Neutral citation [2024] CAT 33

Case No: 1584/5/7/23(T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 April 2024

Before:

HODGE MALEK KC
(Chair)
TIMOTHY SAWYER
ANDREW TAYLOR

Sitting as a Tribunal in England and Wales

BETWEEN:

WHISTL UK LIMITED

Claimant

- v -

(1) INTERNATIONAL DISTRIBUTIONS SERVICES PLC
(formerly ROYAL MAIL PLC)
(2) ROYAL MAIL GROUP LIMITED

Defendants

JUDGMENT (COSTS AS DAMAGES)

APPEARANCES

Alan Bates (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.

Andrew McIntyre (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This judgment concerns an application by the Defendants in these proceedings (together, "Royal Mail") to strike out, or alternatively, for summary judgment on the Claimant's ("Whistl") claim for the legal costs of its intervention in appeals by Royal Mail in the Tribunal and Court of Appeal against an infringement decision issued by Ofcom (the "Application").

B. BACKGROUND

2. On 14 August 2018, following a formal complaint submitted by Whistl, Ofcom issued a decision addressed to Royal Mail (the "Ofcom Decision"), in which it found that Royal Mail had infringed the Chapter II prohibition under the Competition Act 1998 ("CA 1998") and Article 102 of the Treaty on the Functioning of the European Union.

3. On 5 October 2018, Whistl issued the present claim for damages in the High Court. The pleading included a general endorsement only, and stated that particulars of claim were to follow.

4. Royal Mail appealed against the Ofcom Decision to the Tribunal pursuant to section 46 of the CA 1998 (the "Tribunal Appeal").[1] Whistl was granted permission to intervene in the Tribunal Appeal at a case management conference ("CMC") on 7 November 2018. In an Order of the Tribunal made on 7 November 2018, which Whistl did not seek to appeal, Whistl was ordered to bear its own costs of the CMC.[2] Whistl's claim for damages was stayed by consent in January 2019 to allow the Tribunal Appeal to run its course.

5. The Tribunal handed down judgment in the Tribunal Appeal on 12 November 2019 dismissing Royal Mail's appeal (the "2019 Tribunal Judgment").[3] Whistl applied to the Tribunal for an order that Royal Mail pay a portion of its costs as intervener in the Tribunal Appeal; it did not reserve its right to claim its costs

[1] Case No. 1299/1/3/18: Royal Mail plc v Office of Communications.
[2] Order of the Tribunal made 7 November 2018 and drawn 14 November 2018, paragraph 14.
[3] [2019] CAT 27.

as an intervener as damages in its submissions on that costs application. In response, Royal Mail invited the Tribunal to refuse Whistl's request or, alternatively, to limit Whistl's recoverable costs to a nominal or very small amount.

6. The Tribunal handed down a ruling dismissing Whistl's costs application on 10 January 2020 (the "2020 Tribunal Ruling").[4] In the 2020 Tribunal Ruling, the Tribunal:

(1) noted that it had a wide discretion under Rule 104 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") in relation to costs awards (at [38]);

(2) recalled the "general position" that "interveners are neither liable for other parties' costs, nor able to recover their own costs" but also noted that the "Tribunal has on occasion departed from this", and cited examples of that (at [39]);

(3) considered Whistl's arguments:

(i) that its application was justified because:

> "[Whistl] was the object and victim of Royal Mail's anti-competitive behaviour; that it was obliged to intervene in this case to protect its interests and to rebut mistaken allegations of fact about its situation and conduct; and that the factual evidence provided by its executives and the economic evidence provided by its expert witness Mr Parker were of material assistance to the Tribunal": [40]";

and

(ii) that there was precedent for the Tribunal making an award of costs in favour of an intervener which was also an alleged victim of the relevant anti-competitive conduct: [42];

[4] [2020] CAT 2.

(4) considered Royal Mail's objection to Whistl's application and its argument that Whistl's costs were "entirely at Whistl's own risk" (at [41]); and

(5) ultimately dismissed Whistl's application, as follows:

> "44. […] Under the Tribunal's current approach, the normal practice is that intervening parties neither contribute to other parties' costs nor are they entitled to recover their own (see the cases referred to at para 39 above and para 8.10 of the Guide to Proceedings). There can be exceptions and, in appropriate circumstances, the Tribunal has a discretion to award costs to an intervening party.
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> 45. We have considered carefully whether the circumstances are appropriate in this case but have concluded that they are not. Interveners are required to make their own assessment of the benefits or otherwise of seeking to intervene, and in this case Whistl would appear to have had a number of incentives to do so, including the existence of its damages claim to which we have referred. It should not, in our judgment, be allowed also to recover its costs of intervention in this case."

7. Accordingly, the Tribunal's final costs order of 20 January 2020 made no provision as to Whistl's costs. Whistl did not seek to appeal that aspect of the 2020 Tribunal Ruling.

8. Royal Mail appealed against the 2019 Tribunal Judgment to the Court of Appeal. Whistl was a respondent to those proceedings, having been an intervener below (the "CoA Proceedings"). The Court of Appeal dismissed Royal Mail's appeal. On 6 May 2021, Whistl applied to the Court of Appeal for its costs of this appeal, and Royal Mail made written submissions in opposition to this application. Again, Whistl did not reserve its right to claim its costs as an intervener as damages in its submissions to the Court of Appeal. Indeed, the impression given by those submissions was that if the Court of Appeal did not award those costs in its favour, then Whistl would, at the end of the day, lose out because it would have to bear those costs itself.

9. The Court of Appeal rejected Whistl's application for costs, ordering on 10 May 2021 that "Whistl shall bear its own costs in the appeal".[5] No reasons were

[5] *Royal Mail PLC v Office of Communications and Whistl UK Limited* [2021] EWCA Civ 669.

given for this order; it is not unusual for the Court of Appeal to deal with such costs applications in that way.

10. Royal Mail sought permission to appeal to the Supreme Court against the judgment of the Court of Appeal. Both the Court of Appeal and the Supreme Court refused permission.

C. THE APPLICATION

11. By its Particulars of Claim dated 30 August 2022, Whistl claims for several heads of loss and damage alleged to be incurred in consequence of Royal Mail's conduct, including (at [110.2]):

> "110.2. Legal costs and expenses, and costs of management time, incurred by Whistl in making and pursuing its complaint to Ofcom regarding Royal Mail's conduct, and in assisting Ofcom in upholding the findings of infringement in the CAT, Court of Appeal and UK Supreme Court".

