



Neutral Citation Number: [2019] EWHC 1665 (Ch)

Case No: HC 2016-002774

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 04/07/2019

Before :

DEPUTY MASTER BOWLES

Between :

(1) Blizzard Entertainment SAS
(a company incorporated in France)
(2) Blizzard Entertainment Inc.
(a company incorporated in the State of Delaware)

Claimants

- and -

(1) Bossland GmbH
(a company incorporated in Germany)
(2) Zwetan Letschew
(3) Patrick Kirk

Defendants

Michael Hicks (instructed by **Bristows LLP**) for the **Claimants**
Tom Moody Stuart QC (instructed by **Boyes Turner LLP**) for the **Defendants**

Hearing dates: 30th and 31st January 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY MASTER BOWLES

Deputy Master Bowles:

1. On 21st March 2017, Mann J granted judgment, by consent, in favour of the Claimants, Blizzard Entertainments SAS and Blizzard Entertainment Inc. (to which, save where it is necessary to distinguish one Claimant from another, I will collectively refer as Blizzard), on their claim for infringement of copyright and inducement of breach of contract against the first Defendant, Bossland GmbH (Bossland) and against the second and third Defendants, Zwetan Letschew and Patrick Kirk (Mr Letschew and Mr Kirk). Mr Letschew and Mr Kirk were, at the material dates, both directors of Bossland and both shareholders in Bossland.
2. Blizzard is the creator and publisher of a number of well-known and extremely successful multi-player, online video games. The games relevant to this Claim are World of Warcraft, Diablo III, Hearthstone, Heroes of the Storm and Overwatch. I am told that these games are played by millions of players worldwide.
3. Bossland produces and sells software which is designed to enable users of these games to secure advantages as against other users of the games, contrary to the rules of the games and, more importantly, for current purposes, contrary to the end user licence agreements entered into by each player of Blizzard's games. Bossland's software is of two types, Cheats, which, as the name suggests, enables a player to cheat, within the given game, and Bots, which, again, contrary to the rules of the games and the end user licences entered into by players of Blizzard's games, automate the playing of aspects of the games, to the, apparent, advantage of the player using the Bot. The Bots relevant to this claim are Honorbuddy and Gatherbuddy, in respect of World of Warcraft, Demonbuddy, in respect of Diablo III, Hearthbuddy, in respect of

Hearthstone and Stormbuddy, in respect of Heroes of the Storm. The Cheat, relevant to this Claim, is Watchover Tyrant, which is used with reference to Overwatch.

4. To meet, as I am told, the problem, if that is what it is, created by the use of Bots and Cheats, Blizzard has introduced software, designed to identify and expel users of Bossland's Bots. Bossland, in its turn, has created its own software, Tripwire, the purpose of which is to mitigate, or nullify, Blizzard's anti-cheating software. Both parties have, thereafter, in a way not inaptly described by Mr Moody-Stuart QC as an evolutionary arms race, engaged in a process of improvements and updates, intended on the one hand to nullify Bossland's software and, on the other, to secure the continued operation of that software.
5. The essence of the Claim brought against Bossland, Mr Kirk and Mr Letschew is that, in creating and marketing its software, the Bots, the Cheat and Tripwire, in licensing the use of its software to persons playing and taking part in Blizzard's games and in providing updates to that software to those using that software, Bossland, Mr Kirk and Mr Letschew procured and induced those users to act in breach of their contracts with Blizzard, arising from the end user licence entered into by each such user.
6. Additionally, because the use of Bossland's software, Bots, Cheat and Tripwire, by those playing the relevant games and using Blizzard's software in the playing of those games, was a breach of the licences under and pursuant to which users were allowed to make use of the software embodied in the games and, for the purpose of playing the games, to copy, at the least, substantial parts of the artwork and computer programs embodied in the games, those users, making use of Bossland's software, thereby infringed Blizzard's copyrights in the games. Correspondingly, in providing and

licensing its software to those users, Bossland, Mr Kirk and Mr Letschew authorised those infringements and are liable therefor.

