Neutral citation [2021] CAT 19

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1367/10/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 July 2021

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) JD SPORTS FASHION PLC**
**(COMPANY NO. 01888425)**
**(2) PENTLAND GROUP LIMITED**
**(FORMERLY PENTLAND GROUP PLC – COMPANY NO. 00793577)**
**(3) PENTLAND GROUP LIMITED**
**(REGISTERED IN JERSEY – COMPANY NO. 129937)**

Appellants

- v -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

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**RULING (COSTS OF THE SECOND AND THIRD APPELLANTS)**

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## A. BACKGROUND

1. This costs assessment arises from an appeal brought by the three Appellants in this case against a decision by the Respondent, the Competition and Markets Authority ("CMA"), made on 29th July 2020, imposing a penalty of £300,000 for failure to comply with an interim enforcement order ("IEO") dated 17 May 2019. The IEO was made during the investigation by the CMA of the acquisition by the First Appellant, JD Sports Fashion PLC ("JD Sports"), of Footasylum Limited ("Footasylum").[1]

2. The Second Appellant (Pentland Group Limited, which I shall refer to as "Pentland UK") at present owns 55% of the share of JD Sports. Until 21st November 2019 it was a UK PLC; it then became, under a corporate re-structuring, a wholly-owned subsidiary of the Third Appellant, (also called Pentland Group Limited, but which I shall refer to as "Pentland Jersey"), a public company registered in Jersey, and at that point changed its name to Pentland Group Limited[2].

3. Pentland UK and Pentland Jersey (which, for convenience, I shall together refer to as "Pentland") were separately represented from JD Sports throughout the CMA's investigation of the Footasylum acquisition, Pentland by Eversheds Sutherland (International) LLP ("Eversheds") and JD Sports by Linklaters LLP ("Linklaters") and Freshfields Bruckhaus Deringer LLP ("FBD").

4. The CMA's decision had been preceded on 4th February 2020 by a provisional decision finding that the IEO had been breached and proposing a penalty of £400,000. JD Sports and Pentland made representations to the CMA against the

[1] That investigation led to a decision by the CMA of 6th May 2020 condemning the acquisition and requiring divestment by JD Sports of its shares in Footasylum. That decision was appealed to the Tribunal by JD Sports on 17th June 2020 and a judgment by the Tribunal was given on 13th November 2020 ([2020] CAT 24) upholding the appeal in part and remitting the case to the CMA for further investigation. Permission to appeal was refused by the Tribunal on 17th December 2020 and by the Court of Appeal (Lady Justice Simler) on 3rd March 2021. The CMA subsequently re-opened its investigation, with a final report envisaged for September 2021.

[2] Somewhat confusingly, Pentland UK and Pentland Jersey have the same corporate name.

provisional decision in the weeks that followed, including a submission of 6th April 2020 by JD Sports in relation to the impact of Covid-19. The CMA's final decision was issued on 29th July.

5. What the CMA saw as a breach of the IEO, and the object of the decision and penalty, was the disposal, on 24th October 2019, of a store leased by Footasylum in Wolverhampton, one of its 70 stores. Following the start of the CMA's investigation of the acquisition, JD Sports and Footasylum had agreed to arrangements under which Footasylum, although its shares had been acquired by JD Sports, was operated under separate management. There were additional arrangements between Pentland UK and JD Sports allocating responsibility for compliance with the IEO. The CMA found, amongst other things, that these arrangements were inadequate to prevent the breach of the IEO giving rise to the decision and penalty.

6. On 1st September 2020, the three Appellants filed a joint Notice of Appeal with the Tribunal against the CMA's decision. The essence of the appeal was that the decision was addressed to JD Sports and its parent companies, but concerned a breach, if there was one, by Footasylum. There were seven grounds of appeal, including unfair process, fundamental flaws in the CMA's assessments, errors in relation to the inclusion of Pentland Jersey and errors in relation to the appropriateness and amount of the penalty. Two of these grounds, at least, were of specific concern to Pentland.

