most important determination, i.e. who won? We actually say it is also fairly straight forward on the facts of this case – in some other case it may be difficult but not in this case.

We then go on to say, as you will have seen in the written submissions that having determined, with respect we say with relative ease, who won, the standard and traditional costs approach should then be taken, namely that subject to other relevant considerations that I certainly do not lose sight of like reasonableness and extent of victory, irrelevance or any of those other things, the normal rule should apply: namely costs follow the event. In that regard, if I may invite you to take up ----

THE CHAIRMAN: This is going to the OFT's primary argument that there should be no order for costs – the point you are making?

MR. HARRIS: Yes.

THE CHAIRMAN: I do not think you need address us on that at this stage, we will wait and hear the OFT's submissions, you can save that for reply.

MR. HARRIS: I am very happy to do that. In those circumstances, Sir, I will shorten what I was going to say at this stage, reserve it to the reply, and in that context I was going to develop the difficulty the OFT faces in reliance on some of its cases, the so-called Ofcom cases and the case of *Booth* but I can keep that to reply.

We say that the correct approach is that costs should follow the event, but we do not say that that is a rule that is set in stone or immutable, and it is certainly not the only relevant consideration, just as in the High Court it is not set in stone or immutable. Nevertheless, we say that it is of extremely high relevance in this case because of the sheer scale of the victory. In achieving that victory – again a critical component of my submissions – is that Hays had to expend significant legal resources. We could only vindicate our rights, as I put it, to the tune of £25 million having spent a significant sum to get there, and that is a central

concern and effectively why the rule is as it is – you follow the event but you had to pay to get that event. It is not fair if, having achieved the event you do not get your costs as a general starting proposition.

What I would like to do now, Sir, if I may, is just to remind the Tribunal as to certain aspects within the judgment of this Tribunal on the substance.

THE CHAIRMAN: On that basis that you have outlined the question then is what proportion ----

MR. HARRIS: Precisely.

THE CHAIRMAN: -- and what extent?

MR. HARRIS: Yes.

THE CHAIRMAN: And that is then what we are concerned with and we would like your help on, and whether certain elements that have been challenged by the OFT, and there are two in particular, should be disallowed.

MR. HARRIS: Precisely, Sir. What I am going to do now is to take the first point, by far the most important: proportion. We start by looking at the Judgment because partly I want the Tribunal just to refresh its memory as to the proportion of the Judgment and also certain parts within it. Then I am going to make a series of submissions expressly in support of the 80 per cent that I invite you to award.

THE CHAIRMAN: Yes, we have all re-read the Judgment.

MR. HARRS: I am grateful, in that case I will take it quickly. The first paragraph of the Judgment is para. 37. This is the Tribunal concluding (and I am picking up four lines down) on any view it was a wholly disproportionate penalty. That is talking about the 116 million for Randstad and unsurprisingly, as the Tribunal said, it was not appealed. But the very same approach and methodology was applied to Hays, and two lines from the bottom the Tribunal said it was “clearly too high”. That is relevant, we say, before I turn to the 80 per cent because under the case law this Tribunal is entitled, and I would invite it to take account of the question of reasonableness when it comes to assessing the proportion. It is not an exact science, the 80 per cent, or 70 or 90 whatever the case may be, but it can be shaped and it should take shape within the context of the reasonableness of the parties’ approach to the litigation. We say that para.37 is really rather stark. This was a case that was clearly wrong, wholly disproportionate and, nevertheless, the OFT proceeded to defend on all the grounds in great detail as we shall see in a minute, albeit quickly, an outcome that was clearly and wholly disproportionate and manifestly too high. We say that by itself is not enough, I would accept to get me over any submission about lack of reasonableness. However, it is aggregated in this case by two factors that I would invite you to expressly

take into account, and notably the OFT has not addressed these at all in its lengthy written submissions.

The first factor is that we, Hays, as it happens alongside the other appellants, made very significant and detailed submissions expressly including gross/net at the administrative stage. You do not need to turn it up, but in the costs application we have included the written submissions by Freshfields at that stage, at B5, and by just flicking through it you can see it is a very significant document, very worked up.

As regards gross/net I was familiarising myself again with it over the weekend, we take every single point in that document that we then took in the appeal and we then added, by way of expert evidence to the appeal, every single point, all of which the Tribunal has agreed with in the Judgment. We say it makes it more unreasonable than it would otherwise be for an OFT to fight on every point on a gross/net issue that was subsequently proven to be completely wrong and that led to a very significant over penalisation, that we made all of those points in detail at the administrative stage and they were all dismissed. It does not end with the question of the costs. I should add, of course, that in the background this was an expensive document to produce. So there is no suggestion that Hays will ever get back its costs of expenditure on legal fees at the administrative stage and yet that, in my respectful submission, should not be overlooked when it comes to assessing the reasonableness of the proportion that Hays seeks of its costs that it is potentially capable of recovering before the Tribunal.

The second factor, which I say takes this case out of the ordinary – so in addition to the full submissions at the administrative stage – is the evidence of Mr. Lawrence, namely that, we say reasonably and properly, Hays made express approaches to the OFT to settle this case for, to quote his words, "in the region of several million pounds", which is what we ended up with. Again, no response from the OFT on that. Those approaches were rebuffed, and what we say is again, in the round, that is a relevant consideration because of course, had the case been settled for the several million of pounds that it ended up being we would not be here at all today and neither party would have had to have expended all its legal resources, whatever those figures may be.

In a moment, as I say, I am going to address you as to why it should be 80 per cent that we ask for, but part of the complexion for that 80 per cent is that the Tribunal, we respectfully urge, to err on the side of, if you like, for lack of a better phrase, generosity as to proportion in favour of Hays, bearing in mind para.37 – the OFT got it very badly wrong, the fact that we had to spend a great deal of money on admin stage submissions which subsequently

proved to be right, but we can never recover those costs; and thirdly, because we ought not to have had to spend any money at all if the OFT reasonably had accepted the settlement overtures and approaches. That is the overview.

In terms of two specific issues within the Judgment, there is the gross/net issue. Given that the Tribunal has recently re-read this, the Tribunal will be familiar with the fact that gross/net starts at para.39 and then goes on for some 21 paragraphs. Within those 21 paragraphs the appellants and Hays succeeded on everything except two. There were a whole number of sub-issues there, for example, *Endesa*, for example, sub-contracting, for example, the relevance of other measures of profit and the examples go on and on and on.

THE CHAIRMAN: Two you did not succeed on?

MR. HARRIS: Yes, the two sub-points within it are an aspect of the expert evidence, the paragraphs are 42, you did not agree with the Hays and Eden Brown submission regarding definition of applicable turnover and amounts derived from, and we accept that, but you can see one paragraph within the 21.

THE CHAIRMAN: That is the one issue, and the other one ----

MR. HARRIS: The other one, my note says paras. 58 to 59 ----

THE CHAIRMAN: Yes, that is the general accounting.

MR. HARRIS: It is an aspect of the expert accountancy evidence, but it is not the only aspect. So within the 21 paragraphs two deal with items that we did not – two sub-points within the overall argument where we of course won completely, or won, two of those 21 we did not. It is true that one part of it related to expert evidence, but it is also true that one of the points that we specifically did win on at para. 45, that the Tribunal concluded "in our judgment strongly supports the use of net fees" is the joint statement of the two expert accountants, which is set out in para.45.

THE CHAIRMAN: Well we drew on that as support for it.

MR. HARRIS: Yes.

THE CHAIRMAN: Not because the OFT's expert accepted that, it was not explained in your expert report.

MR. HARRIS: No, I accept that. But what I do strongly urge upon the Tribunal, and bearing in mind that Hays does accept that there should be a discount to the fees that it is seeking, is to say that within the context plainly of very relevant argument upon which Hays won, to the tune of many, many millions of pounds, and of all the sub-points of which there are some eight or nine that I have marked in the various different paragraphs, there were then another two sub-points where Hays did not succeed. Well that is in the nature of presenting

different ways of putting a main point – there were often nuances and sub-points. Of course I accept that one of the sub-points had an extra level of expense attached to it, namely, expert evidence, but I would say to this Tribunal that if and insofar as any of that was unreasonable, which of course I would not accept, and I do not think the OFT has ever accepted that its expert evidence was unreasonable, but if and insofar as there is any point about excessiveness then that is for the costs judge.

THE CHAIRMAN: I am not sure it is, because it is for us to disallow heads of costs. A costs judge will look at hourly rates and so on, but in terms of a decision on the issue that has been raised, namely whether Hays should recover the costs of its expert evidence or not, we regard that as a decision for us.

MR. HARRIS: Well I will address that straight away then, Sir. The first point is the OFT have not made that submission but be that as it may. The second point is whether they do make the submission that it should be disallowed or not we would resist on the grounds that the only proper basis upon which you could disallow a whole head of costs would be if that head of costs was somehow improperly incurred.

THE CHAIRMAN: If it is an issue or an aspect of evidence that was unsuccessful or irrelevant why should we not disallow it?

MR. HARRIS: I will take those in turn. The "did not succeed" point first. That should properly be reflected in the discount to the costs that are awarded, in my submission.

THE CHAIRMAN: But if it is a specific head of costs that is wholly related to that and your expert was asked to address two issues, and those are the two issues that you have identified, very properly, where one of them fell and the other one we said it is irrelevant and unhelpful, and those were the two matters that your expert was instructed to deal with.

MR. HARRIS: Yes, but it is also fair to say that, for example, in para.45 of the judgment the expert corroborated, and this Tribunal found that strongly supportive of, aspects of the other arguments that we are making on this same ground. It was part of a piece, in our submission. Yes, we do accept that some parts of it were found to be neither here nor there by the Tribunal, but it is illustrative, in my submission, of the fact that nobody at the time of the trial or leading up to it said, "Hang on a minute, this is irrelevant, it should not be being adduced".

THE CHAIRMAN: I did question at the CMC why expert evidence was needed, and I was told that the argument would be run that under accounting principles the appellant could have shown its turnover in its accounts on the basis of net fees. That is why expert evidence was being introduced, and indeed that ----

MR. HARRIS: That is what we sought to do.

THE CHAIRMAN: -- you sought to do.

MR. HARRIS: As it happens, we did not succeed in persuading this Tribunal that that was right. That is inevitable in litigation.

THE CHAIRMAN: It is not inevitable that you have an expert with a whole and discrete set of accounts on something that is unsuccessful but you nonetheless include it in the pot costs that you recover.