12. In its Defence, Royal Mail pleaded back to this paragraph as follows:

> "81.3. It is denied that the Claimant is entitled in any event to recover any legal costs or expenses, or costs of management time, incurred as a result of its intervention in the CAT proceedings in circumstances where (i) the Claimant's application for a costs order against Royal Mail in those proceedings was considered and refused by the CAT ([2020] CAT 2) and (ii) in any event, the Claimant was not a necessary party to those proceedings. The Claimant's claim in relation to the costs of the CAT proceedings is therefore an abuse of process and is liable to be struck out. Alternatively, if (contrary to the above) the Claimant is entitled to recover any such costs, it may do so only to the extent that such costs were both reasonably and proportionately incurred.
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> 81.4. It is denied that the Claimant is entitled in any event to recover any legal costs or expenses, or costs of management time, incurred as a result of its intervention in the Court of Appeal proceedings in circumstances where (i) the Court of Appeal's Order dated 10 May 2021 ordered that "Whistl shall bear its own costs in the appeal" and (ii) in any event, the Claimant was a party to the Court of Appeal proceedings only because of its own voluntary decision. The Claimant's claim in relation to the costs of the Court of Appeal proceedings is therefore an abuse of process and is liable to be struck out. Alternatively, if (contrary to the above) the Claimant is entitled to recover any such costs, it may do so only to the extent that such costs were both reasonably and proportionately incurred."

13. Whistl has indicated that it no longer pursues its claims for the costs of management time and participating in the UK Supreme Court proceedings.

14. Royal Mail does not seek to strike out/seek summary judgment on the part of paragraph 110.2 of Whistl's Particulars of Claim that provides that "[l]egal costs and expenses ... incurred by Whistl in making and pursuing its complaint to Ofcom regarding Royal Mail's conduct". The Application is confined to those costs which Whistl alleges it incurred in relation to the proceedings before the Tribunal and the Court of Appeal (the "Relevant Costs Claims"). The Relevant Cost Claims amount to £2.8 million. In the context of the present proceedings, in which Whistl is claiming well over £600 million, the Relevant Costs Claims represent less than half of 1 percent of the claim.

15. Royal Mail has applied:

(1) For strike out of the Relevant Costs Claims pursuant to rule 41(1)(b) of the Tribunal Rules, which provides that the Tribunal:

> "…may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, strike out in whole or in part a claim at any stage of the proceedings if […] (b) it considers that there are no reasonable grounds for making the claim".

(2) For summary judgment on the Relevant Costs Claims pursuant to rule 43(1) of the Tribunal Rules, which provides that the Tribunal:

> "…may, on its own initiative or on the application of a party, after giving the parties an opportunity to be heard, give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that […] (i) the claimant has no real prospect of succeeding on the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing".

D. ISSUES FOR CONSIDERATION

16. Royal Mail submits that:

(1) Litigation costs can ordinarily only be recovered as costs, and not as damages. This general rule was established in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 (CA) ("Quartz") and has been followed in subsequent judgments. Whistl has already sought its costs of the Tribunal Appeal and the CoA Proceedings from the Tribunal and the CoA, respectively. Both the Tribunal and the CoA considered

the matter and, in each instance, fixed Whistl's entitlement to costs at zero. As a matter of law, Whistl cannot now circumvent those costs orders (both of which have become final) by seeking to recover the costs it was refused as damages in subsequent proceedings.

(2) The Relevant Costs Claims amount to an abuse of process in that they constitute an impermissible attempt to re-litigate, and/or a collateral attack on, the costs orders in the Tribunal Appeal and CoA Proceedings. This would undermine the considered judicial decisions of the Tribunal and Court of Appeal. Royal Mail also submits that Whistl is precluded (by the principle in *Henderson v Henderson* [1843-1860] All ER Rep 378) from raising in these proceedings matters which they could and should have raised in the Tribunal Appeal and/or CoA Proceedings.

(3) The Relevant Costs Claims are bound to fail for a lack of causation. Any costs incurred by Whistl in respect of the Tribunal Appeal and/or CoA Proceedings were not caused by Royal Mail's infringement of competition law, but rather by Whistl's voluntary decision to intervene in the Tribunal Appeal (and/or to participate actively as a respondent in the CoA Proceedings). Whistl was not obliged to do so, having already provided extensive evidence and assistance to Ofcom during its investigation.

17. In response, Whistl submits that:

(1) There is no general rule that litigation costs can ordinarily only be recovered as costs, and not as damages; there are many reported modern cases demonstrating that litigation costs can be recovered as damages. A claim for legal costs by way of an award of damages is of a different nature from an application for an award of costs in the proceedings in which these costs were incurred.

(2) The Relevant Costs Claim is not an attempt to relitigate costs applications that were refused by the Tribunal and the Court of Appeal; it is a distinct claim from those costs applications. What Whistl is

seeking to do in the present proceedings is to prove that it suffered loss by reason of Royal Mail's infringement in the form of loss of profits it would otherwise have made, and to then also seek, as an additional head of loss, its intervention costs as being costs reasonably incurred for seeking recompense for its loss of profits and for other loss and damage caused to it. Whistl reasonably incurred the intervention costs in order to protect a litigation asset, namely Ofcom's finding of infringement. Neither the Tribunal nor the Court of Appeal could have fairly adjudicated a claim by Whistl that it had been caused loss and damage in the context of Royal Mail's appeals of the Ofcom decision, and it was not realistically open to Whistl to bring into those proceedings (or its costs applications) a claim that it had been caused loss and damage.

(3) Quantifiable costs reasonably incurred for the purpose of recovering compensation for loss or damage caused by a tort, and which would not otherwise have been incurred, can be recovered as damages. Whistl's claim can be described as analogous to case law on recovery of costs reasonably incurred in seeking to mitigate a loss; by its intervention, Whistl was taking a reasonable step directed at seeking to reduce the negative impact of the infringement on its net profits. Whistl provided both factual and economic evidence to the Tribunal that were important in preserving Ofcom's infringement finding.

18. The issues for consideration in this judgment are as follows:

(1) Should the Tribunal at this interlocutory stage reach a conclusion as to the merits as to this head of damages claim by Whistl, or is this a matter which is best left for trial?

(2) Is there any general principle, subject to certain exceptions, that a party who has unsuccessfully sought its costs in one proceedings involving the same party against that party may not recover its costs in separate proceedings as damages?

(3) Does this claim for damages fall within a category or situation where in principle it should be able to recover such costs as damages?

