Neutral Citation Number: [2016] EWCA Civ 719

Case No: (1) C1/2015/0906 & (2) C1/2015/0910

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE COLLINS
CO/10469/2012 & CO/10838/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2016

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE LLOYD JONES

- -

Between:

(1) GALLAHER GROUP LIMITED & ANR
(2) SOMERFIELD STORES LIMITED & ANR — **Appellants**

- and -

COMPETITION AND MARKETS AUTHORITY — **Respondent**

- -
- -

Lord Pannick QC and Hanif Mussa (instructed by **Slaughter and May**) for the **1st Appellants**
Monica Carss-Frisk QC and Jessica Boyd (instructed by **Burges Salmon**) for the **2nd Appellants**
Daniel Beard QC, Andrew Henshaw QC and Brendan McGurk (instructed by **CMA Litigation Unit**) for the **Respondent**

Hearing dates: 22 & 23/06/2016

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Approved Judgment

Master of the Rolls:

1. In March 2003, the Office of Fair Trading ("OFT") started to investigate Gallaher Group Limited and Gallaher Limited ("Gallaher") and Somerfield Stores Limited and Co-operative Group Food Limited ("Somerfield") among others for potential infringements of competition law in relation, in particular, to the retail pricing of certain competing tobacco products ("the Tobacco Investigation"). Save where the context otherwise requires, I shall refer to Gallaher and Somerfield as "the appellants". The appellants were given the opportunity to enter into without prejudice negotiations with the OFT which, if successful, would lead to early resolution agreements ("ERAs"), by which the parties would admit infringements of competition law and promise co-operation in return for reduced penalties. The broad effect of an ERA was that the party concerned would receive a substantial discount in penalty if it admitted the infringement and did not appeal to the Competition Appeal Tribunal ("CAT").

2. On 28 January 2008, the OFT produced a paper entitled "A Principled Approach to Settlements in Competition Act Cases". The paper sets out 10 principles. The third principle is: "Fairness, transparency and consistency are integral to an effective settlements process". It is explained in these terms:

> "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 particularly 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 [Effective Project Delivery] principles, and in light of the considerable 'knock-on' effects that settlements may have, particularly at this nascent stage in their development, [the OFT's Advisory Policy & International Group] should be involved early when settlements are being considered."

3. The Tobacco Investigation was conducted under the Competition Act 1998 ("the 1998 Act"). On 24 April 2008, the OFT issued a Statement of Objections ("SO") addressed to thirteen companies including the appellants alleging infringements of competition law. Shortly after issuing the SO, the OFT invited the companies to enter into negotiations with a view to concluding ERAs. The appellants both entered into ERAs. The material terms of each agreement were the same in each case. Clause 7 provided that, if the appellant appealed to the CAT, the OFT reserved the right to make an application to the CAT:

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

4. Gallaher signed its ERA on 2 July 2008. It provided that the penalty payable would be a little over £50 million instead of about £90 million. Somerfield signed its ERA on 10 July 2008. The penalty payable under this agreement was reduced to just under £4 million from a figure about twice that amount. The ERAs were signed by the OFT on 11 July 2008. Six of the companies to which the SO had been addressed entered into ERAs. At about the same time, the OFT gave certain assurances to Martin McColl Retail Group Limited and TM Retail Limited (together "TMR"). This was pursuant to what has been referred to in these proceedings as "the 2008 Decision". TMR was one of the companies to which the SO was addressed. These assurances lie at the heart of this litigation. In short, the OFT told TMR that, if it entered into an ERA, the OFT would pass on to it the benefits of any successful appeal by other companies without requiring TMR itself to appeal. The OFT did not inform any of the other companies of the 2008 Decision or give any of them similar assurances.

5. A party who entered into an ERA was entitled to exercise its right of appeal against any subsequent infringement decision by the OFT (albeit that it would lose its discount in penalty were it to do so). Neither of the appellants exercised this right.

6. On 15 April 2010, the OFT issued its decision in respect of the Tobacco Investigation ("the Tobacco Decision"). This made findings of infringement against the appellants as well as against other companies including TMR. An appeal was lodged by some of these companies (but not the appellants). On 12 December 2011, the CAT allowed the appeals. Encouraged by this decision and in reliance on the assurances it had been given in July 2008, TMR (which had not appealed the Tobacco Decision) sought to recover the penalty that it had paid to the OFT.

