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Case Nos: 1035/1/1/04
1041/2/1/04

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 February 2006

Before:

THE HONOURABLE MR JUSTICE RIMER
PROFESSOR ANDREW BAIN
MRS SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

THE RACECOURSE ASSOCIATION AND OTHERS

Appellants

and

OFFICE OF FAIR TRADING

Respondent

AND

THE BRITISH HORSERACING BOARD

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr Christopher Vajda QC (instructed by Denton Wilde Sapte) and Mr Sam Szlezinger of that firm appeared for The Racecourse Association and its co-appellants

Mr David Vaughan QC and Miss Maya Lester (instructed by Addleshaw Goddard) appeared for the British Horseracing Board

Mr Rhodri Thompson QC and Mr Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Office of Fair Trading

Heard at Victoria House on 1 November 2005

JUDGMENT ON COSTS

Introduction

1. We delivered our reserved judgment on the substantive appeals in these proceedings on 2 August 2005. We allowed the appeals of both (i) The Racecourse Association and its co-appellants ("the RCA appellants") and (ii) the British Horseracing Board ("the BHB") and set aside the decision dated 5 April 2004 of the Office of Fair Trading ("the OFT") that the sale of certain media rights under a Media Rights Agreement dated 2 May 2001 ("the MRA") infringed the Chapter I prohibition imposed by section 2 of the Competition Act 1998 ("the Act"). When we delivered our judgment, we adjourned argument on all questions of costs to a date to be fixed.

2. On 1 November 2005, we heard argument on applications by the RCA appellants and by the BHB for orders that the OFT should pay their respective costs of the two appeals. The OFT resisted the applications, although not totally. It accepted that it should pay at least 90% of the RCA appellants' costs, but disputed that it should pay more. It raised greater objections to the claim that it should also pay the BHB's claimed costs but (if we were minded to assess costs summarily) recognised a liability for just under a third of the BHB's claimed costs.

3. At the conclusion of the argument, we took the view that the magnitude of the financial gulf between the BHB and the OFT was such that we should reserve our judgment on the BHB application. Had the RCA appellants' application been the only one before us, we would not have reserved our judgment on it, but as we considered it possible that our decision on the BHB application might have an impact on the RCA appellants' application, we thought it as well also to reserve our judgment on that

application. In the event, it has had no such impact. This is our judgment on both applications. We will take as read our judgment on the substantive appeals.

The Tribunal's jurisdiction to award costs

4. The Tribunal's jurisdiction to make costs orders is contained in Rule 55 of The Competition Appeal Tribunal Rules 2003, which provides, so far as material:

> "**Costs**
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> 55.-(1) For the purposes of these rules 'costs' means costs and expenses recoverable before the Supreme Court of England and Wales ….
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> (2) The Tribunal may at its discretion, subject to paragraph (3), 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.
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> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court …."

5. Rule 55 replaced the provisions formerly in Rule 26 of The Competition Commission Appeal Tribunal Rules 2000. Rule 26(2) was almost identical to Rule 55(2), differing only in an immaterial respect. We consider that the principles applicable to the jurisdiction under the former Rule 26(2) are equally applicable to that under Rule 55(2), upon which the argument before us turned.

6. It will be noticed at once that, by comparison with the relatively elaborate guidance on costs orders to be found in Part 44.3 of the Civil Procedure Rules 1998, Rule 55(2) contains little guidance as to the criteria to which the Tribunal should have regard in exercising its discretion to award costs. In particular, in so far as it

empowers the Tribunal to take account of the parties' *conduct* in relation to the proceedings, on one view that consideration goes to the quantum of costs that any party should be required to pay rather than to the prior question of whether a costs order should be made at all, although we doubt whether the rule in fact intended to draw such a distinction.

7. Fortunately, we do not find ourselves unaided in deducing the intentions presumed to underlie Rule 55(2), since this Tribunal, by a panel chaired by Sir Christopher Bellamy, gave valuable guidance on Rule 26(2) in their judgment on costs in the combined appeals of *The Institute of Independent Insurance Brokers v. The Director General of Fair Trading* and *Association of British Travel Agents v. The Director General of Fair Trading*, 29 January 2002. Those appeals had been against decisions by the Director General refusing to withdraw or vary a decision entitled *Notification by the General Insurance Standards Council*, and we shall refer to the case as "the *GISC* decision". In paragraphs 48 to 62 of their costs ruling, the Tribunal set out some general principles relevant to the exercise of the Rule 26(2) discretion, although the Tribunal emphasised that it was not formulating any rigid rules and that each case must be dealt with on its own merits, with the Tribunal retaining flexibility to meet particular circumstances as they arise (paragraph 48).

