Neutral Citation Number: [2015] EWHC 84 (Admin)

Case Nos: CO/10469/2012 & CO/10838/2012

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2015

**Before** :

**MR JUSTICE COLLINS**

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**Between :**

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| **THE QUEEN (on the application of (1) GALLAHER GROUP LIMITED and (2) GALLAHER LIMITED** | **Claimants** |
| **- and -** | |
| **COMPETITION AND MARKETS AUTHORITY** | **Defendant** |
| **- and between -** | |
| **THE QUEEN (on the application of (1) SOMERFIELD STORES LIMITED and (2) CO-OPERATIVE GROUP FOOD LIMITED** | **Claimants** |
| **- and -** | |
| **COMPETITION AND MARKETS AUTHORITY** | **Defendant** |

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**Lord Pannick QC** and **Mr Hanif Mussa** (instructed by **Slaughter and May**) for the **Claimants** in CO/10469/2012
**Ms Monica Carrs-Frisk QC** and **Ms Jessica Boyd** (instructed by **Burges Salmon LLP**) for the **Claimants** in CO/10838/2012
**Mr Daniel Beard QC, Mr Andrew Henshaw QC** and **Mr Brendan McGurk** (instructed by **CMA Legal**) for the **Defendant**

Hearing dates: 19th and 20th November 2014

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# Approved Judgment

**Mr Justice Collins:**

1. These two claims have pursuant to directions given by Blake J following his grant of permission to pursue them on 5 August 2014 been heard together. They raise issues which are common to both. The defendant was until 1 April 2014 the Office of Fair Trading (OFT) and it is convenient to continue to refer to it as the OFT in this judgment since all material documentation identifies it in this way.

2. In March 2003 the OFT began an investigation into the tobacco market. It believed that there might have been infringements of Section 2(1) of the Competition Act 1998 (the 1998 Act) by virtue of "agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition". Section 2(2)(a) of the 1998 Act applies s.2(1) in particular to agreements, decisions or practices which "directly or indirectly fix purchase or selling prices or any other trading conditions". The infringements alleged in these cases are of what is known as the Chapter 1 prohibition.

3. Section 25 of the 1998 Act empowers the defendant to investigate, inter alia, where there are reasonable grounds for suspecting that there is an agreement which may affect trade within the UK and has its object or effect the prevention, restriction or distortion of competition with the UK. If following such an investigation the defendant proposes to make a decision that there has been an infringement of inter alia s.2(1) of the 1998 Act, Section 31(1) of the 1998 Act requires it to:-

> "(a) give written notice to the person (or persons) likely to be affected by the proposed decision; and
>
> (b) give that person (or these persons) an opportunity to make representations".

The written notice required by s31(1)(a) is called a Statement of Objections.

4. On 24 April 2008 the OFT issued a Statement of Objections (SO) addressed to thirteen parties, namely two manufacturers (Gallaher and Imperial Tobacco) and eleven retailers. The SO ran to 419 pages and set out the material conclusions and evidence which had led the OFT to consider that an infringement of the Chapter 1 prohibition had occurred. It also indicated what action the OFT intended to take and its reasons for so doing. Two types of infringement were alleged. First, that there was an agreement between each manufacturer and each retailer whereby the retailer would apply what were termed 'pricing relativities' between competing brands as required by the manufacturers. This restricted the retailer's ability to apply different prices. Secondly, that there had been what was called 'illegitimate indirect contact' whereby some of those involved had exchanged information about future retail pricing intentions with their competitors. Both of these were said to have the object or the effect of preventing, restricting or distorting competition in the supply of tobacco products in the UK in breach of s.2 of the 1998 Act.

5. If, following consideration of any representations made by those served with SOs, the defendant decides that a party has infringed the Chapter 1 prohibition, it may by virtue of s.36(1) of the 1998 Act require the payment of a penalty if satisfied that the infringement has been committed intentionally or negligently (s36(3)). Section 46(1)

of the 1998 Act provides for a right of appeal to the Competition Appeal Tribunal (CAT). An appeal can be brought against a decision that there has been an infringement and against the amount of any penalty (s.36(3)(a) and (i)). This is what in other contexts would be termed liability and quantum.