MR. HARRIS: Let me address that, Sir. It would be different were this a case in which the OFT had also said at the time of the case management conference – which was open to them and which would have been consistent with, we say, the somewhat fortuitous submission that they now find themselves to make on this aspect – "Actually, we agree, we agree with the indication of the Tribunal, it is not relevant, we do not see how it is going to assist", and either invite the Tribunal to disallow it there and then, which was something that was open to them, and indeed was open to the Tribunal irrespective of whether the OFT took the point. They did not do that. Not only did they not do that, but they then sought to engage every single step of the way with the main points and the sub-points to the tune of supplemental reports and extra reports on this issue. That can not have been, Sir, on the basis that they considered that, albeit they always considered the argument to be wrong, to be misconceived and irrelevant. That was never a submission of the OFT. So we say, Sir, there is a danger of acting with the benefit of hindsight if, having reached the end of the case, it is ultimately found that a sub-point is not terribly helpful. It would be unfair, with the benefit of hindsight, to disallow that altogether when all the parties were proceeding on the basis that that was a relevant part of the case.

I should add to this, and this is picked up in the written submissions, and I will happily turn up the case if you like, but in the *RCA* case, as Sir Colin Rimer there said, it is open to the OFT to protect itself, or seek to protect itself, by relevant case management decisions. There was no sense or time at which the OFT said, "Hang on a minute, come what may, we never want to pay any experts' costs". If it had taken that view there would have been two things it could have done, or should have done. One is to seek an order from the Tribunal, and secondly, it could have not adduced any expert evidence of its own. It is simply not right for the OFT to say, as it does in its written submissions, that they had to adduce expert evidence and go to all that expense. That is not right.

If you have the courage of your convictions you say that it is irrelevant, it is not going to help, then you do not adduce evidence. That would have left Hays out on a limb. That is not the way this progressed, Sir.

I would go on to say that, as a matter of principle, in any event, it would be unfair, particularly given that the costs judge can look at the magnitude of AlixPartners' fees and, for the sake of argument, say, "That is a bit too high", or, "That one has gone a little bit astray somehow", particularly given that he can and will do that in this case as necessary. The proper approach, as a matter of principle, would be for the Tribunal only to disallow something where it has been not lost, where that can be reflected in a deduction of the proportion, but that it has been misconceived or unreasonable. That, I would accept, is a principled approach. There is no basis for saying that it was misconceived or unreasonable to have adduced the evidence. It is just that ultimately we did not seek to persuade you on the back of it. That is not unreasonable or misconceived, and the OFT has never suggested otherwise. Of course, the litmus test there is that if it was misconceived and unreasonable then the OFT is every bit as guilty as we are, because they adduced the self-same amount of expert evidence that we did. They brought their expert to the Tribunal and I cross-examined him, and vice versa. Nobody at any point said, "Hang on a minute, this is a waste of everybody's time and money".

That is what I have to say about disallowance. Going back to the judgment, there are these 21 paragraphs, only two of which do not hit home, but the rest hit home to the tune of many millions of pounds. That is on gross/net.

The next issue on p.22 of the judgment does not pertain to Hays. That was the relevant year of turnover. I will come back to the seriousness percentage, because it would be obviously unfair for me to skip what we lost. I will come back to that, but I will just skip over that for a moment to MDT. That starts on p.29. Again, we do not need to go through the detail, but suffice it to say that when one does re-read it, of course Hays won on every single point – every single point on MDT. By my reckoning that was 23 paragraphs. So just on a ready-reckoning approach, which is the only one realistically available to us, that is some 44 paragraphs of the part of the judgment dealing with substantive legal submissions. That deals with gross/net and MDT.

Then it is fair to say that we did lose on three grounds. If you want to note them they are senior management – that is four paragraphs between 118 and 121; compliance – that is seven paragraphs starting at 123, so it must go up to 129; seriousness – nine paragraphs between 71 and 79. Just on a ready-reckoning approach that means that in the judgment

alone on the grounds where Hays won that is some 44 out of 64 paragraphs, which is just a touch under 70 per cent of the judgment.

This is the first of my submissions wherein I seek to persuade you that the 80 per cent that we seek is a reasonable figure for you to come to, particularly bearing in mind my starting submissions about how the context of your percentage assessment should be partly shaped by the lack of settlement and the costs of the admin stage.

THE CHAIRMAN: Doing it on the basis of the paragraphs in the judgment, where does one put Atkins?

MR. HARRIS: Atkins did not take any ----

THE CHAIRMAN: One sentence of the judgment, but that is because it had been abandoned. It had been run as a point. A witness statement was put in, the OFT had to defend it.

MR. HARRIS: Strictly speaking, no, Sir. What happened was Atkins was raised in the notice of appeal. The OFT defended, but defended on the basis, "We got it right in the decision", and that was it. There were no further costs. Before people started to gear up for the trial, that case was abandoned because we came into possession of some more evidence.

THE CHAIRMAN: Can you help us, when was it abandoned? What was the date when it abandoned?

MR. HARRIS: I can find that out, Sir, and let you know. It may be that we can do that during the course of the hearing. I do not know, I am afraid.

THE CHAIRMAN: Presumably there was a letter to the OFT from Freshfields.

MR. HARRIS: There must have been.

THE CHAIRMAN: It should be on Freshfields' file, so perhaps you can let us know.

MR. HARRIS: Yes. Of course I do not overlook, and indeed our written submissions acknowledge, that Atkins was another ground of appeal that did not succeed, albeit *sui generis*.

THE CHAIRMAN: It does not really come into your 70 per cent, it has got to be netted off, and taken down to reflect that, because obviously costs were incurred on it.

MR. HARRIS: I accept that. I would say minimal, but nevertheless ----

THE CHAIRMAN: One witness was largely Atkins and the balance was, I think, Mr. Cheshire. So all the costs of that witness were unsuccessful. That is the difficulty of doing it by paragraphs.

MR. HARRIS: Sir, I put it like this: all of these, as in the recent case of *Durkan*, that you will have seen referred to in my skeleton, are ready-reckoners, precisely because we are not dealing in either detailed assessment or specific allocation of costs to issues. What you are

about to hear from me by way of submission are a series of other ready reckoners, because it is incumbent upon me to persuade this Tribunal that the 80 per cent that we seek is a figure reasonably open to you. So the first one is a ready-reckoner, and no more. It was just under 70 per cent of the substantive legal paragraphs in the judgment.

Let me put it like this: that at least, we would say, would give some comfort to the Tribunal that when we say a high percentage interest à la 80, that is not against the background of that having formed some insignificant part of the Tribunal's deliberations and hence its judgment. Quite the opposite; we would say it is strongly supportive, not the exact percentage, but nevertheless strong supportive.

It does not end there because we have done a similar exercise with the transcripts, and I am plainly not going to go through them, but my instructions are that of the four day hearing – and this is necessarily a little bit more approximate, because sometimes different things come into a day's transcript – it was 265 pages out of 380 pages, which is 70 per cent. If one has regard to Hays' skeleton argument for the trial, that is ----

THE CHAIRMAN: So 265 pages are on the issues on which you succeeded?

MR. HARRIS: Yes, gross/net and MDT. We would say it is no accident that the Tribunal's judgment is broadly 70 per cent on those issues when broadly 70 per cent of the hearing was on those issues. Again, it is no accident that 75 per cent of Hays' skeleton argument for the trial was devoted to MDT and gross/net. If you want the figures, it is 40 pages out of 54.

In fact, even more revealing is that nearly 80 per cent of the OFT's skeleton argument for the hearing dealt with MDT and gross/net. That is 27 pages out of 35.

So again, just a series of ready-reckoners, just to give some flavour and to bring back to the Tribunal what this trial really focused upon.

It is also relevant – this was a factor expressly relied upon in *Durkan* – to have regard to the legal citations within the grounds, because of course that takes up more time and tension.

The Hays' notice of appeal refers to no case or legislation at all in relation to senior management or compliance, which were grounds that we lost. In contrast, the gross/net and MDT grounds referred to more than ten cases, and nevertheless cited a series of extracts from legislation, not limited to competition, you will recall, but also to human rights and to criminal law, at least one of which criminal law cases was cited with a degree of approval by the Tribunal.

So what I am saying is that there was an added degree of complexity and legal submissions on the ground that we did succeed upon as compared to the ones where did not. Again, a ready-reckoner, I put it no higher than that, but on the basis of my instructing solicitors'

research, less than 10 per cent of the content of the witness statements and expert reports dealt with the compliance and senior management issues ----

THE CHAIRMAN: That is witness statements and expert reports?

MR. HARRIS: Yes, witness statements and expert reports.

THE CHAIRMAN: You would not expect the expert report to deal with it at all.

MR. BEARD: I am sorry, there is just an issue arising here. There is an awful lot of evidence being given about the analysis of documents and witness statements and transcripts. When Mr. Harris comes to the counting up of paragraphs in the judgment we can follow it, but all of this material is new. It is rather difficult for us to even begin to comment upon it apart from saying, "This is not the way to do it". That must be a concern for the Tribunal. If Mr. Harris is going to rely on this sort of analysis, it is only proper that we should have been able to see it beforehand.

THE CHAIRMAN: I think as far as time spent in the hearing, we have got a pretty clear idea. Whether it was precisely 70 or 68 per cent ----

MR. BEARD: I resisted standing up at that point, because of course the Tribunal was here, it heard the material. When we get into a division of how the witness statements and the expert reports were deployed, that is a matter that they should have dealt with sooner and given to us.

THE CHAIRMAN: Would it not have been helpful to have written a letter and put it one of your two rounds of written submissions?

MR. HARRIS: Sir, I take that point as regards ----

THE CHAIRMAN: We are not going to stop you. Your basic point is that, looking at a variety of different measures, it is between 70 and 80 per cent on the two big issues?

MR. HARRIS: Yes, and I certainly take the point about content of witness statements, but the other points are not unfair in the slightest. Indeed, the OFT itself has gone through the skeleton and notices of appeal and said, "There were so many issues and we divide them up in this way". It is not beyond my learned friend to look at the number of pages in the skeleton arguments.

THE CHAIRMAN: If between 70 and 80 per cent are on the two big issues, how does that get you to 80 per cent of your costs?

MR. HARRIS: Sir, what we say is that the traditional and standard approach where one does not win all the issues that one runs is to discount by a proportion. What we say is that against the background of the points that I began with, the para.37 and the two others, and then one has regard to the fact that approximately 70 or 80 odd per cent of all of these broad brush

issues were issues upon which we succeeded, then that should translate into 80 per cent of the costs in what we say is a standard way.

THE CHAIRMAN: I can see that if we make cross-costs orders. They are generally out of favour and we would be most disinclined to do that. What you are saying may also take a generous view and point to 80 per cent of Hays' costs against the OFT and 20 per cent of the OFT's costs against Hays, which we would then have to net off. I do not see how it ends at 80 per cent of your costs in a single costs order.

MR. HARRIS: I understand that, Sir. I also accept that there is obviously a degree at or around what we say is the appropriate level where the Tribunal may say, à la *Barclays*, this is a good case in point, "it does not reflect sufficiently well on the Regulator's side that the appellant, who basically won the case, actually did not succeed and the OFT went to some costs in defending the issues upon which it succeeded in its defence". I would accept that there is a set of figures there where it is open to the Tribunal to say, for example, if you did not like the 80 per cent reason then it could be down to 75 per cent or 70 per cent, or something like that. I do not resile from that. I do say that it should be in this upper bracket of percentages for the reasons that I have given.