8. Subject to that last important caveat, we derive from the *GISC* decision the following guidelines. First, the fact that a successful appellant has been put to expense in exercising his rights is a relevant factor, although it will not necessarily be decisive (paragraph 49). We interpret this (taken with all else that we regard as implicit in the *GISC* decision) as reflecting a starting point for the exercise of the discretion that a successful appellant ought, subject to all other relevant considerations, to be entitled

to be compensated for the costs he has incurred in vindicating his rights. Second, this presupposes that it is possible to identify a clear "winner". In some cases, the result may be rather closer to being in the nature of a draw and so it may be just to allow the costs to lie where they fall (paragraph 50). Third, it is subject to the consideration of whether the winner has incurred costs in arguing issues on which he has lost, or has acted unreasonably in the proceedings, being factors which may require a disallowance of part of the claimed costs or may even justify none being awarded at all. The Tribunal regarded CPR Part 44.3(4) and (5) as providing analogous guidance in these respects (paragraph 51). Fourth, different considerations will be likely to apply to different kinds of case. For example, as regards costs orders *against* losing appellants, cases involving penalties will require particular consideration (paragraph 52). Fifth, the starting point that the loser pays the winner's costs should not apply if it would frustrate the objects of the Act.

9. Having made these general points, the Tribunal then (in paragraph 54) considered whether any general rule to the effect that losing appellants might be liable to pay the Director General's costs might be a deterrent to achieving the objects of the Act, particularly in the case of smaller companies, representative bodies and consumers; and it gave certain guidelines, although we will not summarise them as they are of no relevance to the circumstances of the present appeals. More to the point, the Tribunal then turned to deal with the policy argument that a general rule that the Director General must ordinarily pay the costs of successful appellants might drain his resources and might deter him from making decisions that were potentially vulnerable to appeal. The Tribunal was sympathetic to the Director General's expressed concern that he might find himself faced with costs bills run up on a "no expense spared" basis, but also recognised that considerations such as these could not

be decisive. The Tribunal concluded its general guidance with the following passage, which is relevant to aspects of the present applications:

> "58. We think, therefore, it would not be proper, certainly at this early stage, to fetter our discretion under Rule 26(2) by adopting a general principle to the effect that, if the Director loses, he should be liable to pay costs to a private party only if he has been guilty of a manifest error or unreasonable behaviour. *Booth's* case [*Bradford Metropolitan District Council v. Booth* 164 JP 485 (10 May 2000)] indicates that such a rule is not, as a matter of law, required. To introduce such a rule in the context of this Tribunal could, in itself, be a disincentive to exercising the right to appeal, with possible detriment to the competitive process in the market.
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> 59. In our view, the Director's concerns over costs are better addressed by other means. The aim of the Tribunal's case management procedures is to focus as early as possible on what the main issues are so as to avoid unnecessary escalation of costs. That aim is supported by the use of written procedure, sanctions against prolixity, control over the presentation of expert evidence, limits on oral hearings, and strict timetabling. Disclosure of documents, which is a major source of cost in traditional litigation, is minimised before the Tribunal. While it is, perhaps, inevitable that some cases before the Tribunal will be expensive, the Tribunal's procedures are designed to save costs wherever possible. The Director did not have the advantage of that system under the former Restrictive Trade Practices Acts.
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> 60. Furthermore the Tribunal will, as necessary, use its powers in relation to costs in support of its case management powers. We have already referred to developments in the civil courts designed to ensure that the costs incurred are proportionate to the matters at stake, and in particular the willingness of the courts to make orders which reflect the parties' degree of success on particular issues. In addition, 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.
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> 61. In our view the issue of multiple appeals raising the same point, apparently a major source of concern to the Director, can conveniently be addressed in the case management context and the appropriate orders made, if necessary on the Director's application. Similarly the Director's hypothetical example of a case where he loses narrowly on an issue involving a complex economic assessment is a case for another day which we need not rule on now."