(4) Is it an abuse to seek these costs now as damages in these proceedings?

(5) As a matter of causation, have these costs been caused by the infringement alleged in these proceedings or at least arguably so such that this claim should go to trial?

E. THE LEGAL FRAMEWORK

(1) Strike out and summary judgment

19. There is no dispute between the parties as to the tests for strikeout and summary judgment before the Tribunal, which closely follows the practice in the High Court under the Civil Procedure Rules.

20. Rule 41(1)(b) of the Tribunal Rules sets out the Tribunal's power to "strike out in whole or in part a claim at any stage of the proceedings if … it considers that there are no reasonable grounds for making the claim".

21. In respect of summary judgment, Rule 43(1) provides:

> "The Tribunal may of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if —
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> (a) it considers that—
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> (i) the claimant has no real prospect of succeeding on the claim or issue;
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> [...] and
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> (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing."

22. For the purposes of this Application, there is no material difference between the test for strike-out and the test for summary judgment, at least insofar as concerns the merits threshold (see *Wolseley UK Ltd v Fiat Chrysler Automobiles NV* [2019] CAT 12 at [15]).

23. The powers under Rules 41(1) and 43(1) are to be exercised by the Tribunal on the same basis as would apply in the High Court under the Civil Procedure Rules: see e.g. *Gutmann v First MTR South Western Trains Ltd* [2021] CAT 31 at [52]. The legal principles governing applications for summary judgment – which have also repeatedly been applied by the Tribunal to strike-out applications (see e.g. *Gutmann* and *Wolseley* above) – were summarised by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at [15] as follows:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to

> give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

(2) Recoverability of costs of previous proceedings as damages

24. Several authorities address the key issue of seeking the costs of prior proceedings in separate proceedings as damages. There may not necessarily be bright lines as to the scope of the principle, nor are the exceptions closed as the law develops, as in many areas of our common law system.

25. The question of whether costs of previous legal proceedings are recoverable as damages was considered in *Quartz*. In the first set of proceedings, the defendant had presented a petition to wind up the claimant company. The petition was dismissed, but the company was not awarded any of its costs of defending the action. The company brought a claim against the defendant in tort, seeking to recover as damages its costs of the first proceedings. The Court of Appeal held that the false and malicious presentation of a winding-up petition was in principle actionable in tort; however, the costs of the first proceedings were not recoverable as damages. Bowen LJ held (at 690):

> "...the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action."

26. We do not regard this paragraph in *Quartz* as being confined to actions for malicious prosecution; that is not how the law has developed. Nor is the principle limited to cases where a party is attempting to recover the shortfall between actual and assessed costs by claiming the shortfall in a subsequent action, as discussed by the Court of Appeal in *Berry v British Transport Commission* [1962] 1 QB 306 ("*Berry*"), which cited *Quartz.*

27. *Berry* also involved a claim for malicious prosecution in which the plaintiff sought her costs of defending herself in the previous proceedings. The defendant

alleged that these costs were not recoverable because they were too remote. Devlin LJ (at pp. 319-320) characterised this challenge as based on:

> "an old rule which is stated in Mayne on Damages, 11th ed. (1946), p. 119, in the following terms: 'It was regarded as a general principle that the right to costs must always be considered as finally settled in the court where the question to which that right was accessory was determined; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered; or if costs were expressly withheld in the particular case, none would be recoverable by suit in any other court.' This principle is part of the general law of damage and is not specifically related to actions for malicious prosecution. It has, however, frequently been applied in this form of action, and Mr. Lawson for the Commission has particularly relied on *Quartz Hill Consolidated Gold Mining Co. v. Eyre.* That was a case in which the defendant presented a petition to wind up the plaintiff company. It was never served on the company and the defendant gave notice that he was withdrawing it, but the company nevertheless appeared to ask for its dismissal. It was dismissed by Hall V.-C. without costs; I have no doubt that my brother Danckwerts was right when he said in the course of the argument, after looking at the report of the case in the Weekly Notes, that the reason why the plaintiff company was given no costs was because their appearance was considered to be unnecessary. The company brought an action for malicious prosecution and the damage they alleged was the expenditure of costs incurred in opposing the petition which they estimated at £30. The Court of Appeal held that the damage was not recoverable. Brett M.R. said: 'The theory is that the costs which the losing party is bound to pay, are all that were necessarily incurred by the successful party in the litigation, and that it is right to compel him to pay those costs because they " have been caused by his unjust litigation; but that those which are called 'extra costs,' not being necessarily incurred by the successful party in order to maintain his case, are not incurred by reason of the unjust litigation.' Bowen L.J. said: 'The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the ordinary action: if he does not get them, he ought not to get them in a subsequent action'."

> The rule is not easy to apply with justice because it embodies a presumption, which the law finds it convenient and maybe necessary to make; but which it has to, and does in other contexts, admit not to be in accordance with fact. Rule 28 (2) of the Supreme Court Costs Rules, 1959 [Second Schedule to the Rules of the Supreme Court (No. 3), 1959], provides that the ordinary basis on which costs shall be taxed is the party and party basis; and that on a taxation on that basis there shall be allowed all such costs " as were necessary or proper for the attainment of justice or " for enforcing or defending the rights of the party whose costs are " being taxed." Other bases are provided for special cases. Rule 29 (1) provides that where costs are payable to a solicitor by his own client all costs shall be allowed " except in so far as they are " of an unreasonable amount or have been unreasonably incurred." Another similar and perhaps wider basis is under rule 31 where costs are payable to a trustee out of the trust fund. The difference between these standards and that laid down for a party and party taxation puts one in mind roughly of the difference between expenditure under

> Schedule E and expenditure under Schedule D in income tax law—the difference between what is necessary and what is reasonable. Reasonableness is, of course, the ordinary test that is applied in a damage claim and which would be applied here if the items of expenditure claimed were not incurred in litigation".

28. The basis for the rule was said by Devlin LJ (at pp. 320-321) to be:

> "that what is presumed to be the same question cannot be gone into twice. The rule appears to have been first laid down by Mansfield C.J. in *Hathaway v. Barrow* where he put it on the ground that 'it would be incongruous to allow a person one sum as costs in one court, and a different sum for the same costs in another court.' If in the earlier case there has been no adjudication upon costs (as distinct from an adjudication that there shall be no order as to costs), a party may recover all his costs assessed on the reasonable, and not on the necessary, basis. If a party has failed to apply for costs which he would have got if he had asked for them, a subsequent claim for damages may be defeated; but that would be because in such a case his loss would be held to be due to his own fault or omission. In any case in which the legal process does not permit an adjudication, the rule does not apply".