I would also remind the Tribunal – and this has been noted as the Tribunal will know in several cases – that the counter-costs, as to which we have no actual evidence, will be notoriously very much lower than the costs incurred on the appellant's side. That has been expressly reflected in at least two Tribunal judgments that are in the authorities' bundle.

Therefore, I would urge the Tribunal to exercise some caution in further discounting below whatever the Tribunal comes to as the appropriate percentage of win, if you like, by reference to the OFT's costs as if it were a commercial party when it obviously is not. In this case, it is not only the usual reasons about having in-house counsel and heavily discounted external barristers, but there is the additional point that on the MDT the OFT, of course, was able to share those costs very much across not only the other two CRF appeals, but the 25 construction appeals. So it would be, in our submission, grossly unfair to think that that is not a relevant consideration.

Just in terms of the 80 per cent and conscious of time moving by, I would just remind the Tribunal that the OFT itself has stated at para.45 of its costs submissions that, "a significant proportion of the costs of the proceedings was attributable specifically to that issue".

THE CHAIRMAN: Yes.

MR. HARRIS: Moving on for perhaps another five minutes or so, the OFT has taken a particular point in its skeleton about the appeal procedure and the handling of the appeals, we say,

with respect, that that is a misconceived to suggest that the way in which the appeals were handled and progressed is something that should now be held against Hays.

THE CHAIRMAN: You need not address that.

MR. HARRIS: The double effect point I have just debated with you, Sir. The disallowance we have already dealt with. The guidance to the costs judge: you have asked me, Sir, about the expert evidence ----

THE CHAIRMAN: Just one moment. Yes?

MR. HARRIS: I am happy to assist if there is any other area.

THE CHAIRMAN: The other point is why it was reasonable and proportionate to have an additional Silk just to argue the MDT point?

MR. HARRIS: The answer to that, Sir, we would say is twofold: the same point that I made earlier about the expert evidence which is that if there is something excessive about that then the costs judge can deal with it. I know that is not a full answer. We would also say that one very much has to view the reasonableness of the decision to instruct Lord Pannick against the context of the situation in which Hays found itself. One of the reasons why we cited in our appellant's further submissions the paragraph from Mr. Venables' evidence which includes that confidential passage in the middle, it is p.8 of my written submissions, as we noted in the notice of appeal, it had caused great consternation in the market ----

THE CHAIRMAN: We can understand why Hays wanted leading counsel, unlike CDI, and it was facing a large penalty, the question is why it needed two leading counsel and why a point which does not involve particularly abstruse areas of public law, is there any reason to think it could not have reasonably have been argued by Mr. Brealey.

MR. HARRIS: The decision to instruct was critically informed by the fact that it was announced to the market that Hays had been fined £43.3 million, albeit then discounted by leniency, and the uncontested evidence of the very senior executives, and you will recall that it was not just the finance director who came to give evidence, but the Chairman, and you will recall perhaps Mr. Lawson's evidence was that this was a blue chip company that had an almost unparalleled reputation for integrity and that it had blown a hole in that reputation and shocked the senior executives and sent a very damaging message to the market, as Mr Venables said. This was against the background, you may recall in his evidence, that he is the interface with the investors and the market. He does the market calls and he meets the investors and he travels round the world meeting these people. He had been told that Hays was regarded as having committed one of the most serious offences ever investigated and that several – I interject some words here, but I am sure this is in the statement and is

certainly what he said – he had been told by some of his clients that they thought that Hays must have engaged in a criminal offence. That is why it leads to the confidential bit.

It was against the background of that level of concern for a company of that type for whom this was a hitherto completely unrecognised type of behaviour – as you know, we have always contended that it was Mr. Cheshire acting in many ways on a frolic of his own and he was subsequently got rid of – against that background and with the number in question, the number is critically important, this was a fine of tens of millions of pounds, and it came, if you will recall, sir, against the background of the construction appeals that the highest fine, even for massive multi-nationals like Kier and people like that, was very significantly less than the one that appeared one week later with Hays' name attached to it. We say that it is no accident that in those circumstances, with this sort of market reaction for a plc, that company should treat it with the utmost seriousness and wish to devote to it the best legal resources that it thought were available. That is the background to the decision to instruct Lord Pannick.

It is also relevant to say that it came, frankly, as a surprise to Hays that the OFT had not sought to take the MDT issue further. We say that for two reasons: one, because we sought to dissuade them, even at the administrative stage, from imposing a deterrence uplift. Secondly, the OFT's case was always, "We have got a precedent here, MDT has been determined by the Tribunal, we rely upon it".

Also, because they fought, with respect to them and I am not saying there is anything improper in this, tooth and nail on all of the MDT points. That whole list of 23 paragraphs, this Tribunal had to deal with all of the sub-points because the OFT contested every single one.

My submission is that it was reasonable in the context of the case in which we found ourselves gearing up for the trial, and bearing in mind that we thought there was every prospect that this issue at least would go further, to have on board a pre-eminent counsel. Of course, he only came on board for that issue.

Again, I would go back to, but without repeating myself, the submissions from before that it would be different if it was completely inexplicable why Lord Pannick was instructed or it was misconceived, or that it was improper or unreasonable.

THE CHAIRMAN: There is nothing improper in the least. Hays is, of course, entitled to instruct as many Silks as it like. It can have three Silks. The question is whether it is reasonable and proportionate such that the other side, when you are successful, should bear the burden of those costs. That is the question.

MR. HARRIS: Sir, I do not think that I can take that any further. It was reasonable and proportionate for the reasons I have given in the circumstances of this case.

Sir, I think the only other matter that I wish to just draw to your attention is in the OFT's skeleton, which is p.2, and to p.4. They identify what they call five main points. I just invite the Tribunal to note that points 2, 3 and 4 are irrelevant for today because they are all points about alleged excessiveness of the fees. That is para.6, 7 and 8.

THE CHAIRMAN: Point 4 is partly the one we have just been discussing.

MR. HARRIS: Yes, and point 1 is factually wrong because it says in the third sentence:

> "The OFT incurred significant costs in resisting the appellants' cases on these issues but the applicant's submissions deliberately ignore those costs."

THE CHAIRMAN: You are not seeking to claim all your costs, you have made it clear both in writing and today.

MR. HARRIS: Point 5 is the point about public interest and the points that my friend Mr. Beard is going to develop and I shall reply. Unless I can assist you further ----

THE CHAIRMAN: Yes, if you can turn to your summary schedule of costs, we are concerned with the costs of the appeal. Can you help me, on p.4, "1st December 2010 to 21st March 2011, preparing for and attending judgment hearing". I am puzzled by that. You were not there, Mr. Harris, I was. As I recall, there was no one from Hays' legal team at the judgment hearing except possibly a clerk, but I thought it was a barrister's clerk. It may be that there was a trainee. It was a hearing that lasted five minutes.

MR. HARRIS: Sir, may I take instructions. (After a pause) Sir, my instructions are that it is perhaps not most happily phrased in the sense that it did not mean attending judgment – i.e. sending counsel or a solicitor into the room at the handing down judgment ----

THE CHAIRMAN: It says "attending judgment hearing".

MR. HARRIS: Yes, but, as I say, my instructions are that that is ----

THE CHAIRMAN: It is a mistake.

MR. HARRIS: It is a mistake. What in fact happened was physical attendance did occur at the Tribunal, but I understand outside the door in order to pick up the hard copy.

THE CHAIRMAN: That would be a secretary or something.

MR. HARRIS: In fact, it was Mr. Lawrence who attended. That is the context of there needing to be public announcements to the market given what had happened earlier. That picks up my theme from earlier about how important it was for a plc. The lion's share of the costs, I am instructed, are about considering the judgment and giving advice to the client, including of course as regards potential appeals on our part.

THE CHAIRMAN: That is not part of the costs of this appeal, what you might want to do as regards a further appeal.

MR. HARRIS: Sir, reading the judgment is, I would submit, an integral part of the outcome of the hearing about which we are arguing. Inevitably, in reading the judgment, one forms views and speaks to the clients about what one should do about the judgment.

I would accept, Sir, your point if it were preparing, drafting and consulting counsel for grounds of appeal or drafting a petition for an appeal. Sir, Mr. Lawrence helpfully reminds me that, of course, in a case like this, in common with many others in the CAT, there are issues of confidentiality.

THE CHAIRMAN: Yes, and then after that I think those are costs relating to costs, are they not?

MR. HARRIS: Yes, and depending on what happens, we would make costs submissions at the end of today.

THE CHAIRMAN: Yes, thank you. If you could give us the dates.

MR. HARRIS: We will do as soon as we can, Sir.

THE CHAIRMAN: Yes, thank you. So the heavily discounted barrister for the OFT!

MR. BEARD: I will not comment on the irony. The Office in relation to this costs application makes submissions in two parts. The first relates to the general approach to be adopted in relation to penalty appeals cases; and the second part of its submissions will deal with the particular facts and issues in relation to the Hays' case.

Turning then, first, to the general approach to be adopted, it is necessary to look at this in context. Unlike many regulators, such as Ofgem or Ofcom, the Office of Fair Trading does not have its principal functions set out in statute. It is absolutely plain what a key function is for the Office, enforcing the two prohibitions under the Competition Act. It is perhaps just worth recalling the opening words of the White Paper which preceded the enactment of the Enterprise Act. It was entitled ambitiously "A World Class Competition Regime". Its first chapter began with these words:

> "The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong unfettered markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central drive for productivity and grown in the economy and hence the UK's international competitiveness."

However, these sentiments in the White Paper, though worthy, are of limited value if the competition law regime does not bite. As Thurman Arnold, who was in the 1940s, the head of the US DoJ, Anti-Trust Division, said:

> "The maintenance of a free market is as much a matter of constant policing as the flow of traffic on a busy intersection. It does not stay orderly by trusting to the good intentions of drivers or by preaching to them."

The function of the OFT is not simply to preach, it is to act. It is to identify infringements and take decisions against undertakings who have infringed. It is only by doing so that that primary function of the OFT is achieved. Indeed, the OFT has faced criticism for not taking sufficient numbers of decisions over recent years. So it is key to understand that, in the OFT's role, it takes infringement decisions. Of course, if it does so, then under s.36 of the Competition Act it considers the imposition of a financial penalty. Those penalties are set having regard to the guidance that has been provided and in particular the seriousness of the infringement and the need for deterrence. After all, deterring future infringements forms part of that policing role the OFT holds.

Of course, the OFT is only one part of the competition enforcement system. The structure of the Competition Act is to enable appeals to be brought to this Tribunal. The Tribunal has a broad jurisdiction. It is not merely a matter of review, it is a matter of a merit appeal. That means that this Tribunal can decide that a finding of infringement is wrong and that a finding of penalty is wrong.

