Neutral citation [2005] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

14 October 2005

Before:

Sir Christopher Bellamy (President)
Mr. Peter Clayton
Mr. Peter Grant-Hutchison

Sitting as a Tribunal in Scotland

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS UK PLC
(formerly Express Dairies plc)

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

-supported by-

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LIMITED

Interveners

Mr. Ben Tidswell and Mr. Euan Burrows (of Ashurst) appeared for the appellants.

Mr. George Peretz (instructed by the Treasury Solicitor) appeared for the respondent.

Miss Morag Bond (of Herbert Smith) appeared for the interveners.

JUDGMENT: EXPENSES

I INTRODUCTION

1. On 2 September 2005 the Tribunal gave judgment on an appeal brought by the appellants ("Claymore") against a decision of the respondent ("the OFT"), contained in a letter of 9 August 2002 ("the Decision") and supplemented by a witness statement dated 16 May 2003 ("the OFT Witness Statement"), to the effect that certain conduct on the part of the interveners ("Wiseman") did not on the evidence available infringe the Chapter II prohibition of the Competition Act 1998 ("the 1998 Act").

2. In its judgment (see [2005] CAT 30) the Tribunal set aside the Decision on the basis that the OFT had not conducted an adequate investigation. The Tribunal had serious doubts as to the adequacy of the OFT's investigation in relation to both Wiseman's costs in this case and its arrangements with the Cooperative Wholesale Society ("CWS") and Aberness: see, in summary, paragraphs 316 to 318 of the judgment.

3. At paragraphs 324 and 325 of the judgment the Tribunal said this:

> "324. Although the Tribunal has power to remit "the matter" to the OFT, the events here in question now date back over six years. The OFT's investigation of costs related to mid-2001. The CWS arrangements changed in late 2002, when Claymore recovered some business, and the 2002 arrangements with Aberness related, as we understand it, to a twelve month period. In the meantime, Express has merged with Arla, Arla/Express being in April 2003 the largest processor in Great Britain, according to the CC report on that merger (at p. 93).
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> 325. In these circumstances, given the historical nature of this dispute, we see no purpose in making any further order. It is for the OFT, given the time that has elapsed, to decide what, if any, further action should be taken."

II CLAYMORE'S APPLICATION FOR EXPENSES

4. Claymore has applied for its expenses incurred in the proceedings. The OFT opposes that application, but submits that if the Tribunal is minded to make an award of expenses in favour of Claymore there should at least be a percentage reduction in that award. It also submits that it should not be responsible for

expenses incurred by Claymore as a result of dealing with Wiseman's intervention. Wiseman also opposes Claymore's application, submitting that in any event there should be no order as against Wiseman.

The parties' submissions

- *Claymore's submissions*

5. Claymore submits that it should be awarded its expenses. It was the successful party in the appeal. The Tribunal has agreed with it that the OFT erred in its consideration of whether Wiseman had engaged in certain anti-competitive conduct. Claymore should be recompensed for the substantial financial burden it has incurred.

6. As regards, first, the OFT's challenge to the admissibility of the appeal, Claymore submits that it was fully successful: the Tribunal rejected all of the OFT's arguments. As regards, secondly, the various interlocutory matters which arose following the Tribunal's judgment on admissibility (see [2003] CAT 3) Claymore contends that it was put to unnecessary expense. It needed to make two applications for disclosure of material excluded from the OFT Witness Statement. The Tribunal granted the first and ordered the OFT to answer a request for further and better particulars in respect of the second. Claymore should, it says, be entitled to its expenses in this respect as a further explanation of the OFT's case was necessary for it to plead its case.

7. Secondly, Claymore contends that it is entitled to its expenses in respect of the application for recovery and inspection made by way of letters dated 19 March 2004 and 16 April 2004. That application was necessary for Claymore to calculate the effect of the OFT's errors. Claymore claims that it was only as a result of a concession by the OFT at the hearing to determine the application, to the effect that Claymore only had to show that the OFT had committed an error of principle, that the Tribunal declined to grant that application.

8. In respect, thirdly, of the substance of the appeal, Claymore contends that the Tribunal has agreed with the principal grounds on which it appealed. It has not pursued irrelevant points. To the extent that the Tribunal has not determined Claymore's grounds of appeal, it is (except for one argument) simply because the Tribunal did not find it necessary to do so. There is in addition, says Claymore, no countervailing reason why it would be unjust to award Claymore its expenses.