7. The evidence of the OFT is that it decided that, in view of the assurances that it had given pursuant to the 2008 Decision, there was a real risk that TMR would be permitted to appeal out of time; and that an appeal would be likely to succeed. Rule 8(1) of the Competition Appeal Tribunal Rules 2003 (S.I. No 1372 of 2003) provides a period of two months for appealing to the CAT. Rule 8(2) provides that this period may not be extended unless the circumstances are "exceptional". The OFT therefore entered into a settlement with TMR which included paying a sum which covered the amount of the penalty previously paid by TMR pursuant to the Tobacco Decision and an amount in respect of interest and costs. The decision to do this ("the 2012 Decision") was announced on the OFT website in the Update published on about 13 August 2012. Once the appellants learned of this fact, they both asked the OFT to withdraw the Tobacco Decision and refund the penalties that had been levied against them.

8. The OFT refused to accede to these requests. In letters dated 21 September 2012, it wrote:

> "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 did the assurance 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."

9. It was in these circumstances that the appellants issued proceedings in October 2012 seeking judicial review of the 2008 Decision and the 2012 Decision on the basis that principles of fairness and/or equal treatment required that they should have the same benefits of settlement as were afforded to TMR.

10. They also sought to appeal against the Tobacco Decision out of time. On 27 March 2013, the CAT ruled that leave to appeal out of time should be granted on the grounds that there were "exceptional circumstances" for doing so.

11. On 7 April 2014, the Court of Appeal allowed the OFT's appeal against this decision: see [2014] EWCA Civ 400. The leading judgment was given by Vos LJ. In concluding that there were no exceptional circumstances, he placed considerable reliance on the importance of the principle of finality and legal certainty. In holding that this principle carried the day, he noted that the appellants had the fullest opportunity to consider whether or not to appeal. They chose not to appeal with their eyes open.

12. On 1 April 2014, the functions of the OFT were taken over by the Competition and Markets Authority ("CMA") pursuant to the Enterprise and Regulatory Reform Act 2013. Since most of the material facts occurred before 1 April 2014, I shall refer to the OFT without distinguishing between it and the CMA.

13. In a judgment in the judicial review proceedings dated 26 January 2015, Collins J found that the appellants had been treated unfairly and unequally as compared with TMR in 2008 and that the refusal to make payment to them in 2012 required objective justification. He rejected each of the main defences raised by the OFT including the principal ground on which it relied for the less favourable treatment, namely that making the payments to the appellants would compromise the principle of finality and legal certainty. But he dismissed the claims on the grounds that the assurances had been made to TMR without giving them proper consideration and that the OFT had been "mistaken" in making them. He said that, since the penalties had been paid into the Consolidated Fund, the OFT was entitled to justify its unequal and unfair treatment of the appellants on the basis of a principle for which he found support in dicta of Jacob J in *Customs and Excise Commissioners v National Westminster Bank*

plc [2003] STC 1072 that "as a general rule a mistake should not be replicated where public funds are concerned".

14. The appellants say that the judge was wrong, as a matter of law, to hold that there is such a principle as that which he derived from the *NatWest* case. The OFT contends that the judge was right to declare that such a principle exists and to apply it in this case. In the alternative, it seeks to uphold the judge's decision for a number of reasons which are set out in its Respondent's Notice.

The facts relating to TMR

15. It is necessary to examine the facts relating to TMR in a little more detail. On 4 July 2008, TMR's solicitor sent to the OFT an agenda for a meeting to be held on 8 July. One of the things he wished to discuss was what the OFT would be likely to do as regards a party (A), who had entered into an ERA and had not appealed the OFT's decision in relation to it, in the event that another party (B), who had entered into an ERA in similar terms, was successful in an appeal against the OFT's decision in relation to it. TMR wanted to know whether A would be accorded the benefit of B's successful appeal.

16. At the meeting, Ms Sonya Branch (the Executive Director of Enforcement at the OFT) provided an assurance to the representatives of TMR which is recorded in four sets of meeting notes produced by the OFT (all in substantially the same terms). The typed version of the notes includes a record that Mr Stephen Morris QC (representing TMR) said:

> "If a successful appeal is made against the case and [TMR] had entered into an ER agreement, [TMR] would find it unfair to carry the can, so before committing to an ER agreement [TMR] wanted to know what is the OFT's position, if there is a successful appeal, with regard to [TMR].