10. We interpret that guidance, at least as regards costs applications by successful appellants, as amounting in summary to the following. First, as in all cases, there is no immutable rule as to the appropriate costs order; and how the discretion will be exercised in any case will depend on its particular circumstances, one relevant consideration being whether any award of costs may be perceived as frustrating the objects of the Act. Second, subject to this, the starting point is that a successful appellant who can fairly be identified as a "winner" is entitled to recover his costs. Third, such an appellant will not necessarily be entitled to recover all his costs, and may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or which involved unnecessary prolixity or duplication, and he may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part. Fourth, the OFT is not entitled to any special protection from vulnerability to costs orders in favour of successful appellants save such protection as it may obtain by appropriate case management of the appeal directed at ensuring that the costs of the appeal are kept within proportionate bounds.

The RCA appellants' costs application

11. The RCA appellants' application is straightforward. They challenged the OFT's decision that the MRA infringed section 2 of the Act, their challenge was successful and we accepted most of their arguments in support of their appeal. The one issue on which we ruled and on which they were not successful was their argument that there had been no collective selling or concerted action by the racecourses. We dealt with that at paragraphs 157 to 159 of our judgment, where we agreed with the OFT's decision that the conclusion of the MRA at least amounted to a concerted practice between the signatory racecourses.

12. The RCA appellants have provided a schedule of their claimed costs, which total £668,914.05 (excluding the costs of the costs hearing). Those costs represent the costs of the RCA appellants' solicitors (Denton Wilde Sapte) and counsel and include certain costs paid to RBB Economics ("RBB") and Wiggin & Co, solicitors. RBB were the economic advisers to the RCA appellants, and their costs amount to £31,760, being referable to the writing of two reports and the attendance of an RBB economist at the first of the three-day hearing of the appeals in order to be able to provide any necessary assistance on the RBB reports (the opening of the RCA appellants' case occupied that day). Wiggin & Co's costs amount to £6,272.10. They are solicitors to the owners of the Super 12 courses (each of whom is an appellant) and carried out two pieces of work in relation to the appeal. In particular, and in effect as agents for Denton Wilde Sapte, they reviewed the files relating to the negotiations leading up to the MRA. It is said that it was cheaper for Wiggin & Co to do this than for Denton Wilde Sapte to do it themselves.

13. The OFT accepts that in principle it must pay the RCA appellants' costs, although it wishes to challenge the quantum of the claimed costs, which it regards as excessive, and therefore asks that (in default of agreement as to the recoverable costs) there should be a detailed assessment by a costs judge. There is no dispute that we should direct such an assessment in default of agreement. The one area of dispute that does arise is that the OFT invites the Tribunal to disallow 10% of the claimed costs so as to reflect the RCA appellants' failure on the collective selling/concerted practice issue.

14. The RCA appellants reject that as inappropriate. Their submission was that that aspect of the appeals occupied less than 5% of the notice of appeal and reply, and

a mere three lines of the skeleton argument for the hearing at which Mr Vajda QC did not devote any time in developing the point orally (each party had only a limited time for oral submissions, and so they had to be selective). It is also said that the point occupied less than two pages of our 95-page judgment, although a more relevant statistic might be that it occupied less than two of the 37 pages of our judgment devoted specifically to the grounds of appeal. The RCA appellants' submission was that this issue caused the incurring of no more than a trifling part of their costs of the appeal and so the Tribunal should not concern itself with disallowing any part of such costs. Alternatively, if the Tribunal disagrees, it would be more realistic to disallow at most between 2% and 5% of such costs rather than the claimed 10%.

15. The OFT's rejoinder to that response was that the collective selling/concerted action point did not turn simply on a discrete issue of principle that could be identified and argued separately from all other issues. It depended in part on an analysis of the complicated facts leading up to the signing of the MRA, which occupied much of the written and oral arguments presented to us and with which we also dealt fully in our judgment. It is recognised that these facts had to be considered anyway in dealing with the other issues raised by the appeals, but it is said that it is an oversimplification to ignore that they also represented the critical background against which this particular issue had to be assessed.