7. By way of recitals to the order of 21st March 2017, Mann J recorded admissions made by Bossland, Mr Kirk and Mr Letschew in respect of the Claim.
8. Those admissions were as follows:
 - (a) That Bossland had ‘procured and induced users of its software to act in breach of the terms of their agreements with the Claimants, as alleged in the first sentence of paragraph 46 of the Particulars of Claim’;
 - (b) That Bossland had ‘authorised users to infringe the Claimants’ copyright as alleged in the first sentence of paragraph 50 of the Particulars of Claim’;
 - (c) That Bossland had ‘acted pursuant to the common design with the users of its software to infringe’ in this instance, Blizzard Entertainment Inc.’s ‘copyright, as alleged in the first sentence of paragraph 51 of the Particulars of Claim’;
 - (d) That Mr Kirk and Mr Letschew were ‘jointly liable with’ Bossland ‘in respect of’ Bossland’s ‘said acts ...’
9. By paragraph 1 of his order, Mann J entered judgment against Bossland, Mr Kirk and Mr Letschew upon and in respect of those admissions. By paragraph 7, he gave directions as to disclosure such as to enable Blizzard to elect as between an inquiry as to damages and an account of profits. By paragraph 8, following that disclosure, the Claimants were given twenty eight days to elect, as between an inquiry as to damages, or an account of the profits resulting from the Defendants’ acts.
10. The Claimants have elected for that account and this is the judgment pertaining to that account.

11. The scope of the account was further defined, by Mann J, in his Case Management Order, dated 22nd November 2017.
12. By paragraph 1 of that order, he directed that there should be a trial of the account and, by paragraph 2, he defined the issues for determination within the account as being:
 - (a) The profits (if any) made by the Defendants in respect of which the Defendants should account to the Claimants arising out of the acts admitted by the Defendants in the recital to the order of 21st March 2017;
 - (b) What interest (if any) should be paid on such sums;
 - (c) The liability for the costs of the taking of the account of profits (including any interest on costs).
13. As appears from the recitals to the 21st March 2017 order, the acts admitted by the Defendants are further defined by reference to particular sentences in particular paragraphs of the Claimants' Particulars of Claim and the task of the court, pursuant to the order of 22nd November 2017, is to ascertain the profits arising from those acts for which the Defendants should account to the Claimants.
14. The sentences and paragraphs in question are: the first sentence of paragraph 46 of the Particulars of Claim; the first sentence of paragraph 50 of the Particulars of Claim and the first sentence of paragraph 51 of the Particulars of Claim.
15. The first sentence of paragraph 46 alleges against Bossland that it procured and induced users of its software to act in breach of their agreements with Blizzard. Paragraph 46 then goes on to explain the acts undertaken by Bossland, which have, or which are said to have, procured and induced users of its software to breach their agreements with Blizzard. Those acts encompassed the advertisement and promotion

of Bossland's software in the United Kingdom and the grant of licences to use its software in the United Kingdom; the control of access to its software; the taking of counter measures to hide the use of Bossland's software from Blizzard, including by means of Bossland's Tripwire software; and the provision, to users of Bossland's software, of updates to that software intended to allow use of the software, notwithstanding preventative measures taken by Blizzard.

16. The first sentence of paragraph 50 alleges that Bossland has infringed Blizzard's copyright by authorising the use of its (Bossland's) software by users of Blizzard's games. The paragraph goes on to allege that that authorisation has arisen by the grant by Bossland to users of Blizzard's games of licences to use its (Bossland's) software and, further, by reason of facts and matters set out in paragraph 45 of the Particulars of Claim.
17. The first sentence of paragraph 51 alleges that Bossland has procured and induced and acted, pursuant to a common design, with users of its software to infringe the second Claimant's copyright in its games by playing those games using Bossland's software. Blizzard supports that allegation by reference to Bossland's acts in granting licences to use its software to users of Blizzard's games and, again, by reference to the facts and matters set out in paragraph 45.
18. The facts and matters set out in paragraph 45 relate to the counter measures put in place by Bossland to circumvent the measures taken by Blizzard to prevent the use of Bossland's software by persons playing its games. Those measures include, as already stated, Bossland's Tripwire software, which works, apparently, by detecting Blizzard's own anti-Cheat/Bot software and, when that software is detected, stopping the relevant user's use of Bossland's Cheat/Bot software, so that that user's use of that software is not detected by Blizzard.