9. Finally, Claymore contends that the OFT's conduct in the appeal should be taken into account by the Tribunal. Its attitude has been to resist scrutiny of its conduct at every turn, particularly with regard to disclosure. Its conduct has added significantly to the expense of the appeal.

10. As to the award of expenses against Wiseman, Claymore contends that its intervention has accounted for a significant proportion of the expenses incurred by Claymore. It has submitted a statement of intervention, bundles, a witness statement, a lengthy expert report and a skeleton argument. Claymore incurred expenses in considering and responding to those documents. Claymore submits that Wiseman is large and well resourced, and intervened because it was in its interests to do so. It is, says Claymore, appropriate that Wiseman should pay a proportion of Claymore's expenses.

The OFT's submissions

11. The OFT submits that the award of expenses is a discretionary matter for the Tribunal. If there is to be such an award, there are a number of points which in its view should lead to a percentage reduction.

12. The OFT contends that Claymore threw the 'kitchen sink' at the appeal, both in its revised notice of application and in its request for further and better particulars. It refused to reduce its case to three or four prongs of attack, despite requests by the Tribunal to that effect. All of the material put forward by Claymore had to be considered and responded to by the OFT at great cost. In the OFT's submission the Tribunal should not encourage such 'kitchen sink' approaches to appeals.

13. The OFT argues that its approach to Claymore's application for recovery and inspection should not be criticised, a point recognised by Claymore itself. Highly confidential information had been provided to it by Wiseman and other third parties. It is in the public interest for the OFT not to disclose such information lightly. The OFT could not agree to recovery and inspection without an order to that effect from the Tribunal. In any event, it cannot be denied, says the OFT, that Claymore lost on its application. Whilst it is true that the OFT's concession as to materiality of errors did assist the Tribunal in rejecting certain of Claymore's requests, others were dismissed for unrelated reasons.

14. Finally, the OFT contends that if an order for expenses is to be made in favour of Claymore, the OFT should not be responsible for the expenses Claymore incurred in addressing Wiseman's intervention.

Wiseman's submissions

15. Wiseman's primary position is that there should be no order as to expenses. First, it notes that the Tribunal has not remitted the matter to the OFT. It has therefore refused to grant Claymore the principal relief sought in its revised notice of application. Secondly, Claymore pursued its appeal in an immoderate fashion, refusing to narrow it down to a reasonable compass. The Tribunal has rightly, in Wiseman's submission, not addressed many of Claymore's arguments.

16. Wiseman submits that there should in any event be no order as regards itself. The Tribunal's practice has been in general that interventions should be treated as costs-neutral. In this case, Wiseman was forced to intervene, given that Claymore initially sought an order from the Tribunal recording an infringement of the Chapter II prohibition against Wiseman and maintained its request that the matter be remitted to the OFT. Wiseman contends that its intervention, including the report of Mr Bezant and the witness statement of Mr Sweeney, was concise and helpful.

17. Wiseman argues that its position cannot be compared with the cases in which the Tribunal has departed from the normal rule as to the costs of an intervention.

First, the appellants are a much more substantial concern than Wiseman, being the largest dairy group in Europe. Secondly, Wiseman was not the originator of the proceedings.

18. In short, says Wiseman, it has been open and responsive throughout. The fact that the investigation was found to have been unsatisfactory cannot be blamed on Wiseman.

19. Finally, Wiseman submits that it was reasonable for it to take an active part in resisting the application for recovery and inspection of highly sensitive material covering all aspects of Wiseman's business.

20. As to any apportionment of expenses as between the OFT and Wiseman, Wiseman submits that the proportion attributable to the intervention must be materially lower than 25 per cent used for illustrative purposes by the Tribunal at the hearing to hand down judgment. The time spent by Claymore dealing with Mr Bezant's report cannot have amounted to more than a very minor proportion of expenses as a whole.

The Tribunal's analysis

21. The Tribunal's jurisdiction to award costs, or expenses, is set out in rule 26 of the Competition Commission Appeal Tribunal Rules 2000 SI 2000 No. 261 ("the 2000 Rules"), which provides as follows:

> "(1) For the purposes of these rules "costs" means
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> (a) if the proceedings are taking place before a tribunal in England and Wales, costs and expenses recoverable in proceedings before the Supreme Court of England and Wales;
> (b) if the proceedings are taking place before a tribunal in Scotland, costs and expenses recoverable in proceedings before the Court of Session;
> (c) if the proceedings are taking place before a tribunal in Northern Ireland, costs and expenses recoverable in proceedings before the Supreme Court of Northern Ireland.