16. We are not satisfied that the RCA appellants' costs referable to the collective selling/concerted practice point can justly be dismissed as too trifling to merit any special consideration. The point was positively advanced by those appellants and was directed at disposing of the OFT's decision with a knock-out blow. It was, therefore, an important point; it was fully developed on paper by the RCA appellants; it

required, and received, a positive response from the OFT; and it necessarily involved a consideration of the complicated factual background so far as relevant to the point. In the event, the RCA appellants lost on this issue. In our judgment, it would be unjust if they were entitled to recover their costs of raising and arguing it. In principle, therefore, we consider that a percentage of their costs should be disallowed so as to reflect their failure on it. We could simply leave it to the costs judge to determine that percentage, but neither side suggested we should do so, and we consider that it would probably be more appropriate for us to decide it. As to what it should be, we have come to the conclusion that to disallow as much as 10% of such costs would probably be overgenerous to the OFT. Our assessment of the appropriate percentage is necessarily based on an essentially broad brush approach, but we have decided that we should disallow 7.5% of the RCA appellants' costs.

17. Having so decided, there is no dispute as to the order we should make as between the RCA appellants and the OFT. We will order the OFT to pay the RCA appellants 92.5% of their costs of the appeal, such costs (in default of agreement as to their quantum within 28 days of our order) to be the subject of a detailed assessment on the standard basis by a costs judge. If no such agreement is reached within 28 days, the OFT must pay the RCA appellants 50% of 92.5% of the costs bill (namely, £309,372.74) on account.

The BHB costs application

18. The BHB also asks for its costs of its own separate, successful appeal. It claims that it succeeded on all the main points that it advanced and that the starting principle should be that it too should have all its costs. It claims costs totalling £951,330.30, including £327,288 for engaging PricewaterhouseCoopers ("PwC"), its

economic experts. It says that, having succeeded on the appeal, it should also have all its costs, although it accepts that, to the extent that a challenge is advanced to the quantum of its claimed costs, there should be a detailed assessment.

19. The OFT takes a different stance with regard to the BHB application. It asserts that the claimed figure is unjustifiably high, amounting to almost £300,000 more than the RCA appellants' costs. But its main point is that, whilst it accepts that the BHB was an appellant rather than an intervener, it was undoubtedly a "second appellant" – the RCA appellants being the lead appellants – and that we should consider carefully in all the circumstances to what extent it would be just for the OFT to pay costs of this magnitude to a second appellant. It says that, given the obvious overlap between the two appeals, we should assess to what extent the BHB added value to the core arguments of the RCA appellants. It recognises that in principle it should pay the BHB's costs of the adding any such value, but disputes that it should have to pay for the costs of any unnecessary or valueless duplication or addition. It disputes that the BHB bill is wholly referable to the costs of adding value to the lead appellants' case.

20. The OFT pointed out that the Tribunal was from the start anxious to avoid a situation in which the BHB advanced its own full blown, separate appeal. The question arose at the first case management conference on 14 September 2004 (presided over by Sir Christopher Bellamy). The President immediately raised the question of whether the BHB appeal should be stayed or whether the BHB could instead be treated as an intervener in the RCA appellants' appeal. Mr Vajda QC, for the RCA appellants, opposed any stay. When asked by the President what the BHB appeal added to his clients' appeal, he did not produce an immediately convincing answer. He said it raised some procedural points which did not interest his clients (nor

did they interest us very much, although Mr Vaughan QC, for the BHB, devoted a material part of his argument to developing them); that the heart of both appeals went to issues of fact (an apparently weak ground, so it seems to us, for supporting a separate BHB appeal); and that the BHB had a few additional points on the market. He said there was value in the BHB points being ventilated, "subject obviously to case management."

21. The President then put to Mr Vaughan his view that two appeals would double the time, effort and work, whereas if the BHB were merely an intervener that would involve a major saving all round and would help to get to the main points more quickly. Mr Vaughan's response, by reference to the BHB notice of appeal, was that there was solid merit in the BHB pursuing a separate appeal. The President's response was that the BHB's proposed legal analysis as displayed in that notice ranged rather more widely than was likely to be necessary for the disposal of the case. Mr Vaughan disagreed, and said that if the BHB were mere interveners they would not be able to introduce new factual matters.