7. Ground 2 covered a series of alleged errors of fact and assessment by the CMA. These included consideration of the arrangements between Pentland and JD Sports, under which the essential burden of complying with the IEO was placed on JD Sports. The CMA nevertheless considered that Pentland should have exercised closer control. Ground 5 claimed that Pentland Jersey was not subject to any relevant legal obligation at the time of the alleged breach of the IEO (24th October 2019) as the corporate re-organisation giving rise to its involvement took place a month after that event (21st November 2019).

8. As the appeal has been withdrawn, the merits or otherwise of these claims are irrelevant for present purposes. It is relevant, however, that, although Pentland was affected by the decision generally, it also had separate and distinct concerns and arguments to make to the CMA and was not only playing a supporting role to JD Sports in the appeal.

9. In early October 2020 it became clear that the CMA intended to withdraw the penalty and not contest the appeal and that negotiations were in progress to withdraw the appeal with the permission of the Tribunal pursuant to Rules 13(1) and 106 of the Tribunal Rules 2015 (the "Tribunal Rules").

10. On 12th October 2020, the CMA filed a consent order on behalf of the parties, and requested that the Tribunal make the order in the terms sought. By an Order made on 13th October 2020 ("the Order"), I gave permission for the appeal to be withdrawn on the basis that the CMA's decision and the associated penalty were withdrawn. The Order further provided that:

> "2. The Respondent shall pay the costs incurred by the Appellants to date, on the standard basis, to be assessed if not agreed."

11. By letter of 16th March 2021, Linklaters, on behalf of JD Sports, indicated that costs could not be agreed and that they would request a summary assessment by the Tribunal. The CMA, through its appointed solicitors Plexus Law ("Plexus"), expressed strong disagreement with this approach and requested that the matter be subject to a detailed assessment under the Civil Procedure Rules ("CPR").

12. By letter of 22nd March 2021, the Tribunal requested that Pentland clarify its position. By letter of 24th March 2021, Eversheds, on behalf of Pentland, indicated that they agreed with the approach put forward by JD Sports. By letter of 24th March 2021 the Tribunal indicated its endorsement of this approach and set out a timetable for exchange of submissions, to be concluded by 23rd April 2021.

13. JD Sports's submissions (in the form of separate Schedules of Costs by Linklaters and by FBD) were filed on 30th March as were Pentland's

submissions (a Schedule of Costs by Eversheds). The CMA's submissions in response (in the form of "Points of Dispute" by Plexus) were filed with the Tribunal on 13th April 2021. On 22nd April 2021 Linklaters informed the Tribunal that JD Sports had agreed with the CMA a full and final settlement of its costs and that it would therefore file no further submissions.

14. Pentland was apparently unable to reach such an agreement and filed further submissions, in line with the Tribunal's timetable, on 23rd April 2021. On 4th May 2021, the Tribunal sought further clarification of the position. Plexus replied the same day that no agreement had been reached. By letter of 13th May 2021, Eversheds confirmed this also and requested that the Tribunal proceed to make a summary assessment of the costs to be paid to its clients by the CMA.

15. This assessment is therefore confined to the costs payable by the CMA to Pentland pursuant to the Order. The amount which the CMA has agreed to pay to JD Sports has not been disclosed to the Tribunal but the Tribunal is aware of the amounts claimed by JD Sports, involving the costs of two major firms of solicitors and Leading and Junior counsel. The sums claimed were significantly in excess of Pentland's claim. This may be taken to reflect the fact that the major burden of preparing the substantive appeal against the CMA's decision must have fallen on JD Sports' legal team.

16. It falls to me to make this summary assessment as the Chairman entrusted with this matter.

## B. THE PARTIES' SUBMISSIONS

17. Pentland's Schedule of Costs dated 30th March 2021 claimed a total of £179,439.70, consisting of £63,758.20 for six categories of attendances and £93,061.50 for work on documents, together with Counsels' fees of £22,620.00. This appeared to cover work from early 2020 up to March 2021. It identified the individual lawyers involved and gave a time breakdown by category of work and, in relation only to work on documents, by date.