19. Bossland, as it is alleged in paragraph 45, frequently updates Tripwire in an attempt to detect Blizzard's preventative measures in respect of the use of cheats and bots; will, if it becomes aware of measures taken by Blizzard to prevent the operation of its software, update that software with the intention of circumventing Blizzard's preventative measures; will, in any event, if Blizzard updates any of its own games software, for whatever purpose, update its own software in order to enable that software to continue to run with the relevant game.
20. The relevance of all of the last foregoing is that Bossland, Mr Kirk and Mr Letschew contend that the profits for which it must account are the profits derived from the entirety of the infringing, or breach of contract inducing, conduct that it has admitted, that, in admitting the conduct alleged, severally, in the first sentences of each of paragraphs 46, 50 and 51 of the Particulars of Claim, it has, thereby, admitted the entirety of the facts and matters relied upon by Blizzard, as underwriting the allegations in those sentences, and that, in consequence, in the assessment of those profits, there should be brought into account the costs incurred by Bossland in relation to those facts and matters.
21. On this footing, they submit that the approach pleaded by Blizzard in its Particulars of Claim, relating to this account, adopts an overly narrow definition of the conduct, for the profits of which Bossland, Mr Kirk and Mr Letschew are accountable, and that that overly narrow approach, or definition, has, in its turn, the consequence, or possible consequence, of overly restricting the costs, or expenses, to be taken into account in determining the profits for which they are to account.
22. Blizzard's Particulars of Claim purports to limit the conduct, for the profits of which Bossland, Mr Kirk and Mr Letschew are accountable, to the licensing of individual users in the United Kingdom to use the relevant software and, consequently, to limit

the 'direct costs', which Blizzard concedes are deductible from the earnings received from the grant of licences, to the costs directly associated with the process of procuring the grant of licences, namely transactional fees (Gateway Fees and Chargeback Fees) paid out by Bossland to third parties, as part of that process.

23. On this analysis, the costs attributable to the other acts, or conduct, identified by Blizzard, in its pleadings, as inducing the users of Blizzard's games to break their contracts with Blizzard, or as infringing Blizzard's copyright, or as procuring and inducing users of Blizzard's games, pursuant to a common design, to infringe the second Claimant's copyright, are, so it is submitted by Blizzard, to be treated, in the context of the facts of this case and, in particular, in the context of the facts of Bossland's business, as being no more than part of the overheads of Bossland's business and, further, as overheads of that business of a type that do not fall to be brought into account, whether as a whole, or by way of apportionment, when determining the profits for which Bossland, Mr Kirk and Mr Letschew are accountable.

24. The key fact, in relation to Bossland's business, which underwrites this submission is that Bossland carries on a business that does not respect territorial limits, or domestic jurisdictions, which derives its income from the same facts and matters and the same conduct carried on across the world, by way of a single global operation, and which, on the figures available to this court and in the period with which this case is concerned, derived only some 3.6% of its overall income from the relevant software from sales of software licences to users in the United Kingdom.

25. On the back of this last fact, the point is made (and is not disputed) that the overall costs incurred by Bossland, worldwide, in respect of those aspects of Bossland's infringing, or breach of contract inducing, conduct, which Blizzard treats and invites

the court to treat as overheads, have not been increased at all by the fact that that conduct was directed to the United Kingdom as well as the rest of the world.

26. To the like effect, it was agreed, in the course of the evidence, that, had Bossland's conduct not been directed towards the United Kingdom at all, that fact would not have made any difference (subject, perhaps, to costs incurred in respect of affiliates) to the costs that Bossland would have incurred in respect of its overall operation. The sale of licences, in respect of the relevant software, into the United Kingdom was, simply, not a sufficient part of Bossland's overall operation, in respect of that software, as to have any effect upon the costs that it would have elected to incur, worldwide, in respect of that operation.
27. The further fact, that Bossland operates a single worldwide business, has the additional consequence, as I see it, that this is not one of those cases where it can be argued that, in the absence of Bossland's infringing, or breach of contract inducing, conduct, that conduct would have been replaced by business of a non-infringing and non-breach of contract inducing character. This is not the paradigm case of a company, or entity, which carries on an infringing and a non-infringing business and where, in the absence of the infringing business, the company, or entity, would, or might, in its place, have transacted non-infringing business. Bossland only had one business, operated worldwide, and that was the business of the production and sale of software, including the software relevant to this case. There is no basis for the conclusion that, if, somehow, Bossland had not directed its operation into the United Kingdom, its United Kingdom sales would have been replaced by sales, or enhanced sales of the relevant, or other software, in other jurisdictions. Bossland had one business and the existence, or otherwise, of its United Kingdom operation had no

material effect upon either the costs incurred in that business, or the sales of its software elsewhere in the world.