6. Prior to 2008 the OFT offered what Ms Branch, who was between 2007 and 2009 the Senior Responsible Officer dealing with the Tobacco case, calls a type of administrative settlement process to a small number of cases. It could also offer a discount on penalty to those who co-operated in any investigation and an agreement not to impose any penalty on a whistleblower. The former offer, under what was described as the OFT's leniency programme, had meant that the second claimant was granted a 30% reduction in penalty. One of the eleven retailers had had no penalty imposed as a whistleblower.

7. There had been no published OFT guidance on any settlement mechanism. The OFT decided that an Early Resolution (ER) process was desirable. Such process would lead to an agreement, known as an Early Resolution Agreement (ERA). The broad effect of this would be that the party concerned would receive a substantial discount in penalty if it admitted the infringement and did not appeal to the CAT. Thus there would be a finding that it had infringed the material prohibition, which could be used against it if any claim by anyone who alleged he had suffered loss by virtue of the infringement were brought.

8. On 28 January 2008 the OFT produced a paper described as "A Principled Approach to Settlements in Competition Act Cases". At its outset, it said:-

> "'Settlement' in this context means an agreement between the OFT and one or more parties to a Competition Act investigation, whereby a reduced penalty is imposed, in return for an admission of liability and various other types of co-operation. A Statement of Objections and infringement decision will still be issued (in contrast to the position where cases are resolved by way of commitments or informal assurances). However, the administrative procedure will be significantly streamlined and shortened and the appeal risk significantly reduced, as a result of the settlement".

It was recognised that the paper was not definitive and that a flexible approach allowing the OFT's policy to develop in the light of experience was needed.

9. Since this was one of the first cases in which the ER process had been used, Ms Branch has stated:-

> "What the OFT was doing was new and challenging. I was conscious that the OFT could be setting significant regime precedent and the progress of the ER process in the Tobacco case was closely tracked by the Executive Committee (ExCo). The outcome of the ER process was seen to be important not just for the Tobacco case, but for the broader OFT portfolio and reputation at the time. I provided regular updates and progress to ExCo and the Board".

10. The paper sets out ten principles to be applied. The most material for the purposes of this claim is Principle Three, entitled 'Fairness, transparency and consistency are integral to an effective settlements process'. It reads:-

> "16. The overriding principles of fairness, transparency and consistency must always be taken into account. When engaged in settlement discussions, for example, it is important to ensure that the process is consensual and as transparent as possible throughout, in order to avoid any subsequent allegations of undue pressure having being applied to force parties to 'sign up' to settlement.
>
> 17. Consistency is a particular key consideration, given parties' sensitivity to equality of treatment issues. Whether or not the details of an individual case have been made public, particular approaches in one case will inevitably 'leak out' during the settlement process (and be set out in the infringement decision) and inform parties' strategies in others. Consistency of approach (or, alternatively, the formulation of strong arguments to justify taking a different approach in similar circumstances) is therefore vital. In line with EPD principles, and in light of the considerable 'knock-on' effects that settlements may have, particularly at this nascent stage in their development, API should be involved early when settlements are being considered."

11. It is unnecessary for the purposes of this judgment to cite more of the paper in any detail. It is noted in paragraph 35 that it is desirable to distinguish in negotiations between discussions relating to the settlement discount and those relating to substantive elements of the penalty calculation. The latter will involve the parties making representations on penalties. These may (albeit this is not stated in terms in the paper) obviously involve elements peculiar to the individual party. The appropriate settlement discount is likely to apply to all involved in any settlement such as was considered in the Tobacco case. That is because the Tobacco case was what is referred to in the paper as a hybrid case. A hybrid case, in so far as applicable to these claims, includes one in which some, but not all, parties are willing to settle. Extra caution is said to be needed in dealing with hybrid cases since resource savings in settling with some but not all parties are likely to be of a lesser magnitude and could be swallowed up in expending additional resources on complex partial settlements. In paragraph 54, it is said, in relation to hybrid cases:-

> "One issue worth noting upfront, however, is that the importance of adequate advanced preparation and detailed record keeping to ensure consistency and equality of treatment is greater - and a more complex task – in hybrid cases".

12. As it happens, the first claimant was the only manufacturer and the second claimant the first retailer to agree an ERA. The core terms were that there was a voluntary admission of all infringements alleged against the relevant party and a promise of full co-operation with the OFT for the remainder of the Tobacco case. The core terms for each signatory were to be identical. The first claimant signed its ERA on 2 July 2008. An important clause was Clause 7 which stated that if the first claimant appealed to the CAT, the OFT reserved the right to make an application to the CAT:-

> "(a) to increase the penalty imposed on Gallaher in relation to the infringements; and
>
> (b) to require Gallaher to pay the OFT's full costs of the appeal regardless of the outcome of the appeal".