18. The CMA provided a detailed response taking strong objection to many of the detailed items of Pentland's submission. It said its own costs amounted to some £30,000.00 (plus VAT) internal litigation costs and £22,921.00 (plus VAT) external counsel costs and that Pentland's claim was in marked disparity with these figures.

19. The CMA also said that the amounts claimed were disproportionate and unreasonable, given the penalty value of £300,000 and the amount of work that was needed to be done, as well as involving duplicated and excessive work and excessive hourly rates, and questioned whether the rates exceeded those agreed in a retainer. The CMA also objected to any costs incurred before the date of the CMA's decision. Whilst reserving its position on some items, the CMA indicated it would agree to pay £22,598.00 solicitors' costs and counsel's fees of £4,840.00, a total of some £27,438.00.

20. Pentland, in its response, took exception to the overall approach taken by the CMA and to a number of specific points. In particular, it said that the reference to fees being in excess of those in a retainer was wholly without merit; that the amounts claimed were proportionate given the CMA's conduct in this case; that the amount of the fine was not the right measure of proportionality; that a comparison with the CMA's own costs was not appropriate; and that it was reasonable to include work from February 2020 as the CMA's provisional decision of 4th February had effectively been the starting point for the appeal.

21. Pentland also said that the hourly rates shown were reasonable and in line with normal practice, that there was no duplication of work and the hours shown were not over-stated (if they were, this would amount to misconduct, a serious claim which the CMA would have to justify with evidence). It also took issue with a number of other points but declined to give a point by point rebuttal for the reason that that such level of detail was not appropriate in a summary assessment.

22. It is clear, therefore, that there is a very considerable gulf between the amounts claimed and the CMA's stated willingness to pay.

## C. PRINCIPLES

23. The principles governing the Tribunal's approach to a case of this kind are helpfully set out in the President's Ruling of 1st October 2020 in the case of *Ryder Limited and Hill Hire Limited v MAN SE and others* [2020] CAT 21 (see in particular [17]-[26]) ("*Ryder*"), to which both parties referred in their submissions. The *Ryder* case concerned an order made earlier by the President that the Claimants (that is Ryder and Hill Hire) should pay the Defendants' costs in connection with an unsuccessful application for disclosure in a civil damages case. I adopt the same approach in this assessment as the President took in *Ryder* but for ease of reference I summarise the main principles below.

24. Rule 104 of the Tribunal Rules addresses the issue of costs and states, in so far as material:-

> "(2) The Tribunal may at its discretion…at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> (3) …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of:-
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> (a) The conduct of all parties in relation to the proceedings;
>
> (b) Any schedule of incurred or estimated costs filed by the parties;
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> (c) …
>
> (d) …
>
> (e) Whether costs were proportionately and reasonably incurred; and
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> (f) Whether costs are proportionate and reasonable in amount."

25. Rule 104(4)(e) also reflects the governing principle in rule 4(1):

> "The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost."

26. As the *Ryder* case makes clear, the Tribunal is not governed by the CPR and its rules differ in many respects, being for the most part at a higher level of generality. However, the *Ryder* case further points out[3] that, whilst the Tribunal Rules do not contain wording equivalent to CPR rule 44.3(2) on assessment on a standard basis and CPR rule 44.3(5) on proportionality, the Tribunal will follow a similar approach, in particular not allowing costs that are disproportionate merely because they have been reasonably incurred.

27. The CMA referred to the Tribunal's statement in *Tobii AB (Publ) v CMA* [2020] CAT 6 (at [76]):

> "While (the applicant) is free to spend whatever it wishes in making applications, it does not follow that the CMA should be required to bear the full burden of (the applicant's) legal costs out of public funds."

28. Similarly in the Tribunal's ruling on costs in the *Flynn Pharma/Pfizer* appeals[4] at [68]:

> "…We agree with the CMA's submission that while the Applicants are free to spend whatever they wish in bringing their appeals, it does not follow that the CMA should be required to bear the full burden of their legal costs out of public funds."