28. The consequence of the foregoing, is that, if Blizzard is right and all the costs of the activities, pleaded by Blizzard and admitted by Bossland as forming part of Bossland's infringing and breach of contract inducing conduct, other than the costs directly incurred in respect of the sale of Bossland's software licences into the United Kingdom, are to be regarded as overheads then, on the authorities relied upon by Mr Hicks, on behalf of Blizzard, no part of the costs incurred in respect of those activities can be brought into account, by way of a deduction from Bossland's United Kingdom profits.
29. The authorities which point that conclusion are **Dart Industries Inc. v Décor Corp Pty Ltd [1994] FSR 567**; **Hollister Inc. v Medik Ostomy Supplies Ltd [2013] FSR 24**; and **OOO Abbott v Design and Display Ltd [2016] EWCA Civ 98**. The effect of those authorities, as they relate to overheads, was, helpfully, summarised by HH Judge Hacon, when **OOO Abbott** was remitted to IPEC for further consideration (**[2017] EWHC 932 (IPEC)**): 'a proportion of the infringer's general overheads may be deducted from gross relevant profits unless (a) the overheads would have been incurred anyway even if the infringement had not occurred, and (b) the sale of infringing products would not have been replaced by the sale of non-infringing products'.
30. Applying that summary to this case and treating the costs of Bossland's infringing and breach of contract inducing activities, other than those relating directly to the sale of software licences, as overheads, both limb (a) and limb (b) of that summary are satisfied and, in consequence, none of the costs of those activities would be deductible from the profits for which Bossland is called upon to account.

31. The question to be answered, therefore, is whether Blizzard is right to treat the costs incurred by Bossland in respect of those activities as overheads.
32. The answer to that question, although brought into focus by the way that Blizzard's claim in the account has been pleaded, is not, of course, dependent upon the form of pleading. The question, however the matter is pleaded, is a substantive question. Are the costs incurred by Bossland in respect of the activities about which Blizzard complains, other than the costs directly incurred by Bossland, in selling its software licences, properly to be regarded as overheads?
33. Mr Moody-Stuart, for Bossland, argues that they are not, that they are costs directly attributable to the very conduct and activities in respect of which Blizzard complains and for the profits of which Bossland is accountable and that, in consequence, such proportion of those costs as are properly referable to Bossland's United Kingdom business should be deducted from Bossland's United Kingdom income, when determining the accountable profit.
34. Implicit in that submission and explicit in his argument was that, in the case of costs directly attributable to Bossland's actionable activities, the fact, that those activities have not given rise to any costs, which would not have been incurred, in any event, as part of Bossland's overall operation and the fact that those activities, if not carried on, would not have been replaced by other software sales in other jurisdictions, does not preclude the court from allowing a proper proportion of those costs from being deducted from Bossland's accountable profit. As Mr Moody-Stuart put it, the special rules applying to overheads would not have been applicable.
35. Mr Moody-Stuart's analysis of the authorities mentioned above sought to demonstrate that the focus of judicial attention, in those cases, has been upon the circumstances in which a proportion of overheads can be brought into account and

that rather less attention has been given to the determination of the borderline to be drawn between overheads and other, more direct, costs which can be brought into account.

36. Mr Hicks places the borderline as being between ‘direct costs’ and all other costs. By ‘direct costs’ he means, as I understand it, costs determined by the application of principles of incremental accounting; that is to say costs which derive from and are increased by each particular item, the profit from which the accounting party has to account.
37. In making that submission, he relies upon the evidence contained in the report of his accountancy expert, Mr Stern, who, at least until cross examined, asserted that accounting principle required that direct costs should be solely determined by the application of the incremental approach. He relies, also, upon dicta, in **Dart**, a decision of the High Court of Australia, which appears to me to be the seminal, or source, authority in this area, to the effect that, in the accounting process, applicable to an account of profits, the principles and practices of commercial accounting are, or may be, of assistance.
38. It seems to me, having now the advantage of the helpful discussion, or debate, that took place at trial between Mr Moody-Stuart and Mr Stern, that Mr Stern’s initial ‘purist’ approach draws the line between direct costs and other costs too narrowly and that costs (the example discussed was the cost of a mould used solely to manufacture an infringing product) which, although not increasing incrementally with every infringing sale, are, nonetheless, wholly associated with the production of an infringing product, or, as in this case, with conduct which induces, or procures, a breach of contract are, if available, deductible in the proper determination of accountable profits.