In addition, Clause 8 permitted the OFT to adjust the figures in applying the relevant steps set out in its guidance on penalties and to reduce the final penalty. The discount on penalty meant that the first claimant would pay by way of penalty a little over £50 million instead of about £90 million. The reduction from 90 million to £50 million reflected the fact that the OFT dropped one of the infringements relied upon in the SO by the time it issued the final decision. The ERA penalty discount reduced Gallaher's original penalty (before that infringement was dropped) from £116 million to £92 million. This is set out in the ERA.

13. The second claimant signed its ERA on 9 July 2008. It contained so far as material identical provisions to those in the ERA with the first claimant. The penalty was reduced to just under £4 million from about twice that amount. The penalty was reduced in light of the OFT dropping the second infringement relied on in the SO. Thus the discounts to each case were very substantial in terms of sums payable. Both claimants have paid the amounts required by their respective ERAs.

14. All ERAs which have been entered into were signed by the OFT on 11 July 2008. In all, six of those who had had SOs served on them had entered into ERAs. The OFT had been anxious to complete the ERA process speedily – indeed the claimants complained that not enough time was initially given for proper consideration of the material and subsequent negotiations. The important point to bear in mind is that each of those who entered into ERAs were aware of what they had done and admitted that they had infringed the Chapter 1 prohibition. Both the claimants received expert legal advice.

15. Ms Branch has indicated in her statement her approach. The overall purpose of ER was to enable the OFT's administrative processes to be conducted more efficiently. She and all concerned with the Tobacco case believed that they had made a strong and compelling provisional decision but that, having regard to the magnitude of the proposed penalties, there was a reasonably high risk that there would be appeals on quantum which might at the same time challenge liability. Thus it was important that parties should voluntarily admit all infringements alleged in the SO and that to appeal unsuccessfully would result in an increased penalty. Negotiations could raise individual matters such as aggravating or mitigating factors or other factors peculiar to the particular penalty. But it was recognised that fairness and equality of treatment would require that any modification of approach to penalty which would apply to all and which was raised by a party in negotiation would have to be disclosed to all and would require modification to an ERA if it had been signed by the party but not by the OFT. It was also accepted that any representations by those who had not entered into ERAs would, if they narrowed or changed the OFT's case, be applied to the benefit of those who had entered into ERAs. Clause 8 it will be recalled enabled reductions of penalty.

16. Discussions between the OFT and individuals were considered to be akin to commercial negotiation with legally represented parties. Thus, Ms Branch states, unless a specific issue raised in discussion with a particular party "appeared to warrant a change to one of the core terms in the ERA or to a key aspect of the ER process or to the SO itself", it would not be shared with other parties. Clearly matters peculiar to a particular party (for example, specific mitigating factors in relation to quantum of penalty) would not have to be passed on to others. Furthermore, it has not been suggested on behalf of the claimants that there was a need in the interest of

fairness to disclose the content of any discussions. What could be required to be disclosed would be limited to any change resulting from any particular discussions.

17. It was not until 15 April 2010 that the OFT issued its decision that there had been a Chapter 1 infringement. It was directed to the two manufacturers and to only ten retailers. It modified the SO in certain respects, in particular in deciding not to make infringement findings in relation to the effect of the agreements but to make such findings in relation to the object of the agreements. Appeals to the CAT were lodged within the 2 month period allowed by the Rules (subject to a power for the CAT to extend time if satisfied that there are exceptional circumstances: see Rule 8(1) and (2) of the Competition Appeal Tribunal Rules 2003 (SI No 1372 of 2003)). One party to an ERA (Asda) chose to appeal but the others, including the claimants, did not.

18. The appeals came before the CAT in September 2011. On 3 November 2011, the 26th day of the hearing, the OFT's case effectively collapsed. It endeavoured to raise an alternative basis for its decision but the CAT refused to entertain it. The OFT has not since attempted to put forward that alternative or any further case alleging any infringement of the 1998 Act. It is not necessary for the purposes of these claims to consider the substance of the allegations which were dealt with in the appeal.

19. The claimants were understandably dismayed by what had occurred, since the OFT had abandoned the claim set out in the SO and the decision of the CAT meant that the infringements alleged could no longer be substantiated. It was they believed unfair and wrong that they should have had to pay substantial penalties when in reality the OFT had been unable to establish that an infringement had occurred.