(2) The tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the tribunal may take account of the conduct of all parties in relation to the proceedings.

(3) Any party against whom an order for costs is made shall, if the tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court…"

Rule 26 of the 2000 Rules is materially identical to rule 55 of the Competition Appeal Tribunal Rules 2003 S.I. 2003 No. 1372.

22. The Tribunal has given rulings on costs in various appeals under the 1998 Act, including the following: *Institute of Independent Insurance Brokers v Director General of Fair Trading ("GISC: Costs")* [2002] CAT 2; *BetterCare Group v Director General of Fair Trading*, transcript of 1 August 2002; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6; and *Pernod-Ricard v OFT* [2005] CAT 9. It has also given two such rulings in applications for review brought under the Enterprise Act 2002 ("the 2002 Act"): *IBA Health v OFT* [2004] CAT 6 and *UniChem v OFT* [2005] CAT 31.

23. In *GISC: Costs* the Tribunal said, as regards orders for costs against the (then) Director:

"56. In proceedings under the Act powerful companies may well expend very large sums in employing lawyers, instructing experts and taking many points on a "no expense spared" basis. We can understand why the Director may quail at the thought of being ordered to pay costs in such cases. In addition, as Lord Bingham CJ pointed out in *Booth's* case, cited above, there is a public interest in encouraging 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. Thus we accept that the factors urged on us by the Director are potentially relevant to the exercise of our discretion.

57. Again, however, we think that those factors cannot be decisive. In particular, we think that considerations of public expenditure cannot be decisive in cases where considerations of fairness point in the opposite

direction. We also bear in mind that the Act endows the Director, in the public interest, with wide ranging and draconian powers, exercised on behalf of the State, which may substantially affect the civil rights and obligations of those concerned. The costs of the administrative procedures under the Act are not recoverable by the persons affected. However, the Act provides that the exercise of the Director's powers may be challenged, on grounds of both fact and law, before a judicial tribunal. The Tribunal has been given the power to award costs. That power, it seems to us, is a counterbalancing element in the system which both imposes a necessary discipline on all concerned, and enables the Tribunal to deal with the issue of costs as fairly as possible according to the particular case.

…

60. …many factors may be relevant to orders for costs, or indeed whether to make any order at all. Such factors may include whether the appellant has succeeded to a significant extent on the basis of the new material introduced after the Director's decision but not advanced at the administrative stage; whether resources have been devoted to particular issues on which the appellant has not succeeded, or which were not germane to the solution of the case; whether there is unnecessary duplication or prolixity; whether evidence adduced is of peripheral relevance; or whether, in whatever respect, the conduct of the successful party has been unreasonable."

24. In that case the appellants had been wholly successful on the main issue, which had been a straightforward point of law. The Institute of Independent Insurance Brokers (IIB) was a representative organisation which had incurred significant financial expense relative to its resources. Furthermore, its members were directly affected by the contested decision in that case. For those reasons the Tribunal made an award of costs in favour of the appellants. The Tribunal further decided that the General Insurance Standards Council (GISC) should be ordered to pay those costs incurred by the appellants as a result of its intervention. Whilst there was some force in the argument that interventions should be costs neutral,

"80. …GISC represents substantially all major United Kingdom general insurance companies and larger insurance intermediaries. GISC supported the unsuccessful Director, and ran one supplementary argument, on the so-called "rule of reason", which the Tribunal rejected (paragraphs 260 to 267 of the judgment). Although it was, in general, helpful to the Tribunal that GISC intervened, it was in GISC's interest to do so. GISC's intervention did cause the IIB and ABTA to incur extra costs. Although the error made in this case was that of the Director, it was GISC's application to the Director which contained an application for negative clearance, which GISC pursued, which led to these proceedings in the first place. In those particular circumstances we think we should follow the practice of the Court of First Instance, and order

that GISC pay the IIB and ABTA the costs occasioned to them by its intervention."

By way of a broad assessment the Tribunal ordered GISC to pay 15 per cent of the appellants' costs.