29. We also note the Tribunal's earlier decision in *Merricks v Mastercard Inc* [2017] CAT 27, which contains the following passage, cited with approval in *Ryder*:

> "[29] A party to litigation is free to spend as much as it wishes on lawyers, but the Tribunal, like the courts, will control how much it can recover from the other side. In that regard, proportionality is not to be assessed simply by comparing the level of costs with the amount at stake in the litigation but having regard to all the circumstances, including consideration of the legal work which the nature of the case reasonably required."

30. That ruling also quoted and adopted a dictum of Leggatt J (as he then was) in the commercial case of *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), at [13] which included the following statement:

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[3] At paragraphs 20 and 21 of the Ruling.
[4] *Flynn Pharma Limited and Flynn Pharma Holdings Limited v CMA and Pfizer Inc and Pfizer Limited v CMA* [2019] CAT 9.

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case presented proficiently, having regard to all the relevant circumstances."

31. I note, however, that the *Zhunus* case, and the other case cited by the President in *Ryder*, *Re RBS Rights Issue Litigation* [2017] EWHC (Ch), were very high value civil cases. The penalty in the present case, whilst not insignificant at £300,000, is modest in comparison with the level of penalties imposed by the CMA for serious infringements of competition law. It could equally well be argued that the true cost of being accused of a breach of an order made by a public authority and then having the accusation withdrawn without explanation puts a higher, and less easily measurable, value on the matter, and I consider that point as part of the assessment.

32. Finally, the CMA have put forward very detailed and specific comments on the unreasonableness and disproportionality of specific items of costs submitted by Pentland. Pentland has said that such a level of detail is out of place in a summary assessment. I will of course take these submissions into account but I do not see myself as bound to follow the approach advocated by the CMA. As the President observed in *Ryder*, at [26]:

> "…(A) summary assessment of costs is not a short-hand detailed assessment, where the Court or Tribunal goes through the schedule of costs on an item-by-item basis, assessing in each case whether the figure claimed is reasonable and proportionate. It inevitably involves a broad brush assessment by the judge who heard the case or application, drawing to some extent on his or her judicial experience."

I adopt that approach with approval in this case.

## D. THE TRIBUNAL'S DECISION

### (1) Matters to be considered

*Hourly Rates*

33. The CMA submits that the rates charged by Pentland's solicitors are excessive, whilst accepting that some increase over Senior Courts Costs Office rates is appropriate in this case. Pentland stands by the rates it has claimed.

34. I am content to adopt the approach to hourly rates applied in *Ryder* for the grades of solicitor, so that Grade A (specialist competition partners) lawyers' time would be charged at £600.00 per hour, senior associates at a rate of £375.00 per hour and junior associates at £270.00. Similarly, I would allow hourly rates for a senior costs lawyer of £375.00 and a junior costs lawyer of £270.00.

35. In relation to Counsel, the CMA's objection relies largely on duplication with the work for JD Sports and the time period covered by the costs order. They do not question the charge rates for Leading Counsel of £1,000.00 per hour and for Junior Counsel of £440.00 per hour (these rates being calculated from the information provided). I deal with the counsels' fees claimed by Pentland (£22,620.00 divided as to £13,770.00 for Leading Counsel and £8,850.00 for Junior Counsel) later in this assessment.

*Allocation of time*

36. The CMA make detailed criticisms of the way time was allocated as between individual solicitors, and between counsel, as well as claiming that Pentland applied too many lawyers to the case. Pentland, predictably, denies these criticisms.

37. In a summary assessment it is not appropriate to tell a party's lawyers, particularly where they are experienced specialist professionals, how they should conduct their case preparation. What matters is whether the overall charge is one that is reasonable and proportionate in all the circumstances.