29. Devlin LJ continued, at pp. 322-323:

> "Thus the reason for the rule is that the law cannot permit a double adjudication upon the same point. It would be a rational rule and in accordance with the ordinary principle as to res judicata if in truth it were the same point. But it is not. It may be that when the rule was first laid down by Mansfield C.J. in 1807 the two standards of assessment were not so far apart as they are now. By 1844 the distinction had begun to appear in practice if not in theory. In Doe v Filliter Pollock CB said: "The taxed costs are a fair indemnity; and if they are not so, the rules which govern taxation ought to be altered." Alderson B. said: "The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice is another matter .... If the taxed costs are not a full indemnity, they ought to be made so." But this advice has not been taken and the rules which govern taxation have not been altered. In 1869 Blackburn J. in Wren v. Weild said that it was "artificial" to say that the party aggrieved had an adequate remedy in his judgment for costs. In Barnett v. Eccles Corporation Bingham J. said: "The law does not recognise the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay." I find it difficult to see why the law should not now recognise one standard of costs as between litigants and another when those costs form a legitimate item of damage in a separate cause of action flowing from a different and additional wrong. Limitation of liability is a principle that is now well recognised. In the case of damage done by a ship it has been in force for the last two centuries in this country, and for longer in others, and the basis of it is simply that it is not in the public interest that shipowners should be deterred from seafaring by the prospect that they might be crippled by awards of heavy damages. The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground; see, for example, Smith v. Buller, Per Malins V. C. It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law. But the last person who ought to be able to share in that benefit is the man who ex hypothesi is abusing the legal process for his own malicious ends.

In cases of malicious process Mansfield C.J.'s rule has not always been applied. Lord Ellenborough refused to apply it in 1816 and Lord Abinger in 1838 (Sandback v Thomas and Gould v Barratt). But the other view has prevailed, though Tindal C.J. indicated in Grace v. Morgan that his opinion might have been different if the matter was res integra.

If the matter were res integra, I should for myself prefer to see the abandonment of the fiction that taxed costs are the same as costs reasonably incurred and its replacement by a statement of principle that the law for reasons which it considers to be in the public interest requires a litigant to exercise a greater austerity than it exacts in the ordinary way, and which it will not relax unless the litigant can show some additional ground for reimbursement over and above the bare fact that he has been successful. Without a restatement of that sort, there is undoubtedly a practical need for the rule in civil cases. Otherwise, every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he had failed to obtain on taxation; this was unsuccessfully attempted by the plaintiff in Cockburn v. Edwards. Or as Lord Tenterden C.J. said in Loton v. Devereux: "Actions would frequently be brought for costs after the court had refused to allow them." The rule is thus essential to the administration of justice in civil suits and will continue to be so until the time comes, if it ever does, when the law either allows to a successful litigant all the costs he has reasonably incurred or recognises openly that an assessment of damage and a taxation of costs as between party and party are two different things.

I have not inquired into the reason for the rule because I think it open to us to reject it but because we are asked to extend it. The question is whether it should be extended to costs in criminal cases as well as costs in civil cases. It is therefore necessary for us to consider the principle behind the rule in order to see whether it is equally applicable to criminal costs; and we are entitled also to have regard to its utility and value and to ask ourselves whether, if extended to criminal cases, it could be applied with no greater injustice and no higher degree of unreality than in civil cases."

30. Then at pp. 327-328:

"It is for this reason that I cannot agree with Mr. Lawson's submission that we ought not to have regard to case law. He says that the law is less developed in relation to criminal costs than it is to civil; that we may expect authority to amplify the criminal law and that in due course principles will be laid down, which I take it we are invited to anticipate will be the same as in civil cases. I think we must have regard to the law as it is. There is already quite sufficient authority to show that judicial discretion in the award of criminal costs is not the same thing as it is in civil. There is also some little difference in the text of the statutes. One may note in the section applicable in this case [section 5 (1) of the Summary Jurisdiction (Appeals) Act, 1933], which I have already quoted, the requirement about "means" which introduces a very different notion from those usually governing civil awards. I do not lay too much stress on the express provision in this particular section, because I do not think that the exercise of the discretion in any criminal case would be faulted if it were shown that the court had had regard to the means of the parties. My conclusion is that we are not logically compelled to extend the rule we are considering to costs in criminal cases, and in my judgment there is good reason why we should not do so.

> The rule embodies, as I have said, a presumption; and presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable in the sense that "Estoppels are odious, and the doctrine should never be applied without a necessity for it"; per Bramwell L.J. in Baxendale v. Bennett because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own. It may be that, whatever its utility, the rule in its application to civil costs is now too well settled to be disturbed. Certainly it cannot be disturbed in this court. But I have given my reasons for thinking that this presumption is not sufficiently valuable to justify its extension, and I am unwilling to extend it when not compelled to do so by authority or in logic."

31. *Berry* establishes both that the principles in *Quartz* do not apply in a criminal context, and that the principles in *Quartz* are of more general application than suggested by Whistl.

32. A helpful summary of *Quartz* may be found in *National Westminster Bank v Rabobank* [2007] EWHC 3167 (Comm) at [13]:

> "13. The Court of Appeal reversed Diplock J and decided that the rule in civil cases should not be extended to criminal costs. The main judgment was given by Devlin L.J. with whom Ormerod and Danckwerts LJJ agreed. Although the judgment is long and typically closely reasoned, its essential case can be summarised thus.
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> (i) In a civil action an order that a losing party should pay party and party costs is deemed in the manner of a presumption fully to compensate the winning party for the whole of his costs in spite of the fact that it may not actually do so.
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> (ii) If the court deprives the successful party of the whole or part of his costs that is because he deserves not to be compensated because he has needlessly incurred such expenditure and therefore to that extent caused his own loss.
>
> (iii) When at the close of a civil trial the court determines that the successful party should recover the whole or part or no part of his costs and whether or not on a party and party basis, its order is an adjudication upon the issue as to the loss suffered by the successful party by reason of legal costs and expenses.
>
> (iv) The conceptual basis of the rule preventing subsequent claims for damages being deployed to make good unrecovered costs is expressed by Devlin L.J. at page 329.
>
> To be effective as an interposition, there must be a sort of res judicata, a decision in the first case in which costs are awarded on the very point that is in issue in the second case, that is, the quantification of the damage. In a civil case the judicial discretion is directed to quantifying the damage according to the conventional measure.