When it comes to a finding of infringement, there are effectively two dimensions to the assessment: has the OFT got the law wrong? Is its appraisal of the facts wrong?

When it comes to a finding in relation to penalty the situation is slightly different. There may be an argument about the law, but that would be likely to be more limited than in the infringement situation. There may be some argument about the facts, the underlying numbers which are fed into any penalty setting assessment. But most importantly, the assessment of a penalty is a matter of an exercise of judgement. There can be a wide range of different views about what the appropriate level of penalty might be. Saying that, it is important to be clear that the OFT is not implying here that the Tribunal is merely an administrative body. It is clearly not; it is a judicial body. It is, nonetheless, entitled to come up with its view as to the appropriate level of penalty, a different one from the OFT, and that is precisely what it has done in this case.

THE CHAIRMAN: It has done a bit more in this case. It is not saying, "We take a different view", it is saying, "The OFT made fundamental errors in the principle".

MR. BEARD: Sir, of course I understand and I am not in any way trying to gloss the judgment. In making these submissions I am making general submissions. I am trying to deal with this part separately from the particular circumstances of this case. I accept entirely that when one comes to consider costs one takes into account all relevant factors. The key point here is: where is the general starting point in relation to penalty appeals? One then feeds that into how one applies it in relation to this case. The point of course is well taken, Sir. The OFT may not agree with the Tribunal's approach in any particular case, but it accepts that that is the way that the statutory system works. In this case, of course, it is not appealing the Tribunal's decision. The key point is that in any case where an infringement has been found, it is being upheld, or, as in this case, the challenge was actually withdrawn. The OFT in this case thought the penalty should have been substantially higher. As you have said, Sir, the Tribunal disagreed cogently, clearly and said that two aspects in particular, the OFT had got matters really fundamentally wrong, as you have put it, and the penalty is now set as the Tribunal has set it. No appeal has been brought. The OFT does not just sit there blankly. In the light of the Tribunal's judgment in this case and indeed in the construction cases, the OFT has gone away and started a consultation process on its penalties guidance.

None of this changes the fundamental fact that in pursuant of the Office's primary enforcement objective, a serious infringement having been found, there has been a penalty imposed in this case. It is against this backdrop that the Office says that the Tribunal's approach to costs in any penalties appeal case should be considered. First of all, it is recognised on all sides that the Tribunal has a broad discretion in relation to costs. The second point is that the OFT considers that the starting point for the exercise of the Tribunal's discretion should be the public policy objectives of the competition law enforcement regime and the role of the OFT within that regime. Thirdly, in that context, the assessment of a penalty is an exercise of judgement which flows from the finding of infringement. The statutory scheme affords the Tribunal scope to set its own penalties. That does not change any fundamental finding of infringement.

In those circumstances, where the appeal is not against liability but is only against the sanction for liability, and the Tribunal can substitute its view for that of the OFT, the OFT says the starting point should be that the OFT should not face a costs order against it. That is the starting point.

THE CHAIRMAN: Can I just be clear. That is a slightly different way of putting it from the way you have put it in your written submissions. I think you said that this should apply symmetrically and the starting point should be that there is no order for costs, para.33.

MR. BEARD: Yes:

> "With these considerations in mind, the OFT considers that the starting point for any consideration of costs in the penalty only appeal should be either that costs should lie where they fall …"

That is a leaning against ----

THE CHAIRMAN: That is a broader way of putting it. You just said the starting point should be that the OFT should not have to pay costs. Suppose, and it happens, that the OFT has just lost a lot of penalty appeals. Suppose a lot of penalty appeals had been brought and the OFT had won. Under the para.33 starting point the OFT would not recover any costs. What is the OFT's position?

MR. BEARD: The OFT's position is, as I say, that for the purpose of considering the general principle in penalty appeals so far as they apply to today's case, the key issue is whether or not the OFT should be in a position where the starting point is that it faces a costs bill or not.

THE CHAIRMAN: You say that the Tribunal's approach to costs in any penalty appeal should be reconsidered, or considered. Are you saying the starting point should be costs lie where they fall, para.33, or are you saying that the starting point should be an asymmetric starting point that the OFT, because of its discretion, however you want to put it, does not have to pay costs?

MR. BEARD: The submission that has been put in writing would clearly, in relation to today's case, mean that the starting point in relation to the OFT would be that costs lie where they fall, and therefore the focus of these submissions has been in relation to that. It is recognised that there have been cases in relation to liability where, for instance, factors have been brought to bear in relation to small appellants where it was decided that a slightly different principle should apply in relation to liability. The Office is obviously sensitive to that.

THE CHAIRMAN: It is only a starting point.

MR. BEARD: And it is only a starting point. Therefore, in those circumstances, the only concern that would mean that there might be scope for an asymmetric starting point would be the extent to which the Office was to be seen with this Tribunal as part of the overall

enforcement mechanism. The written submissions set out the general proposition that it should be a symmetrical starting point.

For the purposes of today's submissions, obviously we stand by what is put there. We recognise there may be other concerns in other cases, but that is the position on the basis of which the OFT proceeds.

THE CHAIRMAN: Why should the OFT not get its costs if it succeeds?

MR. BEARD: Why should the OFT not get its costs?

THE CHAIRMAN: Suppose you had succeeded on this appeal and these challenges had failed, why would you not be reasonably entitled to your costs?

MR. BEARD: I think that when one is talking about the idea of asymmetry in terms of a costs rule, it is going to be important to consider what the appropriate role is that the different administrative bodies have and judicial bodies within the scheme have. In those circumstances it may be that the OFT would consider that it would be appropriate to seek its costs, but for the purposes of today it is not pursuing that line because the focus today is not on whether or not there must be a symmetrical arrangement. The question is, for the purposes of it failing in relation to elements of the appeal, whether or not it should have to face a sort of presumption that it pays costs. I do not have any instructions of course as to what the situation would be if there had been a success on the part of the OFT in relation to these matters.

THE CHAIRMAN: Your submission is that the starting point would be costs lie where they fall, but then you might say there is something special, but that would be the starting point. I find it hard to see why, if you had succeeded, the starting point should be that you do not recover your costs, and you would have to persuade the Tribunal that there was something special or excessive.

MR. BEARD: I do not suppose we would have to persuade the Tribunal of anything particularly if the position was going to be that a symmetrical costs lie where they fall starting point was appropriate.

THE CHAIRMAN: If you had succeeded.

MR. BEARD: And that was the rubric that applied, then, yes, the Office would have to come forward and explain that.

As I say, for the purposes of the submissions today, the emphasis is squarely placed on the position in relation to the Office. As I say, it is the Office in respect of whom the costs application is made and therefore it is the general principle in relation to a case such as this

where you have, the Office not having succeeded, that the general principle is being explored.

As I say, it is just talking about a starting point, it is not saying that if that rule is to be applied the Tribunal should simply down tools and assume that the OFT is immune from costs. Operating that starting point means that the starting point is not, as Hays suggests, that costs follow the event in penalty only appeals.

There is, if that approach espoused by the Office is not adopted, a real risk that the public policy objective of effective enforcement will be adversely impacted. That, of course, is a matter of significant public interest. A costs regime that deters the pursuit of infringers is failing the public. That is in no way an outlandish or remote concern. The levels of costs that the OFT faces when it defends an appeal are often huge. For all the fine words about detailed assessment, as, Sir, you have already adverted to, those assessments will not reduce levels of costs bills substantially. Of course, the working rule of thumb that tends to operate is that you get around two-thirds of your total costs bill when you go to detailed assessment. Even if a costs judge was terribly aggressive and pushed matters down to around 50 per cent, you are still looking at vast amounts of money being called upon from the OFT to be paid to people that had been rightly found to have seriously infringed important competition prohibitions. This problem is exacerbated in cases where there have been multiple instances of a similar infringement – for instance, in the construction cartel cases or multiple participants in a cartel, as in this case – because, of course, what you have in penalties appeals where appeals are brought, they tend to raise similar issues in relation to the penalty calculations for the multiple parties. The penalty assessment mechanism will, having regard to consistency and principles equality, likely apply similar measures, metrics and assessments ----

THE CHAIRMAN: You get that infringement appeals as well, in cartels, particularly when there are questions of this is an infringement of ----

MR. BEARD: Of course that must be right. I do not deny that in the slightest. If you have got identical factual situations then you can have similar issues arising in liability, and where you have a multi-party cartel of course it is accumulation of evidence that is going to be relevant.

The point here is a simple one, that what we are talking about is a substantial level of costs being faced by the Office in relation to penalty appeals in circumstances where you are dealing with the people that have committed serious infringements.

There may be a huge imposition on the public purse where there is no issue as to the fact that the parties involved have been guilty of very serious infringements. It might be said, "That does not matter, the OFT is always good for the money". Of course, in the end, whilst it is true that the Government will never leave the OFT unable to pay its debts, that overlooks three important points: first, as I have said, the fundamental propriety of the approach proposed by Hays is not accepted. Operating on a presumption that even though a party has been rightly found to have infringed competition law, if it gets a benefit in terms of having its financial penalty reduced, it should also presume it should get its costs is wrong.

Secondly, there is a serious potential impact upon the OFT's approach to enforcement in future. The OFT is clearly accountable to the Government and taxpayer for its budget. So whilst costs orders made will always be paid, they still impact on the way the OFT subsequently acts. If the OFT is discouraged from enforcing decisions made in pursuit of the public interest because of fear of exposure to undue financial prejudice if that penalty decision is successfully challenged the public interest is adversely affected.

THE CHAIRMAN: Why doesn't that argument apply also to infringement decisions?

MR. BEARD: Let us just take it in stages. Any costs order against the OFT will necessarily result in a reduction in the resources available to the Office to investigate infringements. That may apply both to liability and to penalty appeals. The enforcement costs will be increased to the public purse.

There is a third point to be bearing in mind, which is that where the OFT has come along and has properly explained to the Tribunal why it has entered into setting a penalty in a particular way, one that meets the twin objectives of the penalties regime, albeit that the Tribunal may disagree, in those circumstances, what you have is a situation where, in considering what level of penalty it is going to consider setting, the Office is going to be in a position where its penalty assessment will necessarily be affected by the threat of costs. Of course, in relation to liability decisions it may simply face a threat of costs that means it does not pursue an infringement decision. Of course, we are hypothesising a situation where the OFT has decided that in the circumstances it will take a liability infringement decision and it will stand by that notwithstanding the risk of appeal.

THE CHAIRMAN: I was asking a different question, namely your concern about how this will deter the OFT from pursuing infringements, why does that not apply equally to a costs order against the OFT as a general starting point for infringement?

MR. BEARD: Of course it will act as a deterrent in relation to liability.