*The work that was done*

38. The CMA withdrew its decision and penalty and consented to the withdrawal of the appeal some six weeks after it was lodged with the Tribunal and two months before the appeal was due to be heard. This means that the work for which Pentland claimed consisted essentially of assessing the CMA's decision, advising on the prospects of an appeal and preparing and filing the application to the Tribunal. This was a not inconsiderable document and, in Pentland's case, included a witness statement and other documents.

39. Several points arise. The CMA argues that it reacted swiftly to the appeal and did not prolong the dispute and that this was a point in its favour. It could equally be said that in these circumstances it might be questioned why the penalty was imposed in the first place. Pentland argues that it had made clear that there were fundamental flaws in the CMA's approach at the time of the provisional decision and the CMA should never have issued the decision in the way that it did.

40. In my view, the key point is that a substantial decision was issued which required a response in kind and of equal weight and substance. There can be no doubt that a finding of breach of a CMA order and a financial penalty of this magnitude was a matter of the utmost gravity for a public company, including a public company registered in Jersey. I find it not at all surprising therefore that Pentland required its own lawyers to join with JD Sports's lawyers in the appeal and to do a substantial amount of work on the matters described. Whilst appellants often are under no illusions as to their chances of success, in this case Pentland's lawyers could hardly have expected that their work would become unnecessary in such a short time.

*Duplication*

41. In relation to the CMA's claim of duplication of work amongst Pentland's solicitors, my comment at paragraph 37 above applies. The CMA also objects to the amounts charged for liaison and contacts between the lawyers

representing JD Sports and those acting for Pentland. In relation to counsel, the CMA suggests that all their work was of common utility to all the appellants, and therefore that no additional charge for Pentland is justified.

42. I disagree. It was the CMA's decision, rightly or wrongly, to address the decision to JD Sports and to the two Pentland companies rendering each of them liable to pay the penalty. As identified earlier, the addressing of the decision to the two Pentland companies raised specific issues for those companies to address, in addition to their general interest in the appeal. In those circumstances the CMA can hardly object to the different parties seeking separate legal representation. As it was, Eversheds acted for Pentland, whilst JD Sports instructed two leading firms on its own behalf.

43. Given the need for separate representation, there can be no objection to the need for liaison between the two legal teams and some allowance must be made for one team examining and possibly repeating some of the work of the other. It should be noted also that in relation to counsel, all parties used the same two counsel, avoiding duplication of representation at that level. This may seem to be an obvious thing to do, but it must in itself have saved some duplication of work. How counsel allocated their charges between the Appellants is a different question, which I deal with later.

*The time period covered by the costs order*

44. Pentland's claim includes a substantial amount for work done prior to the CMA's final decision and some for work after the date of the Order. The CMA objects to the former, but appears to agree in principle to the latter (essentially costs incurred in preparing the claim for costs).

45. In relation to the earlier period, Pentland argues that the receipt of the CMA's provisional decision on 4th February effectively started the appeal process, in that it contained many of the errors objected to in the final decision. Attractive as that argument might appear, I cannot accept it. The Tribunal's jurisdiction to award costs must apply only in relation to costs incurred in proceedings before

it. It is not for me to award costs on the basis of what happened, or should have happened, at the administrative stage. I therefore can only award costs for work done following the CMA's final decision of 29th July 2020.

46. Pentland acknowledged that £48,810.00 of its solicitors' costs (out of a total claimed of £156,819.70) were incurred prior to 29th July 2020, together with £6,270.00 fees of Leading Counsel (out of a total of £13,770.00). This means that approximately 30 per cent[5] of the Pentland claim for the work of its solicitors may fall out of consideration on this basis, as well as the specific amount identified for Leading Counsel. I adopt the figure of 30% as a sufficiently accurate apportionment.

47. As for later work, the Order requires the CMA to bear the Appellants' costs "to date". The Order was dated 9th October 2020 but I am willing to allow a further period up to and including 15th October to allow for work associated with settling and finalising the withdrawal of the appeal. I deal with the question of costs incurred in preparing the claim for costs separately below.