22. Mr Thompson, for the OFT, identified three main areas where he accepted that the BHB notice of appeal did go beyond that of the RCA appellants: (i) a submission as to the relevant market, (ii) the invocation of the so-called "sporting exception", and (iii) the raising of procedural points about the OFT proceedings. He identified the core point arising in the appeals as being the "necessity" point that we dealt with at paragraphs 160 to 176 of our judgment, but stated that the OFT did not want to shut the BHB out from arguing its additional points in a reasonably economical form, whilst making it clear that it did not want the procedure to get out of control. The

Tribunal's decision was to defer until after the service of the joint defence the consideration of how to manage the two appeals.

23. There was a further case management conference on 22 October 2004, when the President outlined his assessment of the issues that should be the subject of oral argument at the hearing of the appeals, namely: (i) the relevant product market, (ii) the "necessity" point, (iii) whether the courses' collective activity led to an increase in the price for the non-LBO rights, (iv) whether that activity had the effect of restricting or distorting non-price competition, and (v) a point arising principally under the section 9 issue, namely whether the degree of collective behaviour was indispensable to achieving the claimed benefits flowing from the MRA and did not result in the elimination of the competition. The President recognised that there were also other issues, including the procedural ones. The first four issues he had identified were central to our ultimate decision. We did not deal with the point that the MRA qualified for a section 9 exemption, nor did we deal with the procedural issues. After the President had outlined his assessment of the main issues, Professor Bain identified two particular economic issues on which he invited assistance: (i) whether the better model to use was one in which the competing buyers were bidding for, rather than in, the market, and (ii) the possible complementarity of the BHB data rights with the non-LBO rights. The President then expressed the view that the two appeals should "march together but in a structured way." He proposed that, at the hearing, the RCA appellants should perhaps have about a day to present their case, and the BHB a half day to present theirs, which is what was fixed at the final case management conference on 17 January 2005. The BHB was, therefore, allotted half the hearing time of the RCA appellants (and therefore one third of the total time allocated to the two appellants). Mr Vaughan indicated at the October 2005 conference that the BHB

was advancing a broad product definition but that their case as to the product market was "pretty close" to that of the RCA appellants. He agreed with the President that the veto and critical mass questions were central to both the appeals, although pointed out that the two sets of appellants placed different emphases on them in their respective appeals. At the January 2005 conference, Professor Bain also raised another economic issue on which the panel wanted guidance from the OFT, one which was ultimately central to the points made in paragraphs 135 to 150 of our substantive judgment (in particular at paragraphs 139 to144).

24. In responding to the BHB costs application, Mr Thompson submitted that hindsight showed that it would have been far more sensible to have stayed the BHB appeal until after the outcome of the RCA appellants' appeal; and that had the OFT had any idea that the BHB would generate a costs bill of nearly £1 million – almost 150% of the RCA appellants' bill - it would strongly have supported the Tribunal's initial suggestion of a stay. The OFT cannot ask us to turn the clock back, but it can, and does, ask us to accept that the assumption upon which everyone was acting at the case management conferences was that the RCA appellants were the primary appellants, and that the BHB was essentially a secondary appellant whose intended function was to make its own distinctive additional points but was not there simply to duplicate the RCA appellants' arguments or to cause the overall costs of the appeals to spiral to the total enormous sum to which they have. In this context, the OFT is entitled to point out that the BHB was rationed to a half day for presenting its arguments, as compared with the RCA appellants' full day, a time allocation which can be regarded as providing at least a rough reflection of the relative contributions the two appellants were regarded as bringing to the deployment of the arguments as a whole.

25. Turning to the extent to which the BHB did add value to the arguments, the OFT then pointed to our judgment, from paragraph 129 onwards, as referring almost exclusively to the RCA appellants' arguments, save that in certain places it referred to the BHB as supporting those arguments. The OFT's point was that the making of such supporting arguments was, in effect, mere duplication. The BHB's defence of such alleged duplication was that it considered that the RCA appellants had not sufficiently developed the relevant points, but the OFT submitted that this could not be a ground for allowing the BHB its costs of such duplication. The BHB was at liberty to spend what it liked on refining and developing points made by the RCA appellants, but it was quite another matter to expect the OFT to have to pay its costs of doing so.

26. The OFT also pointed out that our judgment attributed only very few points exclusively to the BHB. Mr Thompson referred to paragraph 134, where we rejected a point advanced by the BHB on the burden of proof. Second, he referred to paragraph 136, where we referred to the BHB's point about the complementarity of the BHB data rights and the Non-LBO bookmaking rights, one we accepted at paragraph 149. The OFT's point here was that this was essentially a short point which did not merit the huge expense that the BHB had incurred in obtaining economic advice. Third, he referred to our reference in paragraph 205 to a point advanced by the BHB in support of the issue we discussed at paragraph 203 to 206, one on which we did not ultimately rule.