THE CHAIRMAN: But it is established now by the Tribunal that that is the starting point.

MR. BEARD: I quite accept that. The question here is whether or not a step further should be taken in circumstances where the OFT has decided it can overcome its concerns about whether or not to pursue an infringement, and whether or not to face those costs risks, it then decides how it is going to set its penalty. The danger here is that penalties will systematically be dialled down in the face of this costs risk. Effectively, what you have is a costs risk in relation to liability, which the OFT faces down when it takes its decision recognising the appeal; then you have a secondary or ancillary decision that is part of the enforcement process setting a penalty, but in those circumstances you are likely to be having an impact on the level of penalties being set. It might be said by people in the market, "That is a jolly good thing, penalties are lower". That is not the right approach, because, when properly applied, the penalty setting mechanism is intended to ensure that the public interest in deterring this sort of activity as well as reflecting its seriousness is properly meted in the penalty.

THE CHAIRMAN: Might it not be said that this will have the effect that the OFT will impose appropriate penalties and not penalties that are, to use our words, clearly too high?

MR. BEARD: Of course it will have an impact which suggests that the OFT will reduce the level of penalty it is likely to set, but the concern that the Office has is that in circumstances where it faces an appeal in relation to a penalty it inevitably will have to engage costs in dealing with these matters.

THE CHAIRMAN: If you are wrong in your primary submission, if it succeeds on that appeal and the penalty is upheld, it will get its costs back.

MR. BEARD: Of course that is right, but that also overlooks the fact, in going about its business, it quite properly seeks to ensure that it does set appropriate penalties. It does not go about its business seeking to set inappropriate penalties. I do not think there has been any suggestion that that is the case. In those circumstances, the OFT seeks conscientiously to set appropriate penalties. If it knows that it is going to face very, very significant costs bills then in those circumstances it is likely to take those factors into account.

The hypothesis, Sir, you put to me of the alternative costs rule applying, the orthodox CPR costs rule applying, and allowing the OFT to recover simply does not take account of the asymmetry of risk here. Of course, what you have is, on the one hand, what Mr. Harris is effectively referring to as the "rounding errors of the external fees that the OFT incurs in these matters", the very discounted fees that mean that if you are going to do any set off you really should ignore them ----

THE CHAIRMAN: He did not go as far as that.

MR. BEARD: I thought he maintained that it should be 70 to 80 per cent notwithstanding the fact that otherwise a cross-order ----

THE CHAIRMAN: No, he accepted ----

MR. BEARD: I misrepresent him, I am sorry.

THE CHAIRMAN: -- that there should be some set off. He just said in doing that you should bear in mind that the costs on the public authority side are not of the same order, they are much lower.

MR. BEARD: I understood him to be saying that, effectively in those circumstances, there should be a negligible reduction, but I may be wrong. I am sure he can clarify that.

THE CHAIRMAN: I think he said a small reduction.

MR. BEARD: Nonetheless, the point is that the OFT in relation to its own costs does incur far lower costs in relation to these matters and is able to control those costs. When you are talking about facing costs bills from private parties, and potentially multiple private parties, in those circumstances you do not have control over those matters. All that you know is that the ultimate figure that you could expect to face in relation to a costs claim against you, you should probably at least double because the ability of parties heroically to bill in relation to any appeal, no matter what its length, is something that is in many ways an astonishment to the Office.

With respect, even if you move to a CPR situation, you are not, in fact, curing this difficulty. It is for that reason that the OFT is concerned to revisit these issue, because you have these sorts of asymmetries here, because what you are doing is imposing a significant risk on the public purse and you are imposing an asymmetric risk on the public purse.

Therefore, it is not a question of, as Mr. Harris puts it in his submissions, merely disciplining the OFT and making it make good decisions. What you are at risk of doing in these circumstances is effectively incentivising people to bring appeals which in turn may have a significant adverse impact on the way in which the OFT goes about its enforcement and penalty setting approach in relation to infringement decisions, and that notwithstanding that of course the penalty is the adjunct to the infringement and we are talking about cases where a serious infringement will still be maintained.

Indeed, in dealing with the broad argument, Hays refers to both principles and particular facts in relation to its first principle. Its first principle is that it is very good to have a Damoclean Sword of costs hung over the OFT to add to that discipline. As I have already said, it is quite wrong to see that as being the way in which a system such as this can most

effectively and efficiently operate, because of course the OFT wants to take decisions based on the public interest and the asymmetry of costs risk here engenders a concern that, in fact, there is going to be systematic under-penalisation of infringements in order to minimise the risk that adverse costs bills will be faced in relation to penalty decisions.

As has already been adverted to, it is difficult to see how the OFT would be able to correct the penalties that would be set too low. Undertakings, of course, would have little incentive to appeal. Even though the Tribunal, theoretically, can move penalties up, that eventuality will not occur, and there is a danger that therefore you could get a systematic ratcheting down of the level of penalty, and the systematic ratcheting down not to an appropriate level but to a sub-optimal level in these circumstances.

There is a real danger that Hays' submissions in talking about disciplining the OFT and looking for appropriate penalties tends to confuse the natural self-interest of Hays with the broader public interest of ensuring that here you have an arrangement for imposing penalties that fulfil the public interest of the scheme in place of which both the OFT and the judicial body, the Tribunal, are a part.

Hays goes on and says thought not only will the decisions be appropriate but it will eliminate indefensible decisions. Just to pause there a second, the indefensible decisions we are talking about, they are not the decisions in relation to the infringement, remember, because the whole hypothesis is that the serious infringement is maintained and in circumstances where the OFT had acted unreasonably then, of course, those are factors that would have to be taken into account in any costs assessment. It goes back to the point that the OFT in these circumstances is acting to ensure the public interest in relation to the whole competition enforcement regime is maintained.

The second argument that Hays put forward is that if you apply the costs follow the event rule, as, Sir, you have already put to me, the OFT will be rewarded in costs. I think, first of all, it is a little bit dangerous to talk about "rewards". That is not what the OFT is looking for at all. The OFT conscientiously wants to set penalties appropriately. It recognises that the Tribunal may legitimately differ from it in relation to such penalty decisions. In those circumstances, one has to countenance the situation where the OFT has entirely properly set a penalty. It is an entirely reasonable penalty. The Tribunal looks at it and says, "We do not quite agree with that, it should be different, we think it should be lower". It is not that the OFT has got anything fundamentally wrong, but given the breadth of the jurisdiction that the CAT has, the Tribunal can in those circumstances vary a penalty and of course the costs rule we are talking about must deal with that situation as well. So the OFT could be

losing, as a function of the scope of the CAT's jurisdiction, the Tribunal's jurisdiction having meant that the OFT lost, is it right in those circumstances, notwithstanding the OFT's entirely reasonable approach to penalty, it should nonetheless operate from a starting point that it faces a serious costs bill against it?

It is not a matter of rewarding the OFT, it is a matter of accommodating the appropriate costs rules in the context of penalties to the enforcement system that exists.

The third argument that is deployed is that the OFT will not face undue risk on costs because it depends on what the appellants succeeds or fails on in the appeal which will dictate the level of costs exposure. Again, this argument is wrong and fails properly to capture the asymmetry of risk that the Office faces in relation to these matters. In a way, this case graphically illustrates it. Here you have a situation – and I will come on to some more of the details shortly – of why is it that the OFT says that it won on a number of issues, lost on some, clearly the issues it lost on have a very significant impact on the level of penalty, we make no bones about that, but if, on balance, you say there is a net cost that the appellant should receive here, the level of that net cost is going to be very large. It is for that reason that when, Sir, you talked about netting off costs and when Mr. Harris talked about netting off costs, he was talking only about a very small accommodation. It may well turn out that the OFT's costs are a tiny proportion of Hays' costs in these circumstances. It is worth noting, just looking at the annual report – as I did over the weekend for the Office of Fair Trading – in the year 2010/11, the entire litigation programme budget that is referred to in that annual report is less than the Hays' costs claim being brought in relation to this case. So the costs' exposure is disproportionate.

The fourth point that is raised is the point that, Sir, you have already put to me, which is that the Office is proving too much, that all its arguments apply equally in relation to liability just as they do to penalty. I hope, by emphasising the fact that there are effectively two costs stages in relation to the assessment the OFT undertakes in relation to liability and penalty, we begin to see why it is that placing a different rule in relation to penalty as may apply in relation to liability appeals may be appropriate. If the Office identifies that there is a serious infringement and declares that someone has committed a serious infringement and is found to be wrong, then in those circumstances the case law recognises a different starting point. Where that infringement subsists and where you have the substantial concerns about the disproportionate costs threat that the Office faces and concomitant impact that may have on public policy and penalties in future, in those circumstances a different approach is justified in relation to penalty only appeals.

We are not trying to prove too much. We are not, in fact, trying to prove anything at all. What we are talking about is a starting point, and only a starting point. What we say is that the starting point that Mr. Harris and Hays contend for is not the appropriate starting point that should be used in relation to penalty only appeals.

I will deal very briefly with the case law. We have dealt with it in the written submissions already to some extent. It is well recognised in liability appeals that the situation is that the losing party will generally start off in a position where it will expect to face at least some costs liability. We recognise entirely the comments that have been made by Mr. Justice Rimer in the *Racecourse Association*. Indeed, we cited that case and the passage from it in our submissions saying that we recognise that in liability cases it has been decided that that discretion will mean the Office of Fair Trading does not get any protection in relation to costs. We take no issue with that.

It does not take us any further in relation to the approach to be adopted in relation to penalty only appeals. Similarly, the reliance that is placed on the recent decision in the *Durkan* appeal, which was one of the construction appeals, is of no assistance either. *Durkan* was a case about a liability appeal. It was a five day hearing and four and a half of the days were all about evidence on liability. Half a day was concerned with the penalty appeal which was, of course, in line with the case management in relation to construction where each penalty-only appeal was allocated only half a day's hearing.

It is perhaps worth noting just in passing that in relation to the construction cases, submissions have been made to differently constituted Tribunals saying precisely the same things about the appropriate starting point for penalty appeals in relation to the construction cases because the majority of those cases – I think it was 18 of them – were purely penalty appeals. Others involved some liability and some penalty, including, as I say, *Durkan*.

The Office's point in this connection is simply that the approach it advocates is not, as Mr. Harris and Hays have put it, being taken in the face of "years of contrary learning". In relation to penalty appeals, the approach has not developed in quite the same way as in relation to liability appeals and there is plainly room for this Tribunal to exercise its discretion and to adopt the starting point that the OFT advocates.