*Counsel*

48. Leading Counsel's fees claimed by Pentland comprised £6,270.00 in February 2020 and £7,500.00 on 31st August 2020 for "assisting in drafting notice of appeal". Junior Counsel's fees were £8,850.00 from 25th August to 1st September 2020 for "Drafting notice of appeal". Both Leading and Junior Counsel were named as counsel to all three Appellants in the Notice of Appeal, which was submitted jointly on behalf of Pentland and JD Sports.

49. The CMA objects to the lack of any itemisation of Leading Counsel's fees, to the lack of any basis of allocation of work between the Appellants, apparent duplication between work for Pentland and JD Sports, and general excess and disproportionality compared with the CMA's counsel's fees. The CMA also asserts that there was "a very limited amount of work which related solely to

[5] The actual percentage is 31.12%.

(Pentland)."[6] The CMA does not appear to dispute the hourly rates charged by counsel, but offered to pay only £4,840.00 against £22,620.00 claimed.

50. I have already noted that £6,270.00 of Leading Counsel's fees were incurred before the CMA's final decision and I have considered the issues of the justification for separate representation, joint use of counsel, and the significance of the CMA's own external costs. The issue for decision is whether, overall, counsels' fees incurred after the final decision date are reasonable and proportionate in all the circumstances, and I deal with that in the assessment below.

*Costs incurred in assessing costs*

51. Pentland has claimed, and the CMA has in principle conceded, an element of costs for the preparation of cost schedules and submissions. Pentland's claim amounts to some £12,047.20, allocated as to £5,461.20 for a senior costs lawyer and £6,586.00 for a junior costs lawyer. Even at the reduced rates I have stipulated, Pentland's claim amounts to £9,418.50. The CMA said no costs specialists were needed and offered £690.00[7].

52. Whilst the extent of this disagreement should not be under-estimated, it is significant that the CMA conceded that an albeit modest amount could be awarded in this case for the work done in assessing costs. Whilst it is true that the Order refers to costs incurred "to date", there is a necessary implication, in accordance with normal practice, that some allowance will be made for the work done in putting together a schedule of costs as the basis for negotiation and hopefully agreement. I deal with the amounts involved in the assessment below.

**(2) Assessment**

53. In making a summary assessment of what is a reasonable and proportionate level of costs to award, having regard to all the circumstances, I take the following

[6] Points of Dispute p.16.
[7] 5 hours at £138.00 per hour - see Points of Dispute p.15.

factors into account. First, a finding of breach of a CMA order and the imposition of a financial penalty of a significant amount are significant and serious matters for a public company to address. Second, the operational management decisions in relation to JD Sports' business were a matter for JD Sports and Pentland UK was only involved in the issue of compliance with the IEO by virtue of its position as majority shareholder in JD Sports; Pentland Jersey's position was even further removed. The CMA's practice, which it stated to be standard, of addressing its decisions to all members of a corporate group necessarily has the consequence that there are more parties that needed to incur costs in responding.

54. Third, given that separate representation in these circumstances was justified, there was a resulting need for liaison between the parties' respective lawyers. Fourth, a comparison with the CMA's own legal costs is not helpful in this case, given the different situations of the CMA and Pentland in this case, in part because much of the CMA's work would have preceded the issuing of the decision but also because it was not necessary for the CMA to prepare and file any defence. Fifth, an award of costs can only cover, in this case, costs incurred from the date of the decision appealed against until the date of the Order or shortly thereafter, subject to an additional allowance for costs incurred in preparing the claim for costs.

55. Finally, as a point of comparison, I have the sums claimed by JD Sports for the period from the date of the CMA decision to 15th October 2020, although the Tribunal is not aware of the amounts agreed to be paid by the CMA. The sums claimed totalled approximately £215,000.00 for solicitors' costs and £100,000.00 for counsel.

56. I first deal with the question of whether the amounts claimed by Pentland are reasonable in all the circumstances.

57. Pentland's total claim, after applying the adjusted rates I have stipulated (see paragraph 34), amounts to £133,818 for solicitors' costs and counsels' fees of £22,620.00, making a total claim of £156,438.