20. Accordingly both claimants sought leave from the CAT to appeal out of time. On 27 March 2013 the CAT ruled that leave should be granted on the ground that exceptional circumstances were established, in that the basis upon which the claimants had entered into the ERAs had been fundamentally undermined since the OFT had not been able to establish the matters upon which the admissions made by the claimants in the ERAs were based. The OFT appealed against the ruling of the CAT. These claims had been lodged in October 2012. They would have been unnecessary if leave to appeal by the CAT had been maintained. On 7 April 2014 the Court of Appeal allowed the OFT's appeal and quashed the decision to extend time. The stay which had in the meantime been imposed on these claims was lifted and permission was granted.

21. The principle which defeated the claimants in the Court of Appeal was one based on CJEU jurisprudence that the need for finality and legal certainty in competition cases meant that parties who failed to appeal were not able to take advantage of decisions favourable to those who did appeal: see in particular AssiDoman Kraft Products v Commission (Case C-310/97P) (the 'Wood Pulp II' case) in which only 30 of 43 parties to a cartel appealed. Those 30 achieved annulment of the decision whereupon the other parties sought leave to appeal out of time. The CJEU refused their applications on the basis that it was settled case law that a decision that is unchallenged becomes definitive, that rule being based on:-

> "the consideration that the purpose of having time limits for bringing legal proceedings is to ensure legal certainty by presenting community measures".

22. The Court of Appeal has made it clear that the principle of finality applies in relation to competition cases in domestic law. In Lindum Construction Co Ltd v OFT [2014] EWHC 1613 (CH), Morgan J decided that the failure by the claimants to challenge penalties imposed by way of statutory appeal meant that they remained bound by them. That was so even when appeals by other parties in the same position had succeeded.

23. The Court of Appeal noted that the claimants had both had expert legal advice and were of course well aware of the actions they had taken and of whether the allegations made by the OFT were established. The first claimant had entered the ERA on the understanding that the theory being advanced by the OFT was very broad but on the basis that what became the secondary theory which the OFT tried to pursue when its primary theory collapsed was accepted. As Vos, LJ, giving the only reserved judgment, observed at paragraph 38, the first claimant had signed up "no doubt for sound commercial reasons including reduced penalties and management disruption etc." The second claimant must be taken to have understood that the theory was a very broad one and signed up accordingly. The court drew an analogy with criminal cases such as DPP v Shannon [1975] AC 717 in which the appellant's appeal following his guilty plea was refused notwithstanding the acquittal of his co-conspirator in a subsequent trial. The claimants chose not to appeal with their eyes open.

24. The Court of Appeal's decision would appear to have sounded the death knell for the judicial review claims. However, on 13 August 2012 the OFT had published the following statement on its website:-

> "In 2008 the OFT gave [one of the retailers who can be referred to as TMR] assurances relating to the effect of any successful appeal brought by another party against the OFT's Tobacco Decision (dated 15 April 2010) in respect of TMR.
>
> A number of other parties in the Tobacco Decision successfully appealed to the CAT…..The Tobacco Decision remains as against the parties who did not appeal, including TMR.
>
> In the light of the particular assurances provided to TMR, the OFT has agreed to make a payment to TMR in the amount of its penalty under the Tobacco Decision (namely £2,668,991) and a contribution to certain other costs".

This was not material to the application for leave to appeal to the CAT out of time. But it led the claimants to believe that there had been a breach by the OFT of its duty of fairness and equal treatment set out in Principle Three of its January 2008 paper.

25. The giving of assurances to TMR seemed to indicate that the OFT had been prepared, when negotiations were in train in 2008 to set up ERAs with the various parties, to allow a party to take advantage of a successful third party appeal on liability so as to secure repayment of the penalty paid under the ERA. It should therefore have been made clear to all parties that this possibility existed since it would be highly material in deciding whether to enter into an ERA. It would mean that those who had entered into ERAs did not need to appeal if others appealed and so would not run the risk of loss of the reduction in penalty in case of failure of the appeal and would obtain the benefit of another's successful appeal so far as penalty was concerned.