> In a criminal case, it is not: and the decision contained in a criminal award need not represent a decision on quantification at all.
>
> The practical need for such a rule was that in its absence "every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he failed to obtain on taxation.
>
> (v) By contrast, in a criminal case the discretionary order that the prosecution should pay costs was not necessarily intended to achieve a full indemnity whether actually or on a conventional basis, for, unlike an order for costs in a civil action, the discretion was not required to be exercised so as to achieve complete, or conventionally complete, compensation. As Devlin L.J. put it at page 329 "the decision contained in a criminal award need not represent a decision on quantification at all."
>
> (vi) Because the issue in the second case was not the same as the issue in the first case, since the issue in the first case was not that of the quantification of the damage attributable to incurred legal costs, the rule applicable to civil cases did not apply with regard to costs awards in criminal cases."

33. It should also be noted that chapter 21 of *McGregor on Damages*, (21st ed, 2021) contains a helpful summary of the relevant principles and case law in this area. The analysis there is by and large followed in this judgment, noting that in some respects *McGregor* expresses a view as to what the law perhaps should be, though it is clear where the learned authors are setting out current law or where they think the law should go.

34. The principle in *Quartz* was applied by the Court of Appeal again in *Lonrho Plc v Fayed (No. 5)* [1993] 1 WLR 1489, in which the claimants sought to claim from the defendants their costs of defending a separate action brought by a third party. The Court of Appeal held, by majority, that they could not do so. Per Stuart-Smith LJ at pp.1505-1506:

> "For reasons I have already given in this case the plaintiffs cannot recover damages for injury to reputation. Nor can they recover damages for injured feelings. In the case of Lonrho, it has no feelings. In the case of the personal plaintiffs, they allege no pecuniary loss, so in my judgment they have no cause of action and injured feelings would simply be an adjunct of injury to reputation.
>
> But the plaintiffs also contend that if they can prove some pecuniary loss, for example, in relation to the Iranian contracts, they can also maintain some general, unspecified and unquantified plea of damage to goodwill arising from all the other overt acts relied upon which are wholly unconnected with any loss resulting from the Iranian contracts. I cannot accept this submission. In my judgment the matters alleged in paragraphs 11 to 28 of the statement of claim are acts relied upon as showing the agreement between the defendants, and that

> their predominant purpose was to injure the plaintiffs. But in so far as such acts cause damage to the plaintiffs it must, in my view, be pecuniary damage and it must be pleaded with sufficient particularity. In other words, there must be a sufficient nexus between the act causing pecuniary loss and the other damage for which compensation is claimed. Since the tort of conspiracy to injure is not complete without pecuniary loss, any damages at large must be referable to the act causing the pecuniary loss which constitutes the tort.
>
> I turn to the specific heads of damage in the proposed re re amendments.
>
> [His Lordship considered subheads (a) to (e) of the proposed amendments to the particulars of claim, agreed with the decision of Dillon L.J. in relation to those amendments, and continued:]
>
> This claim (subhead (f)) is for the costs of defending the Esterhuysen proceedings or, alternatively, the irrecoverable costs. In my judgment this claim is unsustainable. Mr. Beveridge accepts that he can have no claim unless Lonrho wins the Esterhuysen litigation. He also accepts that if it is proved in that litigation that the Fayeds have maintained the action, the judge in those proceedings has jurisdiction and discretion to order the Fayeds to pay the costs: Singh v. Observer Ltd. [1989] 2 All E.R. 751, reversed on the facts [1989] 3 All E.R. 777. For the purposes of the present proceedings it must be assumed that the allegation that the Fayeds are maintaining the Esterhuysen action is true. So far as the question of costs in that action is concerned, therefore, the Fayeds are in the same position as if they were plaintiffs. It is well established that a party cannot recover in a separate action costs which he could have been, but was not, awarded at the trial of a civil action, or the difference between the costs he recovers from the other party and those he has to pay his own solicitors: see Clerk & Lindsell on Torts, 16th ed. (1989), pp. 290–292, para. 5.35 and Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883) 11 Q.B.D. 674. In Berry v. British Transport Commission [1962] 1 Q.B. 306 the Court of Appeal refused to extend this principle to the difference between costs awarded to a successful defendant in a criminal trial and her actual costs where the claim is for malicious prosecution. But, apart from expressing concern at the unreality of the position in civil cases, since party and party costs were assessed on the basis of necessary and not reasonable costs incurred, the court did not disapprove the principle stated in the Quartz case. That problem has now been mitigated since standard costs are taxed on the basis of a reasonable amount in respect of all costs reasonably incurred: R.S.C., Ord. 62, r. 12. In my judgment it is vexatious and an abuse of process for the plaintiff to sue for these costs in this action, when they can be recovered in the Esterhuysen action. The defendants should not have to face a claim for the same matter in two sets of proceedings.

35. The rule was considered further by Ferris J. in *Yudt v Leonard Ross & Craig* (1998/99) 1 ITELR 531 at pages 578-579:

> "Application of the special rules which are applicable in cases when a plaintiff claims, as damages, expenditure incurred in other legal proceedings.
>
> So far as costs are concerned, these special rules stem largely from the fact that in practice there is difference between the amount which a successful party in litigation is able to recover from his unsuccessful opponent under an award of costs in his favour and the amount which the successful party has to pay his

> solicitor. Until the rules as to costs were altered in 1986 this difference (ie the difference between costs taxed on the party and party basis and the costs payable by a client to his solicitor) was likely to be substantial. With the adoption of the 'standard basis' as the normal basis for taxing costs ordered to be paid by one party to another the difference should, in theory at least, become much less substantial. It is commonly understood, however, that there remains a difference.
>
> This state of affairs gives rise to the question whether a party can, in a subsequent action, recover the amount of the difference [between costs incurred and costs awarded] by way of damages in subsequent proceedings. If the subsequent proceedings are between the same parties the answer is obviously in the negative. It would make a mockery of the court's order limiting the recovery in the first action if the court in the second action made an award which failed to recognise this limitation."