The first two judgments on costs in penalty appeals, *NAPP* and *GISC*, which have been referred to in the written submissions, and I will not rehearse the particular paragraphs in detail, said that the Tribunal would not limit its discretion to award costs against the OFT in liability cases to cases where the then Director had acted unreasonably. So what you had there were liability cases – one of them was a case of a refusal to withdraw a decision –

where a very strong submission was being put by the Office of Fair Trading saying that there should be no order for costs even in relation to effectively liability cases unless the Office had acted unreasonably – very much more akin to the costs rules that apply, for instance, in relation to the employment tribunal. I refer the Tribunal to paras.56 to 58 of *GISC*, where the court specifically says, "No, we do not accept that". Indeed, if the Tribunal has the authorities bundle perhaps it just briefly worth referring to *GISC*, which is at tab 2. It is under the heading, "The Institute of Independent Insurance Brokers". The acronym I refer to it by is *General Insurance Standards Council*.

THE CHAIRMAN: You say it is para.56.

MR. BEARD: What was being said there was that in liability cases it would be a significant burden on the public purse if the OFT had to pay costs. As I have accepted, those issues can arise both in relation to liability and penalty appeals. That is at 55, and just sets out what the Director is saying. Then 56:

> "We are not without sympathy for the general concerns expressed by the Director …"

and I would invite the Tribunal just to read para.56.

THE CHAIRMAN: (After a pause) Yes.

MR. BEARD: Then in para.57 it says that those factors cannot be decisive. So they are rejecting the extreme version of the rule that says only costs against the OFT where it has acted unreasonably, and that is set out in para.58.

So we completely understand why it is that Hays come along and say, "*GISC* does not help you, and that does not help you". We are not saying that they help us particularly. What we are saying is that they do not run against the submission that we are making in relation to penalty appeals and the general starting point to be adopted.

In particular, it is important to just bear in mind the submission that appears to be being made by Hays in relation to the *Booths* case, which is one that was actually dug out by the Tribunal itself in the course of its consideration of the costs decision in *GISC*, and it is referred to at para.58. Hays says that the points made in *Booths* case were effectively rejected by the Tribunal in *Napp* and *GISC*. That really just is not correct. The Tribunal did not accept that the *Booths* case meant that it was required not to award costs against the OFT where it had acted unreasonably, but it actually indicated both in *GISC* and in *Napp* that it did have a great deal of sympathy with the points in the *Booths* case. It is worth recalling what the key in that case was. Lord Bingham, in *Booth*, emphasised that an important consideration in considering costs awards was "the need to encourage public

authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged".

What we are saying here is that in relation to liability appeals we can see that those considerations will, as has been found by the Tribunal, be outweighed, but in relation to penalty decisions those factors are still significant, and in the context of a penalty decision it remains open to the Tribunal to adopt a different approach. That is what we urge upon the Tribunal.

Finally, just on the case law, Mr. Harris has put forward in his supplementary submissions a lengthy section talking about Ofcom appeals and s.192 of the Communications Act appeals, saying that these are all pretty much irrelevant for the purposes of this analysis, indeed, insofar as they are relevant they actually go against the OFT's case - para. 16 of his submissions.

It is worth bearing two points in mind. First, Mr. Harris says that the case of *The Number* is very different because there Ofcom was effectively acting as an adjudicator between two warring telecommunications parties, and it was obliged to carry out a process of resolving the dispute and taking a decision that could then be appealed under s.192 of the Telecommunications Act.

The first point to note is that s.192 appeals are not limited to dealing with disputes, they also deal with unilateral decisions taken by Ofcom and the statements made in *The Number* about s.192 appeals seem to be entirely applicable to all s.192 appeals.

The second point, also to bear in mind, apart from that initial point being wrong is that although he seeks to distinguish the Ofcom cases on the basis that Ofcom was fulfilling an obligatory role in *The Number* because it was resolving a dispute and taking a decision in relation to it, actually there is a great deal of similarity with the position being taken by the OFT in relation to a penalties decision, because although it is not adjudicating between two warring parties, what you have is an infringement decision and then the OFT fulfilling its task under s.36 wherever and to what extent properly in the public interest to impose a penalty, and in almost all circumstances some sort of financial penalty will be appropriate. So there the OFT is fulfilling a semi-obligatory task. Certainly it is obligatory in the sense that the OFT could not lawfully refuse to consider whether to apply a penalty under s.36, it would have to do so and, as I say, aside from rather eccentric examples such as the public schools cartel, one invariably sees a penalty in relation to an infringement.

As to the second case that is referred to by Mr. Harris, *T-Mobile*, yes, in *T-Mobile* they did award costs against Ofcom – no surprise there. The analysis is that you have a starting point. It is not the end of the consideration, so it is entirely possible that notwithstanding the approach that we are advocating there may be cases where it is appropriate nonetheless to make some sort of award against the OFT, just as was done in *T-Mobile* against Ofcom. That perhaps takes me through from the case law into the particular facts of this case.

Hays accept that the Tribunal, when deciding what to do about costs, has to take account of the extent to which each party won or lost and, of course, in relation to those arguments on which Hays lost, the OFT will have incurred costs in rebutting the relevant arguments. The fact that those costs were imposed on the OFT must be taken into account in deciding what, if any, costs order might be warranted in Hays favour, even under a 'costs follow the event' approach it would be wrong in a penalty appeal just to look at the extent to which the penalty was reduced and, of course, there might be a temptation to do that.

In the course of submissions this morning Mr. Harris has tried to find what he suggests are other sorts of metrics that might be relevant in these circumstances, but actually the appropriate mechanism here is to look at the way in which issues were dealt with, issues were raised and costs were imposed, because it would be conspicuously unfair if Hays' application for 80 per cent of its costs were to be acceded to under any approach to costs assessment.

It is worth bearing in mind that Hays' application for 80 per cent of its costs could only really be appropriate if it had succeeded on at least 90 per cent of its grounds, because if you think about the offsetting effect of the fact that the OFT has to incur costs, and on issues on which it is successful has wasted those costs effectively and does not otherwise recover them, what it means is that you need to win more than the percentage of costs you are trying to obtain. So an 80 per cent starting point is extremely high, even taking into account the fact that OFT costs will be lower than a private party's costs, and we would say that the fact that the OFT's costs would be lower, because it is a Government department, is not something that the Tribunal should place undue weight upon. Rather than making cross-costs orders as, Sir, you referred to, which might be the logical corollary of that approach, where one is dealing with a single costs order, dealing with matters in the round, the fact that the OFT is more economical in the way that it pursues litigation should not be held against it in these circumstances.

Indeed, just to clarify, in relation to the point that Mr. Harris made at the end of his submissions, that the OFT's first point in its written case was wrong because the OFT has

said the applicant's submissions deliberately ignore the costs of the OFT. What is being said there is that the applicant's submissions do discount for the parts of the costs in relation to which they say they were not successful but do not also take into account the fact that the OFT was incurring costs along the way.

More than that mathematical point, the costs schedule and the material provided to the Tribunal is simply inadequate to carry out the sort of apportionment that Mr. Harris is seeking to undertake here. Instead he falls back on counting paragraphs, looking broadly at transcripts and so on. Clearly a more accurate apportionment could have been provided by a reference to issues and heads of costs and it has not been. In those circumstances that creates a significant issue for the Tribunal. What the Tribunal ends up being faced by is an internal estimate by Hays' solicitors and that is no objective substantiation of the basis on which costs should be assessed, and it means that the estimation of 80 per cent of costs is a gross over estimate of any sensible apportionment here. Just taking the gross/net issue, which is one of the two issues of course on which Hays succeeded, what was being said there is that on the argument at principle the OFT should use net fees for setting penalties because in the factual circumstances of the recruitment industry that measure is the better representation than gross turnover of the scale of each undertaking in the market, and thus it is a better way of grappling with the purpose behind the guidelines. But that is the only basis on which Hays succeeded in relation to gross/net. Its other argument, for example, the amounts derived argument were rejected by the Tribunal and it was those misguided arguments that in fact drove the majority of the costs.

THE CHAIRMAN: But we were not to know that. We know what the expert fees are and what they related to, the other arguments, there were witness statements and no doubt those took a lot of work gathering them, and there was an outside analyst who gave a statement. You say the methods put forward by Hays are not sufficiently robust, if we were against you on your primary argument what basis do you suggest we should use?

MR. BEARD: There are two things we say, one is that you look at the range of grounds that we were successful on and that they were successful on. When you look at the grounds on which they were successful you look at whether or not any of the heads of costs that go to those grounds should be disallowed, and that will be, for instance, in relation to expert evidence relating to gross/net and you should also consider whether there are any other heads of costs that should, in any event, be excluded and that would in particular in relation to MDT be the costs pertaining to the additional eminent Silk who was brought in to deal with that matter for one.

THE CHAIRMAN: Yes.

MR. BEARD: We therefore do not think that counting up paragraphs is the sensible way forward.

THE CHAIRMAN: So we have certain discrete costs, apart from them on what basis should the apportionment be done?

MR. BEARD: Hays advanced six grounds of appeal, they succeeded on two of them. If you are going to go for simple numbers then those ----

THE CHAIRMAN: That would be rather unfair because some grounds clearly took much more time, effort and cost than others.

MR. BEARD: We do not fix on the idea that overall the OFT won in this case, we do not suggest that because there were four grounds on which Hays fell and two on which it succeeded, we are not doing anything like that. But when you are fishing around for different metrics if that is the approach that the Tribunal is going to adopt that is one of the factors that clearly must be taken into account.

So an appellant who has succeeded on just two grounds out of six would, in any circumstance, have quite a high mountain to climb. Now, one ground of appeal – the liability ground – was not pursued at all at the hearing. Mr. Harris tried to side step the questions about whether or not costs were incurred in relation to that. Plainly costs were incurred in relation to that. He says that Hays stopped incurring costs relatively quickly in relation to those matters. The Office had significant costs imposed upon it in dealing with those issues and answering the matters in relation to liability.

THE CHAIRMAN: You said that you just relied in your defence on the decision. Obviously you had to base your defence on the decision ----

MR. BEARD: Yes, there is a degree of awkwardness if you start frolicking too far from the decision.

THE CHAIRMAN: Yes.

MR. BEARD: But it is the process of consideration of bringing in external counsel to review matters and review material that imposes significant costs on the Office. So, even if Hays think "That was a bad line, we should not have taken that; we should not have raised it in the notice of appeal", that does impose costs on the Office of Fair Trading. Those are significant issues because again that is the principal concern that the OFT is always going to have ensuring that it gets an infringement finding in relation to these matters, and it gets it right. Of course, it is concerned about penalties being appropriate beyond that, but to try and brush that to one side is quite wrong. Now, we accept it is difficult to quantify what extent of costs one attributes to it. The OFT has not gone away and carried out some kind

of cost scheduling analysis and that would be a waste of money for the OFT to do. But if you are turning up before this Tribunal and asking for your costs in relation to these matters it does seem to the Office that these are matters you should have canvassed, and the summary costs schedule does not properly deal with that. It deals with matters chronologically, there are descriptions ----

THE CHAIRMAN: If we are against you on your primary submission it would follow that the OFT is entitled to its costs on those parts of the appeal on which it succeeded, would it not, if the starting point is that you get the costs of issues on which you succeed?