26. Both claimants wrote to the OFT after seeing the information about TMR. They contended that the assurances given to TMR should result in similar payment to the claimants since they would, had they had known that such assurances could be given, have requested them. It would be, they said, unlawful to refuse their demands. The OFT responded to the claimants in letters of 21 September 2012. It rejected the claimants' demands. Its reasons for doing so were as follows (I quote from the letter to the second claimants):-

> "Considerations of the various obligations you refer to do not require the OFT to replicate the effect of the assurance given to TM Retail which would undermine the principles of finality and legal certainty.
>
> Indeed, viewing the matter at a general level, it is not in itself unlawfully discriminatory (or contrary to any other of the obligations you refer to) to provide an assurance (of the matter requested by TM Retail) only to a party who expressly requests one.
>
> Furthermore, the assurance given to TM Retail was not a term of TM Retail's ERA at all, nor do the assurances contradict any term of the ERA. Nor did the assurance involve any intention to prefer TM Retail over other addressees of the Decision. Simply, the relevant OFT representatives gave an assurance to TM Retail in response to a query which TM Retail expressly raised."

It is to be noted that it is not suggested that what was said to TMR did not amount to assurances.

27. Only since permission was granted has any detail been provided of the material negotiations with TMR and the circumstances which led the OFT to decide that it had to pay to TMR the amount of penalty TMR had paid pursuant to its ERA. I have deliberately not used the word 'repay' since Mr Beard has insisted that what was done was not to be regarded as a repayment but as a discretionary payment made because it was thought that TMR might have a good ground to appeal out of time to the CAT because of what had been said during the negotiations which could also result in a favourable decision of the claimants' applications. That is the way it has been explained by the Chairman of the OFT in a statement before the court.

28. Mr Beard has contended that albeit the OFT had used the word assurances in reality there were a series of exchanges which were inconclusive. It seems that it is being suggested that the word 'assurances' used in the Press Release was inaccurate and that the reality was that there was a concern that what had been said produced a real risk that TMR would be able to appeal out of time. It is accordingly necessary to consider whether what was said in the course of the negotiations with TMR should be regarded as the giving of assurances. The maintenance of the word assurances in the letter of 21 September 2012 is of course inconsistent with Mr Beard's contention.

29. On 4 July 2008 TMR's solicitor sent to the OFT an agenda for a meeting to be held on 8 July 2008. Included in it was the following:-

> "An understanding of OFT's likely course of action as regards parties who have entered into an ERA should either a manufacturer (or a retailer) who has not

entered into an ERA subsequently be successful in overturning on appeal part or all of the OFT's decision against that manufacturer (or retailer) as regards:-

- Liability; or
- Penalty".

Mr Stephen Morris QC, who attended as part of the TMR team, stated that TMR would find it unfair to 'carry the can' if a successful appeal were to be made against the case. The OFT notes record Ms Branch saying:-

> "A successful appeal on liability would result in no finding against [TM Retail]. In terms of a successful appeal on penalty then the OFT would apply any reduction to [TM Retail]".

30. On 10 July 2008 TMR's solicitor sent an e-mail to Ms Branch which set out his understanding of the OFT's position as indicated in the meeting on 8 July 2008. He said:-

> "2. Should another manufacturer or retailer appeal any OFT decision against that manufacturer or retailer to the CAT (or subsequently appeal to a higher court) and overturn, on appeal, part or all of the OFT's decision against the manufacturer or retailer in relation to either liability or fines, then, to the extent the principles delivered in the appeal decision are contrary to or otherwise undermine the OFT's decision against TM Retail, the OFT will apply the same principles to TM Retail (and therefore presumably withdraw or vary the decision against TM Retail as required)."

Ms Branch asked her senior colleague, Mr Christofides, who had attended the 8 July 2008 meeting, whether he was comfortable with the contents of the e-mail from TMR's solicitor and whether point 2 was OK. His response raised some concerns about the formulation in point 2 since it was, as he put it, 'not immediately obvious to what extent the "principles determined" in any appeal by another retailer would automatically translate to the situation of TMR'. He also indicated that he had no objection to Ms Branch acknowledging receipt of the e-mail. He did not, however, directly answer the question whether he was happy that she should respond to the e-mail. There was no response given and so it was understandable and I have no doubt correctly assumed by TMR's solicitor that when TMR signed the ERA it was on the basis of his understanding as set out in his e-mail of 10 July 2008.

31. So far as penalty was concerned, Clause 8 of the ERA enables the OFT to reduce penalty. Thus if a penalty appeal resulted in a decision that the OFT's methodology in quantifying penalty was wrong, it was accepted that any reduction should be applied to all that result might seem to be appropriate. But liability was a different matter since the principle of certainty and finality would be in play. That was at the time not properly appreciated or taken into account either by Ms Branch or Mr Christofides.