36. The Court of Appeal restated the general rule yet again in *Carroll v Kynaston* [2010] EWCA Civ 1404. Shortly before the trial of the defendant's counterclaim, a dispute arose as to whether the counterclaim had been compromised by a settlement agreement. The parties brought the dispute before Field J, who made a declaration that the counterclaim had been settled, dismissed the counterclaim with no order as to costs, and made no order as to the costs of the hearing before him. The claimant subsequently brought separate proceedings against the defendant on the basis that her attempt to continue with the trial of her counterclaim was a breach of the settlement agreement, claiming, inter alia, damages in respect of his costs of the hearing before Field J. The second claim was dismissed at first instance as being contrary to the general rule against the recovery of costs as damages. On appeal, the Court of Appeal upheld this outcome. Ward LJ referred to *Quartz Hill* and *Berry* and stated:

> 23. I turn to the third argument that the general rule is not of application as it relates to a different situation to the one in the instant case. The general rule accepted by Mr McNae was expressed in McGregor on Damages 18th ed., 17-003 as follows: "In a civil action the successful party will generally recover costs against the other party. In earlier days these were called party and party costs, or taxed costs, to be distinguished from solicitor and client costs which was the term formerly used for the greater amount of costs, however reasonable, payable by the client to his solicitor. It would make nonsense of the rules about costs if the successful party in an action who has been awarded costs could claim in a further action by way of damages the amount by which the costs awarded him fell short of the costs actually incurred by him. This has naturally never been allowed, and it is hardly surprising that there is a dearth of authority on the point. Cockburn v Edwards (1881) 18 Ch. D 449 is probably the only case in which such a claim was attempted but without success …".
>
> "30. [...] Here the costs of the hearing before Field J could have been recovered if he had so ordered. If the claimant did not ask for the costs, then he failed to

> mitigate his loss and cannot recover them as damages in a subsequent action on that ground. His difficulty is compounded by the fact that the judge did deal with costs: he made no order as to the costs. As the citations from the judgments of Bowen, Devlin and Danckwerts LJJ [in Quartz Hill and Berry] all make clear, that is the end of it [...]
>
> 31. That conclusion seems to me to accord with sound policy. There must be finality in litigation. Making no order as to costs is an adjudication on the point and the court should not be required to have a second determination of the same issue. The claimant should not be entitled to recover more by way of damages than he could have recovered by way of costs for reasons held good since Cockburn v Edwards 18 Ch D 449. The excess is an irrecoverable luxury. The claimant's true remedy was to appeal the order actually drawn by Field J. He did not do so. He cannot now do so. He cannot now get by the backdoor what he failed to secure by opening the front door. I regard this as hopeless and would dismiss this part of the appeal."

F. DECISION

(1) ISSUE 1: IS IT APPROPRIATE TO DECIDE THE ISSUE AT THIS INTERLOCUTORY STAGE?

37. This Application for strike out/summary judgment largely turns on points of legal principle. The evidence relied on by either party in relation to the Application is limited, and it is not likely that any further evidence will emerge between now and trial that will have any material bearing on the questions that need to be decided in this judgment. This is precisely the type of situation where it is appropriate to determine the issues now, and the Tribunal considers it can so decide.

38. Further, to deal with this claim at this stage would be sensible case management (in accordance with the Tribunal's governing principles) as it can be dealt with at a fairly short hearing, with the benefit of argument in the form of both written submissions and the oral presentation we have received. It will narrow the issues that will ultimately need to be determined at the trial, which will be heard in the last quarter of 2025.

39. Deciding the matter and giving *ex tempore* judgment at the hearing for the Application will also enable Whistl to amend its Particulars of Claim in time for the pleadings and their amendment to be considered in the second case management conference in this matter.

40. We consider this case falls within the principles as to points of law as expounded in *Easyair v Opal Telecom* (at [15)(vii)]), and that we should therefore "grasp the nettle and decide it".

(2) ISSUE 2: THE GENERAL PRINCIPLE ON THE RECOVERABILITY OF COSTS AS DAMAGES

41. There is a vast gulf between the parties as to what the general principle is in relation to seeking costs in subsequent actions. Whistl contends that, in practice, the principles guiding recovery of costs for intervenors before the Tribunal are so restrictive that it is a completely different exercise when such costs are sought as damages in subsequent proceedings. Whistl submits that the correct principle is that where a successful party has a prima facie entitlement to costs, amounting to a real (rather than illusory) right, and that party does not seek their costs, is not awarded their costs or there is a shortfall between their incurred and recovered costs, then those costs cannot be claimed by way of damages in a subsequent action. However, Whistl states that this is not that type of case: Whistl had no prima facie entitlement to their costs for the Tribunal Appeal; they only had a limited opportunity to seek costs as an intervenor given the restrictive principles applied by the Tribunal in determining such questions.

42. It is not necessary to go into how widely the general principle may be defined. Royal Mail contends that the general rule in English law is that the costs of previous legal proceedings are not recoverable as damages in subsequent proceedings. This may be rather too general a statement of legal principle without it being qualified by various exceptions. One does not have to go so far to determine this application. The Tribunal accepts that in general a party cannot claim as damages the costs of earlier proceedings against another party to such proceedings in later or separate proceedings. It is a broad principle and that has been recognised by the authorities, including in *Lonrho* and the other cases we have cited above.

43. The law is sufficiently clear and established that if party A in action 1 is in a position to seek costs from party B in that action and they are either refused or not claimed, it should not be able to claim the costs of action 1 from party B in

action 2 as damages. This principle is amply supported by the authorities we have cited.

44. It is clearly desirable that any claim for costs is determined by the court or tribunal that has heard the first action. It represents finality, and to allow a party to try to claim again in separate proceedings would create satellite litigation between the same parties.

45. The remedy, if a party is dissatisfied with an order refusing costs in action 1, is to appeal against that costs order. If they do not appeal, they will not recover their costs. If they do appeal, and are successful, they will recover their costs.

46. Here, the Tribunal is now dealing with the claim for the Relevant Costs Claims as damages. The Tribunal has its own policies and practice in relation to the costs of intervenors, who generally are not awarded their costs unless good reason is shown for departing from that position, as explained by the Tribunal in *John Lewis PLC v OFT* [2013] CAT 10 at [5]:

> "Rule 55 of the Tribunal's Rules affords the tribunal a 'wide and general discretion' as regards costs (*Quarmby Construction Company Limited v. Office of Fair Trading* [2012] EWCA Civ 1552 at [12]). This includes, in appropriate circumstances, the power to make an order for costs in favour of an intervener. However, it is clear that the general position of the Tribunal is that the costs of an intervention should not be the subject of any specific order (*BSkyB* at [22]). As the Tribunal concluded in *Ryanair Holding plc v. Competition Commission* [2012] CAT 29 ("*Ryanair*") at [7], this general position is concerned to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties. Accordingly, there must be a good reason for departing from this general position in a particular case."