17. The notes record that TMR then left the room while the OFT considered the points that TMR had made and continue:

> "On [TMR's] return… [Ms Branch] also noted the following:
>
> A successful appeal on liability would result in no finding against [TMR].
>
> In terms of a successful appeal on penalty then OFT would apply any reduction to [TMR]".

18. On 10 July 2008, TMR sought confirmation of these assurances by email prior to entering into the ERA. The email set out TMR's understanding of the assurance that had been given:

> "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 that manufacturer or

> retailer in relation to either liability or fines, then, to the extent the principles determined in the appeal decision are contrary to or otherwise undermine the OFT's decision against [TMR], the OFT will apply the same principles to [TMR] (and therefore presumably withdraw or vary its decision against [TMR] as required)."

Although she received the email and considered it, Ms Branch chose not to reply or to contest this understanding. Later on 10 July 2008, TMR provided the OFT with a signed copy of the ERA. On 11 July, the OFT signed the ERA without seeking to retract the assurances it had given on 8 July or to respond to TMR's email of 10 July.

19. On or about 13 August 2012, when the OFT published the Update following its payment to TMR, it described its dealing with TMR in 2008 as follows:

> "In 2008 the OFT gave [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]…….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."

20. In its pre-action correspondence dated 21 September 2012, the OFT accepted that it had provided an assurance to TMR in 2008, and that its reason for making the payment to TMR was that it had "come to the conclusion that the assurance must be honoured."

21. The OFT's evidence is that the assurances were given at a time when it was involved in an intensive and time-consuming process with much discussion and against a demanding timetable. All of the ERAs were due to be (and were) signed by 11 July 2008, i.e. three days after the meeting with TMR. As at 8 July, there were still continuing discussions with five early resolution parties ("ER parties"), all raising their own issues in the course of their separate, bilateral negotiations with the OFT's case team. I shall return to the significance of these points when I discuss the issues that arise in the appeal.

The NatWest case

22. The claimant in the *NatWest* case had submitted a claim for repayment of overpaid VAT which was rejected by a particular tax office of the Inland Revenue. The relevant tax office had chosen to invoke an unjust enrichment defence under section 80(3) of the Value Added Tax Act 1994. In respect of a number of the claimant's rivals, other tax offices had allowed claims for repayment, failing to invoke the statutory defence even though it could have been invoked. The claimant complained that the commissioners ought to allow its claim for repayment in order to afford equal treatment as compared with that afforded to its rivals. The commissioners refused to do so. The VAT Tribunal allowed the claim.

23. Jacob J allowed the Inland Revenue's appeal. He held that it had been correct to invoke the unjust enrichment defence because, on the evidence before the Tribunal,

the claimant had passed on the burden of the additional tax to its customers. Accordingly, it was not entitled to any repayment under section 80(3). He also held that the Tribunal did not have jurisdiction to consider any argument of unequal treatment and did not have jurisdiction to consider that argument on appeal. Despite these conclusions, Jacob J commented briefly (and *obiter)* on the substance of the argument of unequal treatment.

24. He observed that the Tribunal was wrong to find a breach of the principle of equal treatment because it had failed to consider the issue of whether there was an objective justification for any difference of treatment, including the effect on the interests of other taxpayers. He said at para 64:

> "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 repayments to people who are not entitled to them."

25. At para 66, he added:

> "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."

The issues before the Administrative Court

26. Before the judge, it was argued by the appellants that both the 2008 Decision and the 2012 Decision were unlawful. They breached the principle of equal treatment. In summary, they said that each decision fell within the scope of the principle of equal treatment: the appellants were in a comparable position to TMR; they were treated less favourably than TMR; and there was no objective justification for that less favourable treatment. The decisions also gave rise to unfairness, constituted a breach of legitimate expectations and/or were otherwise unreasonable.

27. For the purposes of the hearing below, the OFT raised four main defences to the claims. Three of the defences went to the question of whether it was required to justify its failure to make payments to the appellants. These defences were as follows: (i)(a) the exchanges could not properly be regarded as assurances and (b) fairness and equal treatment did not require that bilateral exchanges between the OFT and TMR during the early resolution negotiations should be replicated in exchanges with other parties; (ii) the appellants were not in a comparable position to TMR because, unlike TMR, they had not asked for the assurances that had been given to TMR; and (iii) TMR was the wrong comparator: the correct comparators were two other companies (Asda and Party A) whose request for assurances from OFT before the deadline for appealing the Tobacco Decision had been refused and TMR was to be regarded as an exceptional case. The fourth defence was that there was objective justification for treating TMR differently from all the other companies.