32. Mr Christofides in his statement says he did not give thought to cases such as <u>Wood Pulp II</u> or the issues of legal certainty or finality. He merely thought that where an agreement was the basis of the infringement, a successful appeal by one party could mean that the case against another could not stand. That would, where there were a

number of parties to such agreement, depend on the circumstances. Ms Branch says that she really only thought about the issue as relating to the possibility of a successful appeal on penalty. She believed that the possibility of a successful appeal on liability was unlikely and the OFT's case would be strengthened further by the admissions of liability by those who chose to enter into ERAs. Accordingly, she saw no need to address the issue in any detail. She merely based her brief response to Mr Stephen Morris' point on a broad sense that, as she puts it, 'in the hypothetical event of the Tribunal deciding there were errors in the OFT's approach to the penalty calculations for the successful appellants' it might be appropriate for the OFT as a public body to make corresponding adjustments to ER parties.

33. Ms Branch's excuse for failing to respond to the e-mail of 10 July 2008 is as follows:-

> "69. I recall being concerned that responding to clarify what I had and hadn't said might be further misconstrued in some way and was conscious not to acknowledge the point either, so decided on balance that it was better for me not to reply. I was also focused on the far more immediate issues around finalising the ERAs with all of the parties for execution the following day".

She goes on in paragraph 70 to say this:-

> "70. As the prospect of a successful third party appeal – at least on liability – seemed so remote and far off in time, and TM Retail was the only party who had raised the specific issue with me at the time, it certainly did not appear to be necessary to consider further, or indeed merit any alteration to the core terms of ER agreements which had already been agreed. I did not consider that by answering a hypothetical, legalistic question which seemed to be remote in time, TM Retail had had any kind of beneficial treatment which needed to be extended to other ER parties. Moreover, this was against the background that, through the ER process on the Tobacco case, one of my particular concerns was to make sure that I conducted the negotiations in a fair and equal manner, preserving confidentiality throughout. More generally, I considered that – given that all ER parties retained the right to appeal under the ERAs – that this was also additional protection of their interest as ER parties".

34. Mr Beard submitted that what transpired did not amount to any assurance but was only a series of unconcluded exchanges. I have no doubt that the failure to respond to the e-mail of 10 July 2008 was tantamount to an acceptance of TMR's solicitors' understanding of what had been stated by Ms Branch at the meeting of 8 July 2008. It clearly did amount to an assurance that TMR would receive the benefit of a successful appeal by another party. Negotiations in 2012 when TMR sought to rely on the assurance resulted in what amounted to a repayment of the penalty together with an amount to cover interest and costs but maintenance of the decision that there had been an infringement of the Chapter 1 prohibition.

35. It is equally clear that neither Ms Branch nor Mr Christofides thought the matter through properly. If they had, they could not have accepted that a successful appeal on liability by other parties could affect those who had entered into ERAs but had not appealed. The principle settled by the Court of Appeal and by Morgan J in Lindum which had been established in the Wood Pulp II case would have meant that Mr Stephen Morris' point should have been rejected. He certainly earned his fee and

achieved a very substantial benefit for his client. Neither of the claimants raised that issue. Ms Taylor, the first claimant's solicitor, says in her statement that no assurances such as TMR sought were requested since the scope to negotiate the terms of the ERA was very limited and:-

> "At that time the prospect of requesting such an assurance would not have been considered realistic as it would have been assumed that the OFT would regard such an assurance as inconsistent with the principle of early resolution and the finality of the OFT's Decision in respect of any party which did not appeal".

36. There can be no doubt, as the OFT now recognises and should have appreciated in 2008, that Ms Taylor's assumption was correct. It would have been contrary to the purpose behind the desire that parties should enter into ERAs that they should be able to take advantage of any successful appeal by a third party. The only possible effect of such an appeal would be in relation to penalty which might need to be reduced if, as I have indicated, the methodology were affected and the particular decision in the third party appeal was not limited to circumstances peculiar to that party. That could be covered by Clause 8 of the ERAs.