39. In this regard, helpful assistance can be derived from the judgment in the New South Wales case of **Lepastrier & Co. Ltd. v Armstrong-Holland Ltd (1926) 26 SR (NSW) 585**. The ultimate decision in that case, namely that the only costs which could be deducted from gross profit in an account of profits were those solely referable to the production of the infringing product and that in no circumstances could a share, or proportion, of overheads be deducted from gross profit, was not followed in **Dart**. Even, however, within that very narrow framework for deductions, it is striking that the court was of the view that the depreciation in the value of a piece of machinery used only for the manufacture of an infringing product, or even a share in the depreciation in value of such a piece of machinery, where that depreciation could be tied to the infringing user, could be deducted from gross profit, notwithstanding that that depreciation could not be attributed to specific sales.
40. The decision, in **Lepastrier**, however, and the concession, if that is what it was, made by Mr Stern in cross examination, does not, however, as I see it, extend the concept of direct costs, or the ambit of deductible direct costs, in such a way as to include, as direct costs, rather than as overheads, costs which are not solely attributable to the conduct, or activities, which constitute the relevant infringement, or relevant breach of contract inducing behaviour. Nor can I find anything in the other authorities cited to me to support such a wider definition of direct costs.
41. The phrase ‘directly attributable’, used by Mr Moody-Stuart to describe costs, which, although not exclusively incurred in connection with the conduct complained of, were, nonetheless, directly incurred in respect of those activities, was, as appears from the decision in **Dart**, at page 571, the phrase used by King J, at first instance, in that case. His use of the phrase, however, did not bear Mr Moody-Stuart’s meaning. As appears at page 573, King J used the phrase as being synonymous with the phrase

‘solely referable’, used in **Lepastrier**, and, therefore, as relating only to costs wholly and exclusively incurred in respect of the activities complained of.

42. In regard to the domestic authorities, in **Hollister**, Kitchin LJ, as he then was, at paragraph 74, drew the distinction between direct costs and overheads. He did not, however, engage in any debate, or discussion, as to the ambit of direct costs.

43. In **OOO Abbott**, Judge Hacon, giving judgment in respect of the original taking of the account of profits in that case ([2014] EWHC 2924 (IPEC)), described the distinction between overheads and other, more direct, costs as being a distinction between costs ‘...associated solely with the defendant’s acts of infringement’ and ‘general overheads which supported both the infringing business and the defendant’s other businesses’. Although Judge Hacon’s formulation of the law as to the circumstances in which a proportion of overheads could be recovered was criticised in the Court of Appeal ([2016] FSR 27), no criticism was made as to the boundary that Judge Hacon had drawn between overheads and direct costs.

44. On the remission of **OOO Abbott** to Judge Hacon, for further consideration ([2017] FSR 43), Judge Hacon, at paragraph 58, reiterated his view as to the placing of the borderline between overheads and other costs and in a further judgment, arising from that judgment ([2018] FSR 17), he explained, at paragraph 25, that, in the context of the taking of an account of profits, ‘overheads’ was ‘nothing more than the word which has been used in earlier judgments to refer to those costs which cannot easily be ascribed uniquely to the infringing, or a non-infringing business’.

45. I can see no good reason to query, or challenge, the accuracy of Judge Hacon’s formulation of the borderline between overheads and other costs, or his treatment of all costs incurred in respect of infringing (and, in this case, also, breach of conduct inducing) conduct as overheads and subject to the rules pertaining to overheads, save

and unless the costs in question are solely associated with the conduct, or activity, in respect of which complaint is made.

46. The underlying principle that grounds that conclusion is derived from the decision in

Dart.

47. In **Dart**, the majority explained, at pages 572 and 575, the approach to be applied in carrying out an account of profits, of the type with which I am concerned, as being one which, while not penalising the accounting party, nonetheless sought to ensure that the accounting party was not unjustly enriched by its actionable conduct.