27. The OFT's overall position was, therefore, that whilst it acknowledges a liability to pay the BHB's costs reasonably incurred in adding value to the overall argument and to our ultimate decision, it disputes that in principle it should pay the

BHB's costs of advancing duplicating or failed arguments, and asserts that the BHB's separate points to which we specifically referred in our judgment cannot be regarded as having added anything of very significant value to the ultimate outcome. The OFT has a particular complaint about the BHB's retention of PwC at a cost of £327,288 as compared with the RCA appellants' costs of retaining RBB at a cost of a mere £31,760. The difference is explained largely by the fact that the BHB did not use PwC simply to produce reports on specific issues; they were in effect engaged as part of the BHB team. The OFT said that much of the PwC effort was devoted to the preparation of an economic model which we implicitly rejected, preferring the RBB/OFT approach. The OFT's essential point was that the enormous costs of retaining PwC cannot be regarded as having contributed anything like a corresponding value to our ultimate decision and that the incurring of such costs was manifestly disproportionate. It is not content for us simply to refer the quantum of these costs to a detailed assessment, but says that we should cap them here and now at £30,000, a figure corresponding to the RBB costs, the RBB contribution having been, it is said, more focused than PwC's.

28. More generally, the OFT also advanced the complaint that the BHB devoted itself to an excessively extravagant and disproportionate investigation of far too many issues, including several which we did not think it necessary to consider in our judgment: their point about the relevant product being "British racing", collective selling in sport, and the procedural course of the OFT investigation. The OFT criticised the BHB as having adopted a "no expense spared" approach: it pointed out, for example, that the bill of costs shows that conferences with counsel were regularly attended by three or four solicitors.

29. The OFT submitted that we should therefore bring a broad axe to bear on the BHB costs bill: a capping of PwC's costs at £30,000 and (if we were disposed to deal with the costs summarily) a capping of the legal costs at £300,000, a sum which equates to approximately one half of the RCA appellants' legal costs and which could be said fairly to reflect that the BHB was allowed half their time for the presentation of its case. If we were disposed to order a detailed assessment, the OFT submitted that we should allow the BHB to recover only 50% of its assessed costs and that we should direct the costs judge to have regard to three particular factors when assessing the costs: (i) that the BHB should recover costs only in respect of those of its distinctive arguments that we accepted, (ii) that no costs should be recovered in respect of the making of arguments which duplicated the RCA appellants' case or were only of peripheral relevance, (iii) that given the apparent "no expense spared" approach of the BHB legal team, a very strict approach should be adopted to the hours claimed by that team.

30. Coming now to our decision on the BHB costs application, we start from the position that there is, in our view, no doubt that the RCA appellants were the primary appellants and that (contrary to Mr Vaughan's submission) the BHB's role was as a secondary appellant. That was reflected at least in part in the fact that the BHB was only allotted half the time of the RCA appellants at the ultimate hearing in which to develop its oral arguments. In the event, the BHB's costs have amounted to nearly 150% of the RCA appellants' costs, with the costs of both appellants totalling over £1.6 million. Total costs of that order incurred in challenging a single decision and ultimately resulting in a hearing lasting a mere three days are, we consider, manifestly disproportionate.

31. The reality is that the OFT has been faced with two separate, full-blown appeals. It is obvious to us that, in the presentation of such appeals, there was a good deal of duplication of argument, a consideration which alone satisfies us that we should look carefully at the suggestion that the OFT should be expected to pay two full sets of costs. We consider that there might perhaps have been something to be said for the view that a fair disposal of the question of costs would be to award one set of costs between both appellants, but as nobody made any such suggestion we have not considered it further. We have awarded the RCA appellants, the primary appellants, 92.5% of their costs, subject to a detailed assessment. As for the BHB, however, we take the view that, as a secondary appellant, it ought only to recover such costs as can fairly be regarded as attributable to the advancing of valuable additional arguments. In particular, we agree with the OFT that the BHB should not be entitled to recover its costs in so far as incurred in supporting, or duplicating, arguments already advanced by the RCA appellants. The BHB was no doubt entitled to spend as much as it liked in doing so, but the critical question is whether it is reasonable to expect the OFT to have to pay for such support or duplication. In principle, we do not consider that it is. We have to say, we hope not unkindly, that we regarded the participation of the BHB in these appeals as adding relatively little to their ultimate outcome, which we consider would have been the same if the BHB had played no part; and that the BHB's most memorable contribution to the proceedings was a mountain of paper, considerable additional complication and an extended appeal hearing from which the Tribunal could usefully have been spared. In saying this, we also make clear that we fully understand that the BHB viewed itself as probably the most important player in the proceedings, and that it regarded it as absolutely vital that it should be able to advance its own independent voice in them; and we do not suggest that it should not have been entitled to do so. But the question