47. Intervenors also benefit from this position; they are generally not ordered to pay the costs of the parties in the event an appeal is decided in a way contrary to the case of the intervenor.

48. Whistl argues that, when considering the scope of the general principle, the question to be asked is not simply whether a party has a right to claim costs in the first action, but whether that party has a prima facie entitlement to costs if successful in that action in accordance with the general practice of the relevant

court or tribunal. If there is no such prima facie entitlement, Whistl argues, then the case falls outside the principles in *Quartz* and developed in the authorities we have cited.

49. In support of that contention Whistl relies on various well-established exceptions to the general principle, to which we will come further on in this judgment. Noting that the general principle does not apply where the first action is foreign proceedings in a jurisdiction where the court has no power to award costs (or no more than nominal costs), Whistl extrapolates that the question in relation to proceedings in England is whether or not there is a prima facie right to costs rather than a very limited right to costs in certain circumstances.

50. Whistl's analysis that there must be a prima facie entitlement to costs by a successful party for the general principle to apply is not supported by the authorities. Where a court or tribunal sets its own threshold or practice for awarding costs, it would undermine that if parties could separately seek costs as damages in separate proceedings. Parties need to know where they stand in relation to costs in the first set of proceedings. The opposing party will get no finality if, at the end of the first set of proceedings, it is open to the prospect of fresh proceedings seeking costs which have either not been sought or refused in the first set of proceedings. Whistl's version of the general principle is also unworkable. Costs are generally at the discretion of the court or tribunal, it is not accurate to describe a successful party as having a prima facie right or entitlement to its costs.

51. In this Tribunal, whilst an intervenor does not have a prima facie entitlement to its costs in the event that its invention is successful, there is a reasonable prospect that an intervenor will recover some of their costs where they have made a substantial difference and an important contribution to a proceeding. This is not a purely illusory right.

52. It is recognised, however, that whether one defines a general rule broadly or in the more narrow sense indicated at paragraph 43 above, there are exceptions. These include the following:

(1) Firstly, where the earlier proceedings were taken in mitigation of loss, and particularly where the earlier proceedings are between different parties to the subsequent proceedings, those may be circumstances where the general rule does not apply (referred to in this judgment as the "mitigation exception").

(2) Secondly, where criminal proceedings are involved it is well established by *Berry* (cited above) that the general principle does not apply.

(3) Thirdly, where the first proceedings are in a foreign jurisdiction in which awards of costs are not available, the general principle does not apply. This has been explained in some detail in *NatWest v Rabobank* [2007] EWHC 3163 (Comm) at [25]. It is also referred to in *Carroll v Kynaston* in the judgment of Lord Justice Ward at [30]. See also *Union Discount Co Limited v Zoller* [2001] EWCA Civ 1755.

(4) Fourthly, where costs are claimed pursuant to a contract, such as where one is seeking the costs of enforcing a mortgage or other security, and the security expressly provides that a party may add its legal costs in trying to enforce that security to the underlying security or debt. An example of that is *Gomba Holdings UK Ltd versus Minories Finance Ltd (No 2)* [1993] Ch 171.

(5) Fifthly, where the first set of proceedings are in relation to, or caused by, breaches of duty and the costs of those proceedings are a direct result of such breach of duty. For example, in a negligence action where a third party is sued to recover the loss by way of mitigation or where proceedings have been brought because of the breach of duty. Thus where a solicitor has negligently advised a party to commence litigation which was ultimately unsuccessful, and that party has incurred significant irrecoverable costs, they may seek those costs as damages against the solicitor for that negligent advice. There are a number of examples in the professional negligence sphere (for example, *Agius v Great Western Colliery Company* [1899] 1 QB 413) and in relation to

negligent legal advice type of claims (see *Yudt v Leonard Ross & Craig,* cited above).

(6) Sixthly, costs incurred in procuring discharge from false imprisonment are recoverable; see *McGregor on Damages*, para.21-022.

(7) Seventhly, there are various other exceptions, such as arguably where there's a claim in deceit suggested by *Playboy Club Limited v Banca Nazionale* [2019] EWHC 303 (Comm) at [40] and see also *McGregor on Damages*, paras.21-025 and 21-026.

53. We do not consider the exceptions to be closed, but the exception or qualification suggested by Whistl is not justified either as a matter of principle or on the approach taken in the authorities.

(3) ISSUE 3: THE PRESENT CLAIM FOR DAMAGES

54. There is no doubt that this claim for costs as damages falls within the narrow version of the general principle outlined at paragraph 43 above. Whistl and Royal Mail were both parties in the previous appeal by Royal Mail before the Tribunal and the Court of Appeal.

55. Whistl sought its costs at the conclusion of the Tribunal Appeal and these were refused. The Tribunal explained why such costs were refused and referred to the practice and policy behind the general rule that costs are not awarded in favour of or against intervenors.

56. Whistl's costs application at the conclusion of the Tribunal Appeal was not wholly hopeless, as it sought to bring its case within *Aberdeen Journals Limited v OFT* [2003] CAT 21. Ultimately, however, the Tribunal did not accept it was appropriate for Whistl to be awarded its costs.

57. Mr Evans, the Director of Legal for Whistl, has provided a statement setting out the reasons why the intervention was brought. He explains that in effect, the intervention was by way of mitigation. The relevant passages are as follows:

> "6. Whistl sought to intervene in the Infringement Proceedings because we were concerned that it could prejudice our damages claim if the First Defendant were to succeed in overturning Ofcom's infringement decision or, more broadly, if the Tribunal were to make any findings or observations that were potentially prejudicial to our position in the damages case. Ofcom's finding of infringement, together with the other binding findings made in the Ofcom's Decision, were plainly something of very considerable value to Whistl in terms of laying the foundation for its damages claim. Those binding findings proved multiple matters that would otherwise need to be proved by Whistl (at considerable additional litigation expense) in the damages claim proceedings. They therefore represented a litigation asset which it was important to Whistl to preserve as part of our overall effort to mitigate (at least in the medium or long term) the impact on Whistl of Royal Mail's abusive conduct, by recovering for Whistl compensation for the loss of the profits it would otherwise have made from its E2E activities. In all the circumstances, we considered it to be reasonable to incur the costs of intervention as part of our effort to protect Whistl from ultimately suffering uncompensated losses of profits in consequence of Royal Mail's abusive conduct.
>
> 10. Whistl's participation in the Infringement Proceedings was solely to protect its ability successfully to pursue its damages claim. It would not have incurred the costs it did in pursuing the intervention other than to protect and advance its damages claim and thereby mitigate the uncompensated losses ultimately suffered by Whistl as a result of Royal Mail's unlawful behaviour."