28. The judge rejected the first three of these defences. But, as I have said, he upheld the fourth: the unequal treatment was objectively justified principally because the assurances had been given to TMR by mistake and a mistake should not be replicated in a case involving public funds.

The grounds of appeal

29. The appellants submit that the judge should not have found that the unequal treatment was objectively justified on the facts of this case and erred in finding that there was a principle of law that a mistake should not be replicated in a case involving public funds. On behalf of the OFT, Mr Beard QC submits that the judge reached the right conclusion for the right reasons on the issue of objective justification. Further and alternatively, he submits that the judge was wrong to reject the three other defences.

30. I shall start with the three defences. If there was no unequal treatment or other relevant unfairness, the question of objective justification does not arise.

The first defence: the principles of equal treatment/fairness do not apply to the exchanges between the OFT and TMR

31. There are two limbs to Mr Beard's submissions here. The first is that the OFT gave TMR no assurance or promise of a substantive benefit, but only engaged in exchanges on a large number of issues conducted under great pressure under a tight timetable. What was said by Ms Branch on 8 July 2008 did not amount to a clear and unambiguous assurance sufficient to come within the scope of the equality principle. It was no more than a statement of what the OFT understood to be the legal position on the question of whether a party which has not appealed can take advantage of a successful third party appeal both as to liability and penalty.

32. In my view, the language used by Ms Branch on 8 July was clear and unambiguous. The context for what she said was the agenda submitted by TMR's solicitors which had asked for an "understanding of the OFT's likely course of action" in relation to liability and penalty as regards parties' position on the issue. This was discussed at the meeting on 8 July. Before committing itself to an ERA, TMR wanted to know what the OFT's position was. I have set out at para 17 above the relevant parts of Ms Branch's response. A successful third party appeal on liability "would result" in no finding against TMR; and in the event of a successful appeal on penalty, the OFT "would apply any reduction to [TMR]". This statement was unqualified and entirely clear. Mr Beard submits that Ms Branch was doing no more than stating her understanding of the law. I can accept that what she said was informed by her understanding of the law. But TMR wanted to know what the OFT would *do* in the event of a successful third party appeal and it received a clear and unequivocal answer. The words "the OFT would apply any reduction [in penalty]" are a clear statement of what the OFT would do. In the context of that statement in relation to penalty, the statement that a successful appeal on liability would result in no finding against TMR would reasonably have been understood as meaning that the OFT would withdraw its finding of liability. TMR's understanding of what Ms Branch said at the meeting was confirmed by TMR in the email of 10 July. That understanding was not contradicted by Ms Branch.

33. The second limb of Mr Beard's submissions in relation to the first defence is that, although the OFT made it clear that the same infringement and penalty methodology would be applied to each ER party, it did not follow that every part of each discussion with each party involved in the early resolution process ("ER process") had to be the same notwithstanding the different issues such parties could raise. The judge found that the discussions between the OFT and the individuals "were considered to be akin to commercial negotiation" (para 16); and he accepted that "[n]egotiations could raise individual matters such as aggravating or mitigating factors or other factors peculiar to the particular penalty" (para 15). But Mr Beard says that he failed to recognise that, where the OFT was engaged in separate confidential negotiations with multiple parties, all differently placed and raising different concerns, it was not necessary for the OFT to replicate the nature and terms of any particular exchanges with other parties. The judge held at para 39 that the requirement to replicate matters which were the subject of queries or requests by other parties extended to "[a]nything which can act as an inducement to enter into an ERA". Mr Beard submits that this was too vague to be a workable test. It was not practicable or reasonable for the OFT, in seeking to respond as best it could to questions raised during the negotiations, to seek to identify which matters might or might not be of particular interest or relevance to other parties which had not raised them.