58. The solicitors' costs I have referred to are broken down into £55,155 for attendances (of which just under half comprised attendance on the client) and £78,663.00 for work on the documents.

59. To allow for the period adjustment, (ie excluding work done prior to 29th July 2020, the date of the CMA's final decision) it is necessary to apply the 30% deduction from solicitors' costs in the manner described in paragraph 46 above. This amounts to a deduction of £40,145.40 giving a resulting balance of £93,672.60. This resulting figure is the potentially awardable sum for solicitors' costs incurred by Pentland, applying the adjustments that I have found are reasonable.

60. I do not propose to adjust counsel's charge rates but note that some £6,270.00 of Leading Counsel's fees were incurred prior to 29th July 2020. The remainder, together with Junior Counsel's fee, amounts to £16,350.00.

61. This would give a total amount for Pentland's claim, reasonably adjusted, of £110,022.60.

62. Against this the CMA has offered a total of £27,438.00, comprising £22,598.00 for solicitors' costs, with one head of costs reserved, (£15,294.00 for attendances and £7,304.00 for work on documents) and an additional £4,840.00 for counsel. For work done specifically on assessing costs, the CMA has offered £690.00[8]. The gap between the parties therefore remains substantial, even after making reasonable adjustments to Pentland's claim.

63. In my assessment, Pentland was fully entitled to take the issue that it faced very seriously and to employ experienced and specialised solicitors and counsel. It was also sensible and efficient for all parties to use the same Leading and Junior Counsel. I do not think the CMA can fairly claim that its reasonableness in withdrawing the decision justifies more lenient treatment in relation to costs. Whilst it undoubtedly saved costs to withdraw the contested decision, it could

[8] See paragraph 51.

equally well be argued that the penalty should never have been imposed in the terms that it was in the first place and that the CMA should always exercise care in considering whether or not particular conduct merits the imposition of a penalty. Agreeing to the withdrawal of the appeal on the basis that it should bear the Appellants' costs seems in the circumstances to have been an entirely appropriate course for the CMA to adopt.

64. Given the adjustments for time and charge rates that I have made, I therefore find it would be reasonable for Pentland to claim the amount of £93,672.60 for solicitors' costs and £16,350.00 for counsel. This would give a combined figure of £110,022.60. However, that is not the end of the matter and it is necessary to consider whether these sums are proportionate to the circumstances of the case.

65. In assessing proportionality, it is necessary to consider, as part of the wider circumstances. whether it is right for a public authority, charged with carrying out its statutory functions, even when it has decided to withdraw a decision and a penalty, should be at the mercy of the commercial legal world's costs and profits in its liability for costs: see the Tribunal's statements in *Tobii v CMA, Flynn Pharma/Pfizer v CMA* and *Merricks v Mastercard* (see paragraphs 27 to 29 above).

66. Having regard to all the circumstances of the case, and balancing these wider considerations against Pentland's justified grievance that it has been put to entirely unnecessary trouble and expense by the CMA's actions, I find it is appropriate to reduce the amounts claimed in relation to both solicitors and counsel by a further one quarter, in addition to the adjustments I have previously indicated. This means deducting £23,418.15 from the solicitors' costs and £4,087.50 from counsels' fees. This still leaves an amount that is in reasonable proportion to the amounts claimed by Pentland, given the relative balance of work and exposure.

67. Taken together, this would mean that the CMA pay to Pentland the sum of £82,516.95, comprising £70,254.45 for solicitors' costs and £12,262.50 for

counsels' fees, the latter sum to be allocated between Leading and Junior Counsel in proportion to the amounts charged for work done within the applicable time period.

## E. CONCLUSION

68. For the reasons set out in this Ruling:

**IT IS ORDERED THAT:**

The CMA is to pay Pentland the sum of £82,516.95 within 28 days of the date of this Ruling.

Peter Freeman CBE QC (Hon)
Chairman

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 5 July 2021