MR. BEARD: Well as, Sir, you indicated, the approach that is adopted in relation to CPR in the High Court is not to quantify cross-costs orders, and it is instead to discount the extent of costs.

THE CHAIRMAN: Yes, by reference to ----

MR. BEARD: But it is by reference to the broad measure of success in relation to issues primarily rather than trying to do a weighing balance of costs.

THE CHAIRMAN: What proportion of discounting should there be?

MR. BEARD: Well we say that overall, whether or not you start from the starting point we suggest there should be no order for costs here. Now, we say that no order for costs is reinforced by what we say is the general starting point in relation to penalty appeals cases. That reinforces the conclusion that when you go through and assess these metrics you should do so with a degree of scepticism as to whether or not any costs order should be made. But we also say that even if you do a 'costs follow the event' basis it should be no order as to costs.

THE CHAIRMAN: An issues base, because you say the costs of the issues on which you succeeded are broadly the same as the costs of the issues on which you failed?

MR. BEARD: What we say is we succeeded on four issues which involved significant costs so you have the liability issue, you have the 9 per cent starting percentage, you have senior management, and you have the level of reduction for Hays conduct, but on the other side of the balancing exercise we say that even in relation to those matters upon which Hays succeeded that there were significant excess costs which were not necessary and were not appropriate and, importantly, were not the basis on which they succeeded. So what you have is that when you are doing the balancing exercise you have to exclude from the Hays' side of the equation all the cost that Hays incurred in relation to the four issues upon which they did not succeed, which we cannot tell from the costs' schedule ----

THE CHAIRMAN: Well you never can.

MR. BEARD: No, we accept, but there is no broad brush approach being taken here, but whether or not the Tribunal considers that an appropriate criticism of the costs' schedule, the point of principle is nonetheless valid, that all of those costs have to be taken out of the equation. Also to be taken out of the equation are, in relation to the MDT issue, plainly all of the costs relating to Lord Pannick. Whether or not Mr. Brealey would have increased his brief fee by any margin is an interesting question, but certainly he was well rewarded for his efforts in the course of the hearing and we would say in these circumstances no uplift should be accounted for.

It is perhaps also very interesting to note that Mr. Harris, in the course of his submissions, emphasised how the points that were made in relation to gross/net were points that had been made in relation to the administrative procedure. In those circumstances the very significant costs that are being sought in relation to additional and eminent representation and all the heavy leg work that is required by lawyers in these circumstances is rather surprising in circumstances where it is said that we had already traversed these arguments at a point in the process where we recognise we cannot recover our costs. So we think there should be a very significant cutting down of the costs. As I say in relation to Lord Pannick in relation to the MDT and, as I say, more generally in relation to the legal costs of pursuing the MDT argument, because it did not require a detailed review of background documents in the OFT's file. So when you look at the 1600 hours that Hays solicitors spent between 1st October and 30th November 2009 on work up to and including the lodging of the notice of application, it is difficult to see how any more than a modest proportion could properly be attributable to the MDT in those circumstances.

It is also worth bearing in mind that the reason that has been given this morning why it was so important to have the eminence of Lord Pannick involved in these proceedings, is that it was a terribly serious decision that was made in relation to Hays. Well, a pause must be taken there: the infringement still stands and the Tribunal has affirmed that the starting point, reflecting the seriousness of this infringement is 9 per cent on a nought to 10 per cent scale; this was an infringement of the highest seriousness. In those circumstances, if there is a concern about reputational damage, actually what was done in relation to recognising finally that in fact there was no appeal in relation to the infringement was a key consideration here.

We recognise that money matters and that a company will, of course, be concerned to expend money to seek to reduce a penalty but the rationale given is one that one can either

be sceptical about or, even if it is right, should not properly be taken into account in relation to the cost assessment. So that is in relation to MDT.

On the gross/net there are essentially two planks of the Hays' case. One was that temporary wages were not amounts derived by the undertaking from sales of products or the provision of services, and the other was that Hays could have stated its turnover in its annual accounts on the basis of net fees alone. The Tribunal rejected those arguments, in particular the Judgment at paras. 42 and 58 to 59, and accordingly – as, Sir, you have already adverted to – the Tribunal did not find the expert evidence of any real assistance. There could be no doubt that Hays incurred significant costs in obtaining that expert evidence ----

THE CHAIRMAN: The point they make about the expert evidence, and you have only got a couple of minutes left, Mr. Beard ----

MR. BEARD: Yes.

THE CHAIRMAN: -- is that they say: "You engaged with that, you instructed an expert", their expert therefore had to respond to that. You did not take the attitude of saying: "We think the expert evidence is irrelevant in this case and we may ask some questions of your expert and that is that."

MR. BEARD: If Hays is maintaining an argument that the temporary workers' wages were not amounts derived, and puts forward and pursues that argument then the Office cannot simply stand back and say: "Okay, we are just going to pretend that does not exist. We can ignore that, we can just pretend that there is nothing there, we will not even cover it in evidence, because one can easily see why it is that come the hearing the first thing that is made as a point against the Office is: "You have not put forward any evidence to deal with these matters, how are we suppose to decide them?" We could then turn 'around and say: "As a matter of principle you do not need to get that far". But it is unrealistic when faced with extensive evidence simply to say: "We are going to say nothing in response to it". It was reactive, it was a cost imposed upon the Office, so that is another factor that goes into the consideration of the balance, but more importantly it was expert evidence that they did not need to pursue. If they had not put in that expert evidence the Office would not have needed to incur the additional costs, the matter would have fallen away, so their costs of that expert evidence should be cut out of their bill and some credit must be given to the Office because it has had to incur costs in circumstances where there was no need for it to do so. That is in relation to the expert evidence, the position of Lord Pannick and, of course, there is a final consideration. Whilst, of course, these are matters that, if the Tribunal were to make an award of costs, could go to detailed assessment and it is important to bear in mind

the exorbitant scale of costs sought – the best part of £2.5 million for a four day hearing on penalty alone. Outside the confines of the legal system there would be a gasp of disbelief. It is more, as I have said, in a single costs claim in the OFT's total litigation programme spending last year, and it is plain that case management alone cannot contain these sorts of enormous costs bills. If it were to be suggested that the process of detailed assessment somehow drags them back to the realms of reasonableness that is not going to happen. In those circumstances we urge upon the Tribunal adopting a different starting point, leaning against a cost order for the OFT, taking that into account it is plain that there should be no order as to costs but even if the Tribunal is to use a "costs follow the event" model, given the number of grounds on which they have not succeeded, the costs they have imposed on the OFT and in relation to those grounds on which they have succeeded, the wasted costs in relation to excessive spending on experts and counsel, and other lawyers which also imposed costs on the OFT mean that in the round the assessment should be no order as to costs.

Unless I can assist the Tribunal further. (After a pause) Sir, if I could beg the Tribunal's indulgence there is just one issue that I failed to deal with.

THE CHAIRMAN: Yes.

MR. BEARD: There was a suggestion that the OFT had acted unreasonably and there is a reference to the Randstad paragraph, but we leave that to one side. There was also a suggestion that somehow the early resolution process should be treated somehow akin to sort of Part 36 offer. That is a matter of serious concern to the Office. If it is starting to be suggested that there should be settlement negotiations in relation to penalty cases and those could have ramifications for the way in which costs assessment worked. That would have a very serious potential impact upon the development of early resolution. This is not a case where you are trading out of some kind of contractual dispute. You have in play a range of public interest concerns that go to working out whether or not in any case or set of cases early resolution will be adopted. It is a non-statutory process, it has been used in a very limited number of cases. The repercussions of treating it as akin to a Part 36 offer would be serious for the way in which the Office could develop that matter. I can develop those submissions if necessary, Mr. Harris dealt with them rather briefly.

THE CHAIRMAN: We will return in five minutes.

(Short break)

THE CHAIRMAN: Mr. Harris, you need not address us on the first submission of the OFT, namely that the basic rule should be that costs should lie where they fall.

MR. HARRIS: I am grateful for that indication, Sir. One matter that we have been able to research in the short adjournment is Hays withdrew the Atkins' liability ground on 4th June 2010 by letter, having indicated three days earlier that it would be withdrawn, and it may interest you, Sir, members of the Tribunal to know that the OFT's defence is dated 30th April 2010, so just over a month prior to that. If the Tribunal would like to cast its eye in its own time on the defence on the Atkins liability ground ----

MR. DAVEY: Did you say 4th June?

MR. HARRIS: Correct, 4th June.

THE CHAIRMAN: 30th April, this was May.

MR. HARRIS: Defence comes in 30th April, just over a month later on 4th June the Atkins' liability ground is withdrawn. However, of direct relevance to my learned friend's submission is if one has the defence ground 1 (p.10, defence) one can see just going through it very quickly that the defence amounts to a recitation in very large measure of paragraphs of the decision, so it consistently cites and relies upon no more than what is in the decision. It does go on for several pages, I accept that. I also accept that it is not completely devoted to nothing but the decision, it does respond to various ways in which Hays put the argument. But the point there, of course, is that that is no cost for the OFT to recite passages of the decision, it is not free-standing work. I am not saying that was the only thing, I am not saying there was no cost, I am just saying we need to put it in context. We also know from having perused the transcript of the CMC that the OFT's counsel's protestations at that stage – and the date was I think April – was that the OFT was very substantially concerned in this period (April/May) with gearing up for the ----

THE CHAIRMAN: CMC was on 5th February.

MR. HARRIS: Yes, that is right, and in the period of the following few months, which is what Mr. Unterhalter was submitting to you, and I quote – for example, on p.5, line 25:

> "I will probably be rather more engaged over that period with the construction cases."

That was indeed why they were saying to you: "Let's bump off CRF".

THE CHAIRMAN: We did not accept it.

MR. HARRIS: Which you did not accept, exactly, but my point there being relatively minimal expense in the defence, withdrawn fairly shortly after at a stage where were being told at the time they are likely to be devoting their resources to something else in any event.

THE CHAIRMAN: Well they were saying that is what they would do and therefore they could not deal with the matter, and the Tribunal said "No, you have to", presumably they then did.

MR. HARRIS: But nevertheless those construction cases did all then proceed, and ours came afterwards, so if there was a gradation or prioritisation of resources ----

THE CHAIRMAN: Well I think they have brought in other ….

MR. HARRIS: Perhaps a point that hits home a little deeper is that we find it difficult to accept the submission of my learned friend that there were large or significant costs of the OFT as regards the Atkins liability ground or, for that matter, on any of the others, compliance, senior manager, and what have you, where there is no evidence from the OFT as to what the size or scale of those costs were. In contrast you do have evidence from us, and you do have these broad brush indications about where everyone was focusing the principal part of their resources and, with respect, we say that that is inescapable, that the lion's share was on the grounds where we won by reference to any one of these indicators, albeit only broad brush. What is sauce for the goose is sauce for the gander. My learned friend says: "You have not produced evidence of issue by issue costs" but if he seeks to say: "You should be knocking off issue by issue that the OFT won on; he has not produced issue by issue ----

THE CHAIRMAN: I have never seen a costs draft where people produce issue by issue costs.