25. In *BetterCare* the appellant was successful on the questions of both the admissibility of the appeal and the substance, namely whether the North and West Belfast Health and Social Services Trust was an undertaking for the purposes of the Chapter II prohibition of the 1998 Act.

26. The Tribunal granted the appellant its costs relating to the question of the admissibility of the appeal but left each party to bear its own costs in relation to the substance, noting that the substance of the case involved virgin territory on which there was no decided authority directly on point and that the OFT had gone to considerable lengths to assist the Tribunal by putting before it helpful factual material. In any event a great deal of the work done as regards the substance of the case would have had to be done had the matter proceeded administratively before the (then) Director (see, generally, p 8 of the transcript).

27. In *Freeserve* the (then) Director of Telecommunications challenged the admissibility of the appeal. The appellant was successful on that issue and partially successful on the substantive issues. The Tribunal awarded the appellant its costs in respect of the admissibility issue but left the appellant and the Director to bear their own costs as regards the substantive issues. As regards admissibility, the Tribunal said:

"In the Tribunal's view, in the light of the earlier judgment in *BetterCare*, it was virtually inevitable that the Tribunal would come to the view that the remainder of the Director's decision in the present case was an appealable decision and in those particular circumstances, which are specific to the facts of this case, we think that Freeserve should have its costs of the admissibility issue. We say advisedly and deliberately the costs of the admissibility issue. It is not a question, as in *BetterCare*, of all the costs up to the date of the admissibility judgment, because quite a few costs will have been incurred before that point in preparing arguments on the substance. It is only in relation to the admissibility issue as a discrete issue that we give Freeserve its costs of that issue." (transcript, p 10)

28. As to the substantive issues, the Tribunal took into account that whilst Freeserve had succeeded on the main issue in the case, there was force in the criticisms made of its presentation of its case in various respects:

> "the abandonment of the request for the Tribunal to take an infringement decision, the abortive application for disclosure, a number of weak points taken on behalf of Freeserve and of course the fact that on at least three of the main points raised by Freeserve, namely cross-marketing, advance notice and the telephone census, the Director has been successful and the appeal has been rejected." (transcript, pp 10-11)

29. As to the position of BT, the intervener in that case, the Tribunal decided that there should be no order for costs, essentially on the basis that BT had been successful on some issues but unsuccessful on others (transcript, p 12).

30. In *Pernod-Ricard* the appellants had been successful on the issue of admissibility of the appeal. The Tribunal awarded the appellants only 75 per cent of their costs relating to that issue to reflect the fact that they succeeded on only one of the two aspects advanced in the notice of appeal. As to the other issues in the appeal the Tribunal made no order as to costs: they had been resolved by agreement between the parties.

31. As regards the position of the intervener, Bacardi, the Tribunal decided against ordering it to make a contribution to Pernod's costs as regards the admissibility issue. Bacardi played a subsidiary role as regards that issue. The points regarding admissibility and procedure were of importance, and the general effect of the case was that further consideration was given to the original assurances given by Bacardi to the OFT which had led to the closure of the file in the first place.

32. In *IBA Health* the Tribunal awarded the applicant its costs of the successful application, 82.5 per cent of which was to be met by the OFT and the remainder by the interveners. The Tribunal noted the speed with which the application had been prepared which understandably resulted in a range of issues being raised, some of which turned out to be peripheral to the central issues in the case. It also noted that IBA had identified in substance a number of the issues which were

subsequently found to have been inadequately explained in the contested decision, and that IBA was a relatively small company.

33. As to the position of the interveners in that case – the merging parties – the Tribunal pointed out that although the interveners' participation was in general helpful, they intervened because it was in their commercial interest to do so. It would not be appropriate to make the OFT, and indirectly the taxpayer, bear the additional costs incurred by IBA as a result of the interventions.

34. In *UniChem* the Tribunal said that in cases under s 120 of the 2002 Act a successful applicant will normally be awarded at least a proportion of its costs. It awarded the applicants half of its reasonably incurred costs on the basis that whilst the contested decision was set aside, the applicant succeeded mainly on only one of the four grounds originally advanced, affecting four paragraphs out of a 50-paragraph decision. The Tribunal said that "where an applicant had succeeded on only limited grounds, in a finely balanced case, it would not be appropriate to make an award to cover all of its costs of the application" (see paragraph 25).