48. Such an unjust enrichment would take place if an accounting party was entitled to deduct from profits for which he was called upon to account costs which he would have incurred irrespective of his actionable misconduct and which, had the actionable misconduct not taken place, would not have been replaced by other non-actionable business activities. In those circumstances, the accounting party's overall profit would be increased, but the accounting party would not be accountable for that gain.

49. The principle applied in **Dart** has been adopted and refined, in this jurisdiction, via the Court of Appeal decisions, in **Hollister** and **OOO Abbott** (see **Hollister**, at paragraphs 80 to 86 and **OOO Abbott**, at paragraphs 38 to 44.) and affords the source, as I see it, both of Judge Hacon's summary of the rules applying as to the deduction of overheads (as set out in paragraph 29 of this judgment) and of his description, or designation, as to the borderline between overheads and other deductible costs (as set out in paragraph 43 of this judgment).

50. That borderline, or distinction, between costs solely associated with the accounting party's misconduct and costs associated with that and other conduct, achieves, in conjunction with the rules applicable to the deduction of a share of those latter costs (overheads), the result of producing an account of profits, which precludes the

accounting party from profiting from his actionable activities, but which, yet, by allowing a proportionate deduction, to reflect increased costs attributable to those activities and a similar deduction, to reflect costs that, but for the accounting party's actionable conduct, would have been incurred in respect of non-actionable business activities, does not, or does not unduly, penalise that party for those activities.

51. By contrast, if the line is drawn as submitted by Mr Moody-Stuart, such that costs, or a proportion of costs, directly, but not solely, attributable to Bossland's actionable activities are to be deducted from Bossland's profit from those activities, and, most particularly, if, as submitted by Mr Moody-Stuart, the entitlement to such a deduction is not qualified in the same way as applies in respect of overheads, then the clear consequence is that the accounting party will be unjustly enriched in precisely the same way as is explained in **Dart** and which is precluded by the decision in **Dart** and by the authorities subsequent to **Dart**.
52. The clear conclusion, flowing from the foregoing, is that the line that Mr Moody-Stuart asks me to draw between direct costs and overheads is not the correct line and that an account, conducted, or taken, in the way that he submits, would have the effect, precluded by **Dart** and the authorities subsequent to **Dart**, of placing the accounting party in a better position than it would have been if it had not been guilty of the acts complained of and, in this case, admitted.
53. That consequence, or effect is avoided, as set out in paragraph 50 of this judgment, if the borderline between direct costs and overheads is defined in accordance with Judge Hacon's summary, at paragraph 58 of his judgment in the remitted account in **Abbott**, and if, therefore, direct costs, deductible in full and in all circumstances, are limited to those which are solely associated with the conduct of the accounting party which has given rise to the account of profits.

54. In the result, I am satisfied that, for purposes of this account, the only costs which should be treated as direct costs are those which are solely and wholly associated with Bossland's actionable and admitted activities in the United Kingdom and that such of its costs as, although attributable in part to those activities, also, to use Judge Hacon's word, support its worldwide activities, in respect of the relevant software, are to be treated as overheads.
55. The consequence of that is that no part of those latter costs can be deducted from the profit for which Bossland is accountable, save to the extent that those costs have been increased by reason of Bossland's actionable United Kingdom activities and save to the extent that, in the absence of those activities, those costs would have been incurred in respect of other non-actionable business activities.
56. In the light of the foregoing and of the matters set out in paragraphs 25, 26 and 27 of this judgment, the bulk of the categories of costs sought to be deducted by Bossland fall away.
57. The gross United Kingdom sales income arising from Bossland's activities for which it is accountable were, in the event, agreed at €373,001. To be set against that figure and reflecting transactional fees directly incurred by Bossland arising from its software sales in the United Kingdom (Gateway Fees and Chargeback Fees) is the sum of €30,943. Both parties accepted that that deduction, calculated by the application to United Kingdom software sales of the proportion, or percentage, that worldwide transaction costs bore to worldwide gross revenue, was appropriate.
58. The other categories of costs, in respect of which Bossland sought to make deductions were described as server costs, worker costs, software costs, legal costs, managing director costs and affiliate costs. In respect of all save affiliate costs, to which I shall return, it was accepted that those costs, although said to be directly

attributable to Bossland's accountable activities, were not solely so attributable, but also supported Bossland's worldwide business and that, as such, only the proportion of those costs that related to Bossland's United Kingdom business should be deducted.