34. In my judgment, the judge was right to hold that the assurances given to TMR fell within the scope of the equal treatment principle that the OFT was obliged to apply to all parties to the ER process. In *Crest Nicholson Plc v Office of Fair Trading* [2009] EWHC 1875 (Admin) Cranston J addressed the application of the principle of equal treatment to the OFT's regulatory activities, under EU law and common law. He noted that it was common ground that "the OFT must comply with the principle of equal treatment *in all steps leading up to the imposition of a penalty"* (emphasis added). This statement has not been challenged before us and rightly so. Moreover, the OFT's internal policies concerning the ERA process also accept the application of the principle of equal treatment. The paper dated 28 January 2008 to which I have referred at para 2 above refers to the importance of consistency and the need to observe equal treatment, particularly in relation to "hybrid cases" i.e. where some parties settle, but others do not. Similarly, the OFT's "Practical Guidance on Settlement" (16 April 2010) states:

> "Consistency and the principle of equal treatment (that is: treating parties in similar circumstances in a similar fashion or, alternatively, formulating strong arguments to justify taking a different approach in similar circumstances) are vital. Parties are invariably sensitive to equality of treatment issues and approaches in one case will inevitably 'leak out' during the settlement process and inform parties' strategies in others" (see Part 3, Section 14).

35. Consistently with this policy and its correct understanding of the law, the OFT stated during the ER process that it would pass on to parties who had already reached agreement in principle "the benefit of developments in the early resolution process": see the email of 8 July 2008 from Mr Christofides to Gallaher. At that time, Mr Christofides was the Director of Competition Law, General Counsel's Office at the OFT.

36. It does not follow that the equal treatment principle required the OFT to replicate word for word its exchanges with every negotiating party (with the breaches of confidentiality that this would entail). That would be absurd and would not be necessary in order to achieve fairness and equality between the parties. What was required, however, was the replication of all substantial aspects of, or relating to, one ERA that could in principle be applied to all and would be valuable to all. There is no principled basis for limiting the requirements of fairness and equality to matters of process and methodology as contended by Mr Beard. Nor is such a limited approach consistent with the OFT's policy documents. I accept the submissions of Lord Pannick QC and Ms Carss-Frisk QC that the assurances given by the OFT to TMR were a substantial and valuable benefit which fell within the scope of the equal treatment that the OFT was obliged to afford to all those who participated in the ER process and entered into ERAs. The assurances placed TMR in a far more favourable position than the other ER parties. The other parties, if they wished to appeal, would have been required to incur not only their own costs of an appeal, but also (pursuant to clause 7 of the ERA) were exposed to the risk that their penalty would be increased and that they would have to pay the OFT's costs whatever the outcome of the appeal. I would therefore reject the second limb of the first defence.

37. For all these reasons, I would reject Mr Beard's submissions in relation to the first OFT defence.

The second defence: the appellants were not in a relevantly comparable position to TMR

The position in 2008

38. Mr Beard submits that the appellants and TMR were not in comparable positions in 2008 because, whereas TMR asked what the position would be in the event of a successful third party appeal, the appellants did not. The judge characterised this submission as the "don't ask, don't get" principle. He said that this did not "override the public law duty of fairness and equality". Mr Beard submits that a party who is willing to settle without any consideration of an issue (in this case, the effect of a successful third party appeal) is differently placed from a party to whom the issue is critical to its decision-making.

39. In my view, the fact that one party (A) has made a request for more favourable treatment and another party (B) has not done so will rarely amount to a good reason for not treating them as being in a relevantly comparable position for the purposes of equal treatment if they are in fact otherwise in relevantly comparable positions. Take the present case. TMR and the appellants were, as a matter of fact, in relevantly comparable positions. They had all been the subject of the Tobacco Investigation and the same SO in relation to allegations of infringements of competition law. They were all involved in the same ER process which, if successful, would lead to ERAs. The fact that TMR (unlike the others) raised the issue of the effect on its position of a successful third party appeal was immaterial to the comparability of their positions.

40. I shall add that negotiations would be impossible if a party which had been promised equal treatment could not obtain a benefit accorded to another party unless he asked for it. The negotiations in this case took place in the context of the express assurances by the OFT that parties would be treated equally. It had been represented by the OFT that the substantive ERA terms on which it was prepared to settle were not negotiable:

see the OFT speaking notes for the meeting on 8 July 2008. In this context, it was reasonable for parties to understand that (i) their room to negotiate any individual concessions would be negligible and (ii) any concessions that were negotiated would be applied across the board without their having specifically to request them.

41. I do not therefore accept that the appellants cannot complain of unequal treatment because they did not seek the assurances. If they had been made aware in 2008 that the assurances had been given to TMR, the appellants would surely have sought similar assurances from the OFT at that time.