35. As to the intervener – one of the merging parties – the Tribunal made no order as to costs. Whilst it was in the intervener's interest to participate in proceedings the intervention was helpful and was conducted in a restrained and reasonable manner. The remission to the OFT was in no way due to any failing on its part: see *UniChem*, [32].

The present case

36. Turning to the case in hand, we consider it appropriate, as in certain of the cases cited above, to consider the issue of expenses by reference to specific episodes in the appeal. First, in relation to the question of admissibility we consider that Claymore should be awarded its reasonably and proportionately incurred expenses. The OFT lost on all of its principal arguments. Moreover, we found, in our judgment on admissibility, that the OFT had attempted to evade the application of the Tribunal's judgment on admissibility in *BetterCare*. It was only at the hearing to determine the admissibility of the appeal that the OFT conceded,

through counsel, that the reason for the Decision was that there was insufficient evidence of infringement: see *Claymore Dairies v Director General of Fair Trading (Admissibility)* [2003] CAT 3 at [128] to [131].

37. As in *Freeserve*, cited above, we consider that in the light of *BetterCare* it was foreseeable that the Tribunal would come to the conclusion that the decision to close the file in relation to Claymore's complaint would be held to be an appealable decision.

38. We should make it clear, however, that it is not a question of all of the expenses incurred by Claymore up to the date of the admissibility judgment, because certain expenses will have been incurred in preparing arguments on the substance. We will come to the substance below.

39. At this stage, however, we give Claymore its expenses on the issue of admissibility alone. Since the OFT should not be required to pay the expenses Claymore incurred in answering Wiseman's arguments on admissibility, we award Claymore 90 per cent of its reasonably and proportionately incurred expenses on the admissibility issue, to reflect the fact that the remaining 10 per cent is in our view attributable to dealing with Wiseman's arguments on admissibility.

40. Although on the issue of admissibility Wiseman's role was subsidiary to that of the OFT, its arguments would have provoked some extra expenses on the part of Claymore. Wiseman is a well resourced company. In the circumstances we consider that Wiseman should pay 10 per cent of Claymore's expenses in relation to the admissibility issue.

41. We turn next to the various interlocutory issues which arose during the proceedings, namely Claymore's requests for recovery and inspection and further and better particulars.

42. We understand why Claymore felt obliged to make the requests for disclosure of the material excised in the OFT Witness Statement, but at the same time sympathise with the OFT's predicament in relation to the disclosure of

confidential information it had received from third parties. The subsequent request for further and better particulars was far reaching, seeking to delve into certain irrelevant matters (see e.g. requests 1.2, 2.1, 4.4 and 23.1) and could have been more targeted. On the other hand, certain of the procedural issues arising on this part of the case were novel, and we do not think the OFT conducted itself unreasonably in dealing with these novel issues.

43. As to the application for recovery and inspection, it is true that the Tribunal took into account the OFT's concession at the hearing on 24 May 2004 that Claymore did not have to prove the materiality of any errors on the part of the OFT in deciding not to grant that application. However, the concession did not relate to all of Claymore's application. Certain specific requests – for access to unexcerpted passages of the CC Report (see [2004] CAT 16 at [123] *et seq*.), the attachments to the letter of 29 November 2001 (see [136] *et seq*.), the information given by Wiseman to the OFT in connection with the voluntary assurances given by the former in lieu of interim measures (see [138]) and a list of personal records kept by officials in the course of the investigation (see [139]) – were rejected by the Tribunal as being disproportionate and/or unnecessary.

44. Moreover, we can understand the OFT's reluctance to hand over confidential information belonging to third parties, particularly where one of those third parties, Wiseman, is a direct competitor of Claymore. In the circumstances, and bearing in mind the relative novelty of the issues, we do not consider that the OFT acted unreasonably in relation to the applications for recovery and inspection. In relation to the major application, which led to the Tribunal's judgment on recovery and inspection, cited above, the OFT was successful.

45. In all those circumstances it seems to us that the right order in respect of the various interlocutory proceedings relating to disclosure issues or particulars is for no expenses due to or by any party.

46. Finally, we turn to the expenses incurred as regards the substantive issues in the case.

47. It is true that the applicants were successful in respect of a number of issues relating to the adequacy of the OFT's investigation. The Tribunal found that the OFT had erred in its approach, notably, to the calculation and assessment of Wiseman's average variable and total costs, to the issue of below-cost pricing, intent, "all of Scotland" contracts and related issues.