59. Leaving aside affiliate costs, I am not prepared to make any deductions in respect of any of these categories of costs.

60. For the reasons already given, they are all to be regarded as overheads and subject, therefore, to the limitations, imposed by the authorities, in respect of the deduction of overheads, or a proportion of overheads, upon the taking of an account.

61. Likewise, none of these categories constitute overheads of a type where, within those limitations, overheads, or a proportion of overheads, can be deducted.

62. As already explained, it is not the case that, in the absence of Bossland's relevant United Kingdom business activities, that business would have been replaced by other business, such that the costs sought to be deducted, in these categories, would have been incurred in respect of that business. Nor is it the case that the existence of Bossland's actionable United Kingdom business has increased, at all, the costs that Bossland has incurred, in these cost categories, in respect of its overall worldwide business.

63. In regard to two of these categories, legal costs and managing director costs, I am not persuaded that, even if deductible costs could have been approached in the manner suggested by Mr Moody-Stuart, it would have been appropriate to make any deduction.

64. Dealing first with managing director costs, the evidence, emanating from Mr Kirk, who, like Mr Letschew, I regarded as an wholly reliable and honest witness, was that, over the years relevant to this case, they had taken their income from Bossland, by

way of an admixture of pay and dividends. In 2009, 2010 and 2011, no payments are shown as being made to Mr Kirk and Mr Letschew, in their capacity as managing directors and, in those years, Mr Kirk told me that income had been taken out of Bossland by way of dividends. Mr Kirk and Mr Letschew are the 100% owners of Bossland. In later years, some pay, starting at €35,700, had been taken, but, as Mr Kirk told me, that pay was, or was likely to have been, supplemented by dividends. The balance between pay and dividends was dictated, not by anything to do with the business, but by a consideration of tax rates on dividends, as against tax rates on directors', or executive pay, and a determination of the most tax efficient way that Mr Kirk and Mr Letschew could take their income.

65. In those circumstances, I agree with Mr Hicks that the level of emoluments taken by Mr Kirk and Mr Letschew from Bossland cannot be sufficiently connected with Bossland's actionable activities such as to justify a proportion of those emoluments as being directly attributable to that business.
66. The position as to legal fees is, in my view, the same.
67. Initially and somewhat unusually, Bossland contended that a proportion of the legal fees that Bossland had incurred, in respect both of these proceedings and certain proceedings in Germany (Bossland is a German company), was directly attributable to Bossland's actionable activities. At trial, that contention was abandoned in respect of these proceedings, but maintained, in respect of the German proceedings; the argument being, as I understand it, that, without the costs which had been incurred in Germany, Bossland's overall business could not have been sustained, that, in consequence, the United Kingdom limb of the business could not have been sustained and, therefore, that a proportion of those costs should be treated as attributable to Bossland's activities in the United Kingdom.

68. I am not satisfied that the evidence of Mr Kirk, which forms the basis of this argument and which relates, as I read it, to an attempt in Germany to procure the destruction of one of Bossland's bots, Honorbuddy, is sufficient to sustain the argument that the costs incurred in the German proceedings were so fundamental to the continued survival, or existence, of Bossland's overall business and, hence, Bossland's United Kingdom operation as to render a proportion of those costs directly attributable to that business. Absent that argument, there cannot be a sufficient connection between costs incurred in German proceedings and Bossland's United Kingdom activities, such as to treat any part of those costs as directly attributable to Bossland's United Kingdom operation.
69. The final specific category for consideration is the category of affiliate costs. Affiliates, as explained to me by Mr Kirk, are people who, via the internet, run marketing operations and, as Mr Kirk put it, provide a route to market for companies like Bossland. They run Facebook campaigns and advertising campaigns on Google and the like and, by so doing, 'direct traffic' to Bossland. Sales made via their activities are credited to them and they are paid commission on those sales.
70. It is apparent from the foregoing, given that affiliates are paid commission on sales achieved, that, across Bossland's overall business, affiliate costs are costs of the type that increase incrementally with additional sales and are, therefore, in principle, the kind of direct costs which, on any view, are susceptible of deduction in an account of profits. In principle, again, if and to the extent that affiliate costs have been incurred in respect of United Kingdom sales of Bossland's software, during the period encompassed by this account, then those affiliate costs are deductible from the sums for which Bossland, Mr Kirk and Mr Letschew are accountable.