42. Finally, Mr Beard also relies on what this court said in *R (on the application of Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1080 for the proposition that a regulator enjoys a wide margin of discretion when deciding whether to treat different parties in the same way. The court said at para 70 that "in principle the more complex and the more judgment-based the decision, the greater the margin of discretion should be afforded to the decision-maker". In that case, a broad margin was held to be appropriate because "the exercise of comparing one region with another [for the purpose of the allocation of EU structural funds] is or ought to be multi-factorial. It involves making a substantial number of value judgments of an economic and social nature" (para 72). As Lord Pannick points out, the present case is very different. In deciding whether the appellants were in a comparable position for the purpose of providing the assurances, the OFT did not need to make any value judgment, let alone complex and multi-factorial value judgments of an economic and social nature. In any event, the OFT had already decided that all parties to the ERA process should be treated with consistency. In my view, the OFT was not entitled to any margin of discretion in deciding whether to treat TMR differently from the other parties.

43. I conclude, therefore, that the appellants were in a relevantly comparable position to TMR in 2008.

The position in 2012

44. Mr Beard submits that the appellants were in a materially different position from TMR in 2012 because the appellants did not (and could not) contend that they had relied on assurances similar to those given to TMR such as to create a real litigation risk for the OFT which would justify compromising with them (as it did with TMR). This is because, absent the assurances, the appellants would have had a weaker case than TMR for establishing the exceptional circumstances that were necessary for the grant of permission to appeal out of time. But as Lord Pannick points out, the only reason why the appellants could not have claimed that they relied on assurances of the type given to TMR was because such assurances had not been given to them; and the fact that assurances had been given to TMR was unfairly withheld from them by the OFT. Furthermore, as I have already held, the failure to give the assurances to the appellants in 2008 was in breach of the obligation to treat all parties fairly and equally. The OFT cannot, therefore, base an argument that the appellants were not in comparable positions with TMR in 2012 on its failure to treat them fairly and equally in 2008.

45. I conclude, therefore, that in so far as the appellants were not in a comparable position to TMR in 2012, it is not open to the OFT to rely on the differences to defeat the allegations of unequal treatment.

The third defence: TMR was the wrong comparator

46. Mr Beard submits that, even if TMR could be considered to be *a* relevant comparator, it was not the only or best relevant comparator to the appellants. The OFT took a different approach in relation to other parties, including Asda and Party A, who raised the same successful third party appeal issue prior to the deadline for appealing from the Tobacco Decision as had been raised by TMR. The assurances given to TMR were not given to any other party. Mr Beard submits that TMR was an exceptional case. In short, the OFT was therefore entitled, having considered the issues more fully, to take a different approach from the one it had taken with TMR. That is what it did in relation to Asda and Party A.

47. I do not accept Mr Beard's submission. As long as the appellants were in a comparable position to TMR (as I have held them to have been), their less favourable treatment calls for objective justification. It is irrelevant that there may also have been other parties who were in a comparable position to TMR who were also subjected to less favourable treatment by being denied the relevant assurances. The fact that other parties may also be able to advance claims of discrimination against the OFT does not disentitle the appellants from doing so. The appellants' complaint is that they were treated less favourably than TMR which was in a relevantly similar situation. It was not that they were singled out for unfair treatment. It is no answer in law to these claims that there may be other parties who have been the subject of similar unfair treatment.

Objective justification

48. Mr Beard submits that the judge correctly held there to be objective justification for not replicating in favour of the appellants the approach that the OFT adopted in relation to TMR because that approach resulted from an inadvertent and mistaken failure to take account of highly material matters, namely the principles of finality and certainty. These principles were clearly reaffirmed by the European Court of Justice in the *Wood Pulp II* decision [1999] ECR1-5363. In that case, some of the addressees of a cartel decision had successfully appealed to the Court of First Instance. The ECJ held that those successful appeals did not decide anything in relation to non-appellants. There was no need to consider whether the grounds for the successful appeal might suggest that non-appellants should be repaid. At para 63, the ECJ said:

> "Where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action against the decisions concerning them and obtained their annulment, the principle of legal certainty underlying the explanations set forth in paragraphs 57 to 62 above therefore precludes any necessity for the institution which adopted the decisions to re-examine, at the request of other addressees, in the light of the grounds of the annulling judgment, the legality of the unchallenged

> decisions and to determine, on the basis of that examination, whether the fines paid must be refunded."

49. In its consideration of the appellants' applications to appeal the Tobacco Decision out of time, the Court of Appeal applied the principles of finality and certainty. Vos LJ said that the successful appeal by other parties "only quashed the [Tobacco] Decision as regards the appellants before the [Tribunal], not generally."