37. The assurances given to TMR were given without any proper consideration by those responsible, in particular Ms Branch, of whether they should have been. They were inconsistent with the Wood Pulp II approach and there was a failure to consider the principles of certainty and finality. Furthermore, the failure to respond to the e-mail of 10 July 2008 was wrong. The reasons given by Ms Branch for that failure are unsatisfactory. Concern that there might be further misconstruction presupposes that there had already been misconstruction and it would have been simple to make clear that there was no assurance in the terms suggested. In any event, the matter should have been considered properly because it should have been appreciated that a failure to respond would be treated as an acceptance of what was put in the e-mail. It may be that Ms Branch thought that what had been said in the meeting did not amount to an assurance, but her lack of response to the e-mail was fatal to that view. She may well not have intended to give an assurance, but her thinking at the time seems from what she has said in her statement to have been driven by the view that the OFT's case was so strong that an appeal on liability would not succeed and so whatever was said to TMR was not likely to be material. There can be no doubt that the matter was badly mishandled.

38. The OFT's powers in relation to infringement of the 1998 Act are subject to public law requirements of fairness and equal treatment. The self-direction in the January 2008 paper is entirely correct. Thus it is essential that in negotiations in relation to ERAs one party is not given an advantage denied to another. There must be what is sometimes described as a level playing field. There may be matters, particularly relating to quantum of penalty, which may be peculiar to an individual party and those will require individual consideration. Mr Beard submits that the obligation to notify other parties in order to comply with fairness and equal treatment was limited to matters which affected the methodology within the ERA or the procedure to be adopted. The latter would include for example agreements to extend time for representations to be made. The former meant that only if the matter was something which should be included in the ERA and was common to all should it be shared with all.

39. I have no doubt that this is too narrow an approach. Anything which can act as an inducement to enter into an ERA is likely, if not limited to the particular circumstances of a party, to be material and should be put to all parties. To give one party an unknown advantage where there are no special circumstances pertaining to that party is in my judgment clearly unfair. If the OFT was prepared to allow parties entering into an ERA to reap the benefits of a third party appeal, that could have been included as a term in the ERA. Thus the contention that its absence meant that it did not need to be shared is hardly persuasive. It was in the OFT's interest that as many parties as possible should enter into ERAs and if parties believed that they could avoid the cost and risks of appealing if they did and reap the benefit of a reduction in penalty, that would be a powerful incentive to enter into an ERA.

40. Following the final decision, Asda's solicitor sent an e-mail to the OFT stating that it was believed that the OFT's case had significantly changed and weakened. He asked for a guarantee that if any appeals were successful to any extent Asda would be put in the same position as the successful appellant. Mr Christofides dealt with this and said that he was unable to give any such guarantee in that, as he put it, this was an untested area. Accordingly, Asda decided to appeal.

41. The defendant contended that because the claimants had not asked for similar treatment to that allowed to TMR they were not in a comparable situation to TMR and so not entitled to benefit from its treatment. It was submitted that the principle 'Don't ask, don't get' applied. No doubt that principle applies where there are negotiations between parties where there is no public law involvement. But it does not apply to override the public law duty of fairness and equality. Mr Beard accepted that it would not apply where the request by a party led to a decision to alter the methodology or to give a procedural benefit which fell within the scope of the fairness requirement. I have for the reasons already given said that I am satisfied that the treatment afforded to TMR was such as was material as an incentive to enter into an ERA.

42. Mr Beard sought to support his argument by reference to a decision by the Court of Appeal in <u>R(Rotherham BC and others) v Secretary of State for Business, Innovation and Skills</u> [2014] EWCA Civ 1080. The claim was based on allegations that the defendant had in allocating EU structural funds produced discriminatory and disproportionate funding costs for the local authority claimants. I do not find any assistance from that case since all it did, so far as material, was to make clear that in applying equal treatment principles the decision maker can and should have regard to any material differences between the relevant parties. Mr Beard's reliance on the failure by the claimants to ask for what was granted to TMR as such difference gets him nowhere.

43. It seems to me that it is unnecessary in the circumstances to have to consider fairness, equality of treatment, legitimate expectation or unlawful discrimination separately. All are included under the aegis of fairness. The willingness of the OFT to entertain such an application and in due course to give the assurances which were given should have been known to all parties for the reasons I have given.

44. It is clear that Ms Branch did not think the issue through properly in her negotiations with TMR and did not believe that she had given the assurances which she had in fact given following her failure to respond to the e-mail of 10 July 2008. Thus she did not think that the obligation of fairness and equal treatment required that other parties be

informed of what had been granted to TMR. Once the issue was properly considered and the importance of finality and legal certainty appreciated the OFT realised that what had been granted to TMR was an error. A mistake was inadvertently made. The final question I have to answer is whether that mistake must nonetheless inure to the benefit of the claimants so that they are at least entitled to be paid, as was TMR, a sum equivalent to the penalty paid by them together with interest and some costs. They do not ask that the decision that they infringed the Chapter 1 prohibition be set aside. That will remain in being. Accordingly, they submit that there will be no breach of the principle of finality and legal certainty since what really matters for the purpose of competition law is that the infringement must stand unless an appeal is brought in time.