71. As regards the evidence, Mr Letschew was able to tell me that the figures that he had produced for affiliate costs were figures that only related to those of Bossland's software products (cheats and bots) which were relevant to this account and did not include affiliate fees pertaining to other extraneous Bossland products. He was also able to satisfy me that his figures for affiliate costs, as shown in the Overview document that he had prepared in respect of this account, were substantially accurate.
72. What he had not done, but what he told me that he could have done, had, in his view, it been a proportionate exercise, was to winnow out the particular affiliate costs which had driven United Kingdom sales. Instead, I was invited to make a deduction in respect of affiliate fees on the footing, or assumption, that, taken overall, it was a fair inference that the proportion of affiliate costs, which, over the period of time relevant to this case, had been incurred, as direct costs, in respect of United Kingdom sales, was broadly proportionate to the proportion of United Kingdom to global sales of the relevant software in that period and, therefore, that circa 3.6% of the relevant global affiliate costs should be deducted. Mr Hicks opposing argument was that, the burden of proof being, as it is, on the Defendants, it was up to the Defendants to identify actual affiliate costs pertaining to United Kingdom sales in the relevant period and that that they had not done.
73. In this instance, I prefer the Defendants' argument. It seems to me that it is inevitable that some of the affiliate costs will have been directed towards the United Kingdom market and will have driven United Kingdom sales, on a direct basis. It further seems to me that, taken across the relevant period, the likelihood is that the proportion of affiliate driven sales relevant to the United Kingdom will, in broad terms, bear the same proportion as United Kingdom sales do to overall sales. Accordingly and bearing in mind that, as made clear in **Dart**, an account of profits can never be a

precise mathematical exercise and that this will be particularly the case where proportionate deductions fall to be made, I consider that it is appropriate, in this case, to allow a deduction from the monies for which the Defendants are otherwise accountable of 3.6% of Bossland's overall affiliate costs, pertaining to the relevant software, in the period covered by the account.

74. There remain to consider two matters; tax and interest.

75. As to tax, it is common ground between the parties that the amount for which the Defendants are accountable is an amount net of the tax paid, or payable, upon the profits in question. The problem, in this case, however, is evidential. It emerged in evidence that, save in respect of the years 2010 and 2011, there is no evidence of the tax actually paid, or payable, and that the tax figures, arising from the Overview document, had simply applied the relevant German rates of tax to the global profits from the sale of the relevant software in the period covered by the account, as shown in the Overview document. Materially, when compared with the tax known to be paid, in 2010 and 2011 in respect of the entirety of Bossland's business, including, therefore, activities unrelated to this account, the figures in the Overview document were very markedly higher and the obvious conclusion from that is that the Overview figure is not an accurate document for purposes of determining the appropriate amount of tax to be deducted from the otherwise accountable profits.

76. On the second morning of the hearing, the Defendants sought to address this, by putting in additional material from their German accountants. I refused to allow the late admission of this material. It came far too late. It reflected, as it seemed to me, a non-compliance with directions given as to disclosure. It gave no opportunity for Mr Hicks to give the material proper consideration and it would have amounted to the grant of a relief from sanction, where no good reason had existed for the material

default and where, in all the circumstances, the grant of relief would have been inappropriate.

77. The question remains, however, as to how to deal with tax. Mr Hicks, very understandably, says that this is a problem, as it is, of the Defendants' own making and that, at most, an allowance should be made in respect of an appropriate proportion of the tax known to have been paid in 2010 and 2011. I am not persuaded that that would be fair.

78. It is evident that Bossland is a tax payer in respect of its business and that the profits that it has made from the activities for which it is accountable, in years other than 2010 and 2011, have, or will be, taxed. In that circumstance, to simply allow a deduction of some part of the global tax paid in 2010 and 2011 will, as I see it, have the effect of making an under-allowance for tax. It is equally evident, as already stated, that the notional tax figures in the Overview document are just that.

79. Mr Moody-Stuart submitted that a fair solution, while, as he conceded, only an approximate one, would be to make an allowance based upon the fact that the actual tax paid in each of 2010 and 2011 for the entirety of Bossland's business was approximately one third of the notional