MR. HARRIS: That is exactly my point, Sir; exactly my point, which is why I say the traditional and orthodox approach is to discount Hays' costs and the real debate here today is what that discount should be. You will have picked up from our written submissions a point I did not repeat in opening, that another basis for the 80 per cent, as well as a broad brush, if you like logistical indicators was: "This is a case in which we received a reduction of more than 80 per cent of the fine' a relevant factor we suggest.

THE CHAIRMAN: The actual costs – I mean there could be one point of out ten which wins which takes half a day and one spends five other days ----

MR. HARRIS: And that is why I do not put it any ----

THE CHAIRMAN: I do not think that is very powerful.

MR. HARRIS: No, that is why I only put it as one of the relevant factors. It certainly goes to the magnitude, we say, in any common person's assessment, in any common sense view of who has won. We did not hear any reply from my learned friend almost on three points and then in the end it was two of the three points. There was no reply to the point that we say goes to the overall context of the assessment; the fact that we incurred considerable costs at the administrative stage and that are irrecoverable – there was silence from the OFT on that point. Likewise, para. 37, this was very clearly wrong, the other wording being, I think, wholly disproportionate. No reply as to why that was not a relevant factor in context. Then we almost did not get a reply on the other point about settlement. We say the Tribunal's

guidance hitherto has been that all relevant factors are to be taken into account. We fail to see, with respect, and no matter what my learned friend would like to have said about the wider context of settlement discussions, we are only interested in this case. In this case we expressly went to the OFT and said: "If you come with a fine of in the region of a few million pounds, and if you had come up with the fine you ended up with there would have been no appeal". All we are saying to you, as a matter of sheer reasonableness, is that that is something that should shape the context of your apportionment. I do not put it as high as CPR Part 36, but I do say that it is relevant, and we did not hear very much on that.

One thing that we did hear twice was that on gross/net there were effectively only two points and that effectively Hays lost on both of them. That is an extraordinary submission to make. The fact is that we won on gross/net.

THE CHAIRMAN: Yes.

MR. HARRIS: So it cannot possibly be right that there were only two points and we lost on both of them when we won tens of millions of pounds on gross/net. The truth is, and I do not propose to do this because the Tribunal has reminded me that it has looked back at the Judgment recently, but when you do go through those 21 paragraphs of the Judgment, as we did very briefly, there are all manner of arguments about, for instance, *Endesa*, for instance sub-contractors, for instance this, for instance that, one goes through them item by item.

The OFT at one point made a submission that temporary and permanent recruitment did differ fundamentally. The Tribunal rejected that as well.

THE CHAIRMAN: Yes, and we were relying in part on the evidence from the people doing their jobs.

MR. HARRIS: Precisely. So that is simply a false submission. The Tribunal has the written submissions that we made about the approach that the OFT succeeded on four grounds of appeal whereas Hays only succeeded on two. Plainly that would be unfair for the reason the Tribunal adverted to and in the written submissions we, of course, point out the very strange anomaly that would produce in a case such as this where you would end up on that basis – we would end up recovering more by way of costs, notwithstanding that those grounds of appeal cost very substantially less to run and would have resulted, had they succeeded, in a very much smaller reduction in the fine. In other words it inverts, illogically, the true approach, and therefore demonstrates that that is not a sensible way in which to proceed.

The point was taken about the fees of Lord Pannick, but there are ----

THE CHAIRMAN: I think the figure is confidential.

MR. HARRIS: Yes, I have no doubt the figure is confidential, but there were a number of points to make in response to that.

THE CHAIRMAN: I should say we are not concerned with the figure, we are concerned with the question ----

MR. HARRIS: The principle, yes.

THE CHAIRMAN: -- of how they have assessed it.

MR. HARRIS: Well I will not repeat anything I said before, I will just make some additional points. It must be right, and to be fair to my learned friend he adverted to this in passing, if Lord Pannick had not been there, which is effectively the thrust of his submissions, Lord Pannick should not have ever been there and that was not a reasonable thing to do, but it must be right that at least some significant proportion of the money that was spent on him would instead have been spent on me and Mr. Brealey, so it would be an unfair windfall for the OFT, certainly to have all of his fees disallowed without any recognition of the fact that the work that he did would then simply have had to have been done by somebody else, though sadly I do not command the same level of fees as Lord Pannick, nevertheless there would have been something.

Another point to bear in mind – a point we made in our written submissions that I did not need to develop in opening – is that it was quite proper in this appeal where the three appellant parties got together in the same hearing for Hays to take the lead on some of the grounds. Now, a ground upon which it pre-eminently took the lead was MDT, not least of all because we had Lord Pannick at the helm on that issue. But it follows that in Hays taking the lead there was a reduction in the amount that had to be spent by way of costs by the other two successful appellants. I can say that categorically in the case of Eden Brown, who I also represented, but I know from the way in which the hearing developed that the same is true about CDI as well. So there has been a reduction in the cost exposure to the other two appellants by dint of the fact that we did employ an additional counsel who took the lead on that issue, and I think in the written submissions we refer to the relative proportions of time in the transcript that Hays dealt with MDT. Well, no accident because we had, for lack of a better phrase: ‘the leading team’.

Another point was made by my learned friend that, well, if you ran a whole series of points on gross/net at the admin stage well how could those costs have been so high at the appeal stage? Well the answer to that is very straight forward. First, the OFT rejected every single point on gross/net at the admin stage and therefore every single point had to be taken at the appeal. Secondly, at the admin stage there were no counsel involved. Thirdly, at the admin

stage there were no experts involved, and fourthly, it is a much less rigorous written procedure at the admin stage: for instance, there are no pleadings. There were written submissions, but written submissions are not the same and do not incur, as we all know ----

THE CHAIRMAN: I think his point was a bit narrower, I think it was directed purely to the solicitors' costs. Obviously counsels' fees come in, the expert comes in I think he was saying, but I do not know that the solicitors' hours were on the MDT, they may have been on the gross/net where all the witnesses ----

MR. HARRIS: Precisely, Sir, that was to be my very next point. There had to be a very significant upgrading between the admin stage and the appeal stage because we had made no headway at all, despite substantively running what turned out to be the winning points. In upgrading we had to have witnesses.

THE CHAIRMAN: I can see the point he is making that on MDT, which is in a sense a point of principle, and it had been made first at the administrative stage ----

MR. HARRIS: But they were not made, Sir, at the admin stage, and that is because the OFT did not ----

THE CHAIRMAN: Because you did not know about them?

MR. HARRIS: We did not know about it, so the point applies, we say, in our favour on both gross/net and MDT. Gross/net had to be upgraded for all the reasons I have given, and I do specifically take up your point about witnesses. There were not witnesses in respect of the point at the admin stage, but because we had lost on everything and therefore root and branch had to establish before this Tribunal how the industry worked - with evidence, how it was properly measured - with evidence, what the true profit nature of the industry was - with evidence, how analysts analyse the industry - with evidence, all of that had to happen post admin stage. What we do say is what is most disappointing, and it is coming back to one of my 'reasonableness' points, is as the Tribunal itself said, if only you had ever taken a step back you would clearly have seen that this was too high, and that was our point. The OFT did not need, we say, to see all the evidence and the expert evidence and the extra counsel and the pleadings, because any sensible regulator – and to pick up the Tribunal's language in para. 37: "On any view" this was way too high, so we feel aggrieved, we say legitimately and reasonably, that at that stage the OFT did not see that on any view they had gone way over the top.

I am reminded by those instructing me that the MDT did not feature at the admin stage, notwithstanding the fact that there was ample opportunity for it to have been drawn to the attention of those instructing me, and that is another factor that should be borne in mind.

We could have addressed it had only we been invited to address it, but in fact it did not appear then and it appeared for the first time in the decision.

Sir, I am conscious of the time and I am very, very nearly finished. Another point that my learned friend took related to reputation, and first he said he is a bit sceptical. Well, with respect, that may or may not be the case but it is irrelevant. The fact is the evidence speaks volumes, so that is the end of that point. Then he said he did not think it was a properly relevant issue, but he missed the point. The point that I was making was that the size of the fine was what caused Hays' Executive such consternation and, in particular, the relative size of the fine. That is why people thought we were the truly bad guys, not just because it was a huge number, but because it was way bigger than anybody else's number, and that is of course a legitimate consideration when senior executives whose reputations, personally as well as corporately, are on the line, should say "We have to gear up very fully and effectively for these appeals."

Sir, if you just give me one moment, I think that is more or less it, but if I could check with those instructing me and just check my notes? (After a pause): Sir, all my other points related to the other ground so I have nothing to add.

THE CHAIRMAN: Thank you very much. We shall give our decision in writing because it is a fundamental point that has been raised by the OFT which we need to consider and address, and you will be informed in the usual way when it is ready to be handed down, and we can have a formal handing down. We shall assume as you cannot in advance know what the decision is, as it were, make reasoned submissions that each of you asks for the costs of this application for costs – is that a reasonable assumption?

MR. HARRIS: That is correct.

THE CHAIRMAN: I think that is clear from your cost note, and is that the case with the OFT?

MR. BEARD: In light of the OFT's principal submission … (Laughter)

THE CHAIRMAN: Well it may not apply for costs ----

MR. BEARD: I would have to take instructions in relation to that, if I could refer to the Tribunal? I am not sure that those behind me will be able to provide those instructions – if I could just check?

MR. HARRIS: Sir, I should just say that my instructions are that the figure that is in the cost schedule we were looking at before is not up-to-date.

THE CHAIRMAN: It does not include your costs.

MR. HARRIS: Well I have not had a chance to look at this but I do not think it does. We are happy to provide, if ever invited, an up-to-date figure, but I would not presume to send in anything unless and until invited.

THE CHAIRMAN: Those are costs of the costs application that we probably could summarily assess.

MR. HARRIS: That is why I made the point, it could be bumped up, but if you were minded summarily to assess we would invite you to do so on the basis of an up-to-date number which we can provide.

THE CHAIRMAN: Yes, if you can put in an up-to-date schedule.

MR. BEARD: I do not want to anticipate too much what the outcome of the proceedings might be, but given the indication that the Tribunal gave to Mr. Harris, I think it may suffice for these purposes that if the Tribunal were not to accept the OFT's principal submission it would ask for its costs in relation to the costs here.

THE CHAIRMAN: In which case what I think we will say is if you could please, both sides, send us a schedule of costs of the application for costs, and is that something that could be provided by the end of this week?

MR. HARRIS: Yes.

MR. BEARD: We will do.

THE CHAIRMAN: Thank you.