45. The penalty is part of an infringement decision and the right to appeal is against liability or penalty or both. Thus the principle of finality and legal certainty, as the Court of Appeal decided, applied to bar an appeal out of time whether in relation to liability or penalty. However, it seems that the OFT deliberately did not refer to the payment to TMR as a repayment in order to maintain the view that the decision in relation to penalty continued in force. This is somewhat artificial but the same approach could be applied to the claimants. They are only concerned to be paid a sum which will mean they are not out of pocket.

46. Mr Beard submits that where public funds are concerned, a mistake which has led to a financial benefit given to a particular person should not be replicated by payments to others. He relies on a decision of Jacob, J in Customs and Excise Commissioners v National Westminster Bank plc [2003] STC 1072. As a result of an erroneous view taken by the Commissioners, the Bank had, it said, overpaid VAT and was entitled to a refund. Other companies in the same position had, again because of the erroneous view taken by the Commissioners through a number of different tax offices, received repayments. Thus, albeit the Bank accepted that it would amount to unjust enrichment, it contended that it was unfair to treat it in a different way to the other companies.

47. The main issue on the appeal from the decision of a VAT Tribunal was whether the Tribunal had jurisdiction to decide the unfair treatment point. Jacob, J decided that it did not. But he also decided that, even if it had had jurisdiction to decide the point, unfair treatment was not made out since there were objectively justifiable reasons why repayment should not have been made.

48. The reason why the Bank’s rivals had received repayments was because the tax office dealing with the Bank was more alert than many others dealing with its rivals. In paragraph 64, Jacob J said:-

> “Just because a tax gatherer makes a blunder which favours some taxpayers by way of a windfall does not mean that he should perpetuate the blunder in favour of others. A number of wrongs do not necessarily make a right. The interests of the general community are involved – taxpayers collectively have an interest that tax properly due should be collected, and that there should not be repayment to people who are not entitled to them”.

In paragraph 66 he referred to the general principle of equality or non-discrimination which required that similar situations should not be treated differently unless differentiation was objectively justified. He continued:-

> "It appears to me to be entirely within the ambit of objective justification to say that mistakes need not be perpetuated and to take into account the fact that what is involved here is both complex law and a necessarily large administrative system".

49. As Lord Pannick submitted, supported by Ms Carss-Frisk, the facts of that case are very different. Instead of a large number of different offices engaged in tax gathering, here there was one body dealing with a single specific case, albeit no doubt to an extent feeling its way in a new approach. The decision to deal with TMR in a way which resulted in the payment to them of the amount it had paid by way of penalty was not, he submitted, a blunder but was a considered decision taken advisedly by the most senior official in the OFT with responsibility for enforcement. But that does not mean it was not a mistaken decision. Furthermore, it was a decision made without consideration of highly material matters, namely the principles of finality and legal certainty.

50. The penalties are paid into the consolidated fund. Thus, as in the gathering of tax, the interests of the general community are involved. There is a collective interest that there should not be repayments of sums unless there is an entitlement to such repayments. It seems to me that in the circumstances the principle that as a general rule a mistake should not be replicated where public funds are concerned should apply. That in my judgment provides an objective justification for the refusal by the OFT to make payment to the claimants.

51. It may be thought that this situation is most unfair to the claimants since they have made large payments by way of penalty when the decision that there had been an infringement upon which the penalty was based has been overturned. But, as the Court of Appeal observed, the claimants were well aware of what was alleged and what they had done and with the benefit of expert advice decided that it was in their interests to enter into the ERAs. When the decisions were made in April 2010, they had the opportunity to consider whether they should appeal as Asda did. They decided not to, fully aware of the Wood Pulp II approach and the probability that, if they did not appeal, they would be unable to take the benefit of third party appeals, save as Clause 8 might apply to an adjustment of penalty. Those responsible in the OFT for the negotiations with TMR are certainly open to criticism, but that in itself cannot be a good reason for finding in the claimants' favour.

52. In the circumstances, I must dismiss these claims.