58. We do not consider that this case falls within the mitigation exception, however widely it is interpreted. This is a case involving the same parties as the Tribunal Appeal. Whistl's actions as an intervenor were not by way of mitigating loss, but to strengthen its position in any litigation against Royal Mail, as it wanted the Ofcom infringement decision to be upheld and to use that decision in these proceedings, relying on sections 58 and 58A of the CA 1998. We do not consider it appropriate to fashion another exception to the general rule on the facts of the present case.

(4) ISSUE 4: ABUSE OF PROCESS

59. As is clear from the authorities, abuse of process is a flexible concept which the court or tribunal is generally well placed to identify. The relevant principles are set out in *Tinkler v Ferguson* [2021] 4 WLR 27, in the judgment of Lord Justice Jackson:

> "28. The court has the inherent power to prevent misuse of its procedure where the process would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people: Hunter v Chief Constable of The West Midlands Police [1982] AC 529, 536 per Lord Diplock.

29. A review of the power to control abuse of process was given by Simon LJ in Michael Wilson & Partners Ltd v Sinclair (Emmott, Part 20 defendant) [2017] EWCA Civ 3; [2017] 1 WLR 2646, paras 39 48, ending with this summary:

(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter's case [1982] AC 529 Lord Hoffmann in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.

(3) To determine whether proceedings are abusive the court must engage in a close merits based analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive since the circumstances may be such as to bring the case within the spirit of the rules, see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V C in the Bairstow case [2004] Ch 1; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris.

To which one further point may be added.

(6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision

> the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the Laing v Taylor Walton case, para 13."
>
> 31. The circumstances in which abuse of process can arise are very varied and are not limited to fixed categories: Hunter, p 536. Examples can be found in: vexatious proceedings amounting to harassment; attempts to re litigate issues that were raised in previous proceedings; attempts to litigate issues that should have been raised in previous proceedings (Henderson v Henderson (1843) 3 Hare 100); collateral attacks upon earlier decisions (attacks made in new proceedings rather than by way of appeal in the earlier proceedings); pointless and wasteful litigation (Jameel).
>
> 32. Nor is there any hard and fast rule to determine whether abuse is found or not; the process is not dogmatic, formulaic or mechanical, but requires the court to weigh the overall balance of justice: Johnson, pp 31, 32 and 34. Indeed, the overriding objective of the procedural rules is to enable the court to deal with cases justly, including when it exercises the power under CPR r 3.4. Where there is abuse, the court has a duty, not a discretion, to prevent it: Hunter, p 536.
>
> 35. In summary, the power to strike out for abuse of process is a flexible power unconfined By narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act."

60. Here we have no doubt that these proceedings, insofar as they are seeking the Relevant Costs Claims as damages, are an abuse.

(1) The matter was fully argued before the Tribunal and the Court of Appeal. There was no appeal against the Tribunal's decision to dismiss Whistl's costs application.

(2) There is a reasoned decision from the Tribunal explaining exactly why Whistl should not be awarded its costs as intervenor. Those reasons still hold good before this Tribunal today.

(3) When seeking costs, Whistl did not do so on a contingent basis. It did not, if its costs were refused, reserve the right to claim those costs as damages in the already pending present proceedings. Indeed, its submissions to the Court of Appeal suggested the opposite. Paragraph

4 of Whistl's submissions dated 6 May 2021 to the Court of Appeal stated:

> "In this case there are strong reasons why: (a) it would be not be fair for Whistl to be left to carry the costs of upholding the finding that RM's conduct targeted against it was unlawful; and (b) in contrast, it would be fair for RM to pay those costs."

It is inherent in that submission that if the Court of Appeal were to refuse the application, those costs were going to be borne by Whistl.

(4) Permitting this claim to go ahead would be contrary to the principle of finality and encourage satellite litigation over the costs of intervenors.

(5) The mere fact that these costs are claimed as damages and not costs does not change the true nature of what is actually being claimed. Whether you characterise the claim as one for costs or damages, having a second bite of the cherry before the same tribunal is abusive.

(6) It is in the public interest that costs are dealt with by this Tribunal on the basis of the principles set out clearly in the authorities and referred to again in the 2020 Tribunal Ruling on costs. It is not in the public interest to have court or tribunal time taken up in having these points reargued in a different format before the Tribunal. It is in the public interest to have finality.

(7) Turning to the private interests of the parties, Royal Mail has faced the risk of paying Whistl's costs before the Tribunal and the Court of Appeal, and now on Whistl's case faces the risk of paying those same costs before the Tribunal yet again. Taking Whistl's private interests into account, it was allowed to intervene, and did so knowing what the test is for recovering their costs, yet now seeks to recover those costs on a different basis. This does not strike the Tribunal as fair.

(8) Whistl has emphasised the fact that there is no prima facie right to costs in the Tribunal for an intervenor in infringement proceedings. There is a right to seek costs, and Whistl sought to recover its costs, but was

unsuccessful. We accept an intervenor does not have a prima facie right to recover its costs in the event of a successful intervention, but that does not mean that the current Application is not an abuse of process. It would undermine the Tribunal's policy on costs for intervenors for such intervenors to be able to seek those costs as damages in subsequent proceedings by applying a different test.

(5) ISSUE 5: CAUSATION

61. On one level it can be argued that Whistl's costs were caused by Royal Mail's infringement. Had there been no infringement, there would have been no Ofcom decision to that effect. Had Royal Mail not appealed that decision, there would have been no proceedings before the Tribunal and Whistl would have had no proceedings in which to intervene.

62. While we consider Royal Mail's infringement may well be too remote to be characterised as the legal cause of Whistl's costs, we do not feel comfortable in deciding the causation point on the basis of the arguments we have heard today; these were rather limited in extent and there are other relevant authorities in the area which have not been cited.

63. In view of the conclusions reached on issues 2 to 4, it is not necessary to reach a conclusion. We do point out, however, that at this stage we are not persuaded by Royal Mail's contention that Whistl's decision to intervene constituted a *novus actus interveniens* which broke the chain of causation.

G. CONCLUSION

64. Whistl does not have any realistic prospect of success in relation to its costs as intervenor in Royal Mail's appeals against the Ofcom decision. Accordingly, the relevant claim should be struck out.

65. This decision is unanimous.

Hodge Malek KC
Chair

Timothy Sawyer

Andrew Taylor

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 25 April 2024