48. On the other hand, we are concerned at the approach adopted by Claymore in this case, which has been to attack in great detail the decision of the OFT, employing some nineteen grounds of appeal, a pleading and skeleton argument amounting to more than 170 pages and an expert report of some 85 pages, and producing voluminous documentation in support of its appeal, much of which was not referred to at any stage of the proceedings. Furthermore, despite various requests from the Tribunal to endeavour to reduce the scope of its appeal Claymore did not do so.

49. In the event, the Tribunal set aside the Decision for the reasons set out above. It did not need to deal with several of the grounds of appeal. Moreover, in respect of one major ground, namely that relating to the calculation in this case of AVC on the basis of incremental cost of supply, the Tribunal did not agree with Claymore (see [266] to [267] of the judgment of 2 September 2005). AVC is a major issue in a predatory pricing case.

50. We also note that Claymore did not abandon the ground of appeal based on Chapter I of the 1998 Act. The supplemental bundles lodged with the Tribunal shortly before the hearing contained a number of documents relating to the Chapter I investigation.

51. We also bear particularly in mind that in the course of the proceedings Claymore abandoned its request that the Tribunal make a finding of infringement. Moreover, the Tribunal did not accede to Claymore's request to remit the matter to the OFT. Claymore therefore failed to obtain a principal part of the relief it sought. In addition, the appellants are not a small undertaking with limited resources and restricted access to specialist legal advice. Express was, at the material time, the market leader for fresh processed milk in England and Wales.

Since the Arla/Express merger it has undoubtedly become one of the largest dairies in Europe.

52. Balancing all of these factors as best we can, we consider that the correct order is that Claymore should be awarded only a proportion of its reasonably incurred expenses relating to the substantive issues. In the exercise of our discretion, and taking a necessarily broad brush approach, we fix that proportion at 50 per cent.

53. That leaves the question of whether Wiseman should be ordered to meet a proportion of Claymore's expenses relating to the substantive issues. In that connection, we bear the following points in mind. First, whilst Wiseman did not originate these proceedings in the same way as did GISC in the *Institute of Independent Insurance Brokers* case, Wiseman actively participated in the appeal. That participation went well beyond protecting business confidentiality and included filing a substantial expert's report.

54. Thus, whilst we acknowledge Wiseman's assistance as intervener, Wiseman advanced a pleading and skeleton argument amounting to more than 80 pages (those of the OFT amounted to less than 75 pages) and adduced a 60-page expert report which, although useful, raised various issues not raised by the OFT and had to be considered by both Claymore and the OFT. Wiseman also made oral submissions at the hearing which supplemented a detailed speaking note prepared during the hearing itself.

55. Secondly, Wiseman did not succeed in respect of its submissions on the substance, although it did succeed on the question whether the matter should be remitted to the OFT. Thirdly, Wiseman is a substantial company with access to expert legal and accountancy advice.

56. In those circumstances, it appears to us that it is appropriate to order Wiseman to pay a proportion of the expenses we have decided to award Claymore in respect of the substantive issues. Taking a necessarily broad brush approach, we decide that in relation to the expenses awarded to Claymore on the substantive issues (i.e. 50 per cent of Claymore's reasonably and proportionately incurred expenses on those

issues), 70 per cent of those expenses should be paid by the OFT and 30 per cent should be paid by Wiseman, Wiseman otherwise bearing its own expenses.

Conclusion

57. We have therefore come to the conclusion that:

(a) Claymore should be awarded its reasonably and proportionately incurred expenses in respect of the admissibility issue. 90 per cent of that sum is to be met by the OFT and 10 per cent of that sum is to be met by Wiseman.

(b) There shall be no order as to expenses incurred in respect of interlocutory matters, including the applications for recovery and inspection and Claymore's request for further and better particulars together with the OFT's reply to that request.

(c) Claymore should be awarded 50 per cent of its reasonably and proportionately incurred expenses in respect of the substantive issues. 70 per cent of that sum as awarded is to be met by the OFT and 30 per cent of that sum is to be met by Wiseman.

58. Any dispute between the parties as to the apportionment of expenses between admissibility, interlocutory and substantive issues will be settled if necessary by the Tribunal. In default of agreement between the parties within 56 days, the matter will be remitted to the Auditor of the Court of Session for taxation.

Christopher Bellamy Peter Clayton Peter Grant-Hutchison

Charles Dhanowa 14 October 2005
Registrar