50. Collins J held that the statements the OFT made to TMR in the course of the exchanges on 8 July 2008 were not consistent with the principles of finality and certainty and failed to take account of these principles. Mr Beard submits that Collins J was right to characterise the 2008 Decision as a "mistake" and to conclude that the mistake objectively justified the unequal treatment of the appellants by the OFT.

51. There was a good deal of discussion before us as to whether it was indeed a mistake and, if so, in what sense it was a mistake. There was also argument as to whether, if it was a mistake, it was the product of careful consideration at a high level (as Lord Pannick and Ms Carss-Frisk contend) or a rushed decision made without proper consideration in the throes of urgent discussions at a busy time (as Mr Beard contends). I do not consider it necessary to examine the evidence on this because in my view the issue of objective justification should not turn on distinctions of this kind. It is not in dispute that the 2008 Decision was a mistake in the sense that it was made without regard to and was inconsistent with the principles of finality and certainty. The judge was right to find at para 44 that "[a] mistake was inadvertently made" by the OFT.

52. Mr Beard places considerable weight on the decision of Jacob J in *NatWest.* He submits that, as a general rule, equal treatment does not require the replication of errors resulting in payment of public money to those who are not otherwise entitled to it. I have already referred at paras 23 to 25 above to the facts in the *NatWest* case and what Jacob J said. As we have seen, Collins J relied on this decision as authority for "the principle that as a general rule a mistake should not be replicated where public funds are concerned". Mr Beard submits that he was right to do so. Lord Pannick and Ms Carss-Frisk submit that he was not.

53. The submissions advanced by the parties in their skeleton arguments were in stark conflict on this important question. Lord Pannick and Ms Carss-Frisk submitted that correcting a mistake could not be an objective justification for unequal treatment. The fact that the OFT was mistaken in 2008 in offering assurances to TMR was irrelevant to whether there was objective justification for the less favourable treatment of the other parties to the ER process. But it became clear during oral submissions that the differences between the parties were less stark than this and, in my view, rightly so. It was accepted that the question whether there was objective justification for the less favourable treatment of the appellants as compared with TMR depended on whether the difference in treatment was fair *in all the circumstances.* Mr Beard accepted that the fact that a decision by a public authority is mistaken is not a trump card which will always carry the day so as to permit the authority not to replicate the mistake regardless of the circumstances. For the appellants, it was accepted that the question is whether there has been unfairness on the part of the authority having regard to all the circumstances. The fact that there has been a mistake may be an important circumstance. It may be decisive. It all depends.

54. The law relating to legitimate expectation is of some assistance here. It is well established that a legitimate expectation cannot be relied on to require a public authority to act in breach of its statutory duty or to do something *ultra vires.* I should make it clear that it is not suggested that it is *ultra vires* the OFT to act in breach of the equality principle. But the courts have considered whether a public authority may defeat a legitimate expectation where the expectation has been created by mistake. In *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, 1127B-D, Peter Gibson LJ said that, where the court is satisfied that a mistake has been made, the court should be slow to fix the public authority permanently with the consequences of a mistake. But importantly, he went on to say that the question of whether the authority should be permitted to resile from a mistaken statement depends on whether that would give rise to unfairness amounting to an abuse of power. The law relating to legitimate expectation is grounded in fairness. The question in the present case is whether the OFT should be permitted to resile from a mistake where to do so results in unfair and unequal treatment of the appellants.

55. It follows that, in so far as Jacob J purported to enunciate a general principle that was applicable in all contexts, in my view he was wrong to do so.

56. In any event, the present case and *NatWest* are distinguishable for a number of reasons. First, unlike the claimant in that case, the appellants had a strong right to and expectation of equal treatment. The OFT had expressly committed itself to affording equal treatment to the limited and defined category of parties to the Tobacco Investigation ERA negotiations. It accepted in its policy documentation that the principle of equal treatment should apply and it had told the appellants that it was observing principles of equal treatment in entering into the ERAs. I accept that, as Mr Beard points out, Jacob J proceeded on the basis that the EU law principle of equal treatment applied. But in judging what overall fairness requires, it is relevant that the decision-maker itself recognised and expressly represented to those with whom it dealt that it would apply the principle of equal treatment.