for us is whether and to what extent it is reasonable to expect the OFT also to pay the BHB's costs of advancing that voice. The OFT, very fairly, does not suggest that it should not pay at least part of the BHB costs, since it recognises that the BHB did make a material contribution to the outcome, and we agree with the OFT in principle. The question is what that part should be.

32. The element of the BHB costs at which the OFT levels a serious criticism is the PwC costs of £327,288 – almost £300,000 more than the RCA appellants' costs of retaining RBB. The OFT submitted that we should cap the PwC costs at £30,000 so as to approximate to, as they submitted, the cost of the rather more valuable contribution from RBB. We do not consider that this, perhaps somewhat extreme, approach would achieve a just result. First, we do not see why we should regard the RBB costs as automatically representing the benchmark of reasonableness; and, as for using PwC as part of the BHB team, we understand that the OFT itself similarly had the benefit of professional economic advice throughout the proceedings. Nor, however, do we consider that we should simply leave it to a costs judge to decide how much of the £327,288 it would be reasonable for the OFT to pay, since we consider that we are probably in a better position to make that assessment.

33. The BHB's economic arguments were originally set out in paragraphs 249 to 353 of their notice of appeal and were revisited in their Reply. Whilst we accepted their point about the complementarity between data and pictures, much of the BHB's economic case was either not accepted by us at all or was already covered, in a more focused way, by the RCA appellants. Other parts of its economic case (in particular, the challenge to the assertion that there was a presumption that the concerted selling had raised the price above the competitive level) might have been of real value had

we not accepted the RCA appellants' way of putting the matter. In these circumstances, we would regard it as unreasonable for the OFT to have to pay all the PwC costs and we consider that we should impose a substantial discount upon them. We have decided that it would be fair to limit the PwC costs recoverable by the BHB to one fifth of the claimed costs, which we will therefore assess at the (rounded) sum of £65,450.

34. The remainder of the BHB costs totals £624,042.30. In part this was reflected in the advancing of arguments upon which we found it unnecessary to form any view, including the so-called sporting exemption point and the procedural points about the OFT investigation. In dealing now with the issue of costs, we do not consider that we should make any assumptions either way as to whether these arguments were good or bad, and we certainly do not propose to decide them now in order the better to guide us in our decision as to costs. We propose instead to take the view that, since we did not regard it as necessary to decide them, the best justice is achieved by letting the costs of those issues lie where they fall. For practical purposes, that means disallowing an appropriate proportion of the BHB costs recoverable from the OFT. In addition, we consider that we should also disallow a further proportion of the BHB costs so as to reflect the very material extent to which their case overlapped the RCA appellants' case, and also to mark the Tribunal's view that the BHB's notice of appeal was in certain respects unfocused, discursive and prolix. In all the circumstances, we propose to allow the BHB to recover 50% of this head of its costs, such costs to be the subject of a detailed assessment in default of agreement.

35. In relation to the BHB costs, we will therefore (i) summarily assess at £65,450 the costs payable by the OFT in relation to the PwC costs, such costs to be paid within

28 days of our order; and (ii) we will order the OFT to pay the BHB 50% of the remainder of their costs of the appeal, such costs (in default of agreement as to their quantum within 28 days of our order) to be the subject of a detailed assessment on the standard basis by a costs judge. If no such agreement is reached within 28 days, the OFT must pay the BHB appellants one half of the relevant part of the costs bill (namely, £156,010.57) on account.

Sir Colin Rimer | Andrew Bain | Sheila Hewitt

Charles Dhanowa
Registrar

February 2006