57. Secondly, there was no large administrative system in issue in the present case comparable to that under consideration in *NatWest.* The entry into the ERAs was managed by the same small group of individuals within the OFT who were charged with the responsibility for the Tobacco Investigation; and the ERAs concerned a limited and defined group of companies. I do not accept the submission of Mr Beard that to hold that a single decision-maker must continue to replicate legal errors whereas multiple decision-makers which make up an organisation need not do so would be entirely arbitrary. It is relevant to what overall fairness requires to make an assessment of the effect of an error (and its replication). We see this in play in cases concerning substantive legitimate expectation. As Laws LJ explained in *Begbie* at p 1131A-C:

> "In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in the *Coughlan* case [2000] 2 W.L.R. 622 that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to

> envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, failing to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.
>
> There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

58. Thirdly, there was no complex legal issue facing the OFT comparable to that facing the commissioners in the *NatWest* case. The OFT had a choice whether it should give any assurances as regards the effect of third party appeals and if so what those assurances should be. It did not have to undertake any assessment of unjust enrichment against a complex factual matrix in respect of which assessment individual decision-makers might reach a different view. It has not been suggested that the 2008 Decision was a complex and difficult decision. Rather, it was a decision which no-one who had the finality and legal certainty principles in mind could reasonably have taken. Those principles were well known and not difficult to understand.

59. For all these reasons, Collins J was wrong to rely on *NatWest* as being dispositive of the present case. The question remains whether, taking account of all the circumstances of the case, the unequal treatment was objectively justified. The unequal treatment entailed by the 2008 Decision was stark and manifest. As I have explained, there was no justification for according to TMR the substantial benefit that the OFT failed to accord to the appellants (and the others who were in materially comparable positions). The failure to inform the appellants and the others at the time of the assurances that the OFT had provided to TMR was particularly unfair. No attempt has been made to justify this save on the unimpressive basis that TMR asked for the assurances and the others did not. Another obvious opportunity to inform the appellants and the others was when the issue was raised by Asda and Party A. The OFT did not do so at that time either.

60. But the real focus must be on the question whether the 2012 Decision was objectively justified. That is when the OFT decided that it would act on the 2008 Decision in relation to TMR and honour the assurances that it had mistakenly given at that time, and to treat the appellants differently. The result was that it agreed with TMR to repay the whole of its penalty plus a contribution of £250,000 in relation to costs and interest. But it refused to pay anything to the appellants. The only difference between the positions of TMR on the one hand and that of the appellants on the other hand was that the OFT had given the assurances to TMR in 2008, but not to the appellants. The effect of that manifestly unfair and unequal treatment in 2008 could

have been reversed after the issue had been raised by Asda and Party A and the OFT's eyes had been opened to the significance of its earlier mistake in giving the assurances to TMR. That would have put all the companies which had been the subject of the Tobacco Decision and to which the SO has been addressed on an equal footing. The OFT could have withdrawn the assurances. It would not have been too late for TMR to appeal at that time. Even if TMR had been out of time, it would have had a very powerful case for arguing that the withdrawal of the assurances was an exceptional circumstance which justified an extension of time for appealing. Instead, the OFT acted on the assurances it had given to TMR, made the 2012 Decision and repaid the penalty previously levied and made further payments too. In all the circumstances, this was a plain breach of the principle of equal treatment and unfair.

61. For all these reasons, I would hold that the breach of the principle of fair and equal treatment was not objectively justified on the facts of this case.

Relief

62. Neither of the appellants is seeking to set aside the Tobacco Decision as against it. To do that would be in breach of the principle of finality and certainty. All that they are seeking is payment of a sum equal to the penalties they paid pursuant to the Tobacco Decision together with interest and costs. In this way, they will be placed in the same position as TMR. This is the approach that it adopted in relation to TMR where, in order to preserve finality and legal certainty, the OFT declined to set aside the Tobacco Decision but instead agreed merely to make the payments.

63. I see no difficulty in adopting this approach in relation to the appellants. The basis on which repayment is sought is not that the Tobacco Decision should be quashed. This is entirely consistent with the treatment accorded by the OFT to TMR. TMR has been repaid the penalty it paid despite the fact that it did not appeal against the Tobacco Decision. The Decision, therefore, still stands as against TMR and the principle of finality and legal certainty is not breached.

Overall conclusion

64. For the reasons I have given, I would allow these appeals. I would invite the parties to attempt to agree the terms of an order which gives effect to this judgment.

Lord Justice Longmore:

65. I agree.

Lord Justice Lloyd Jones:

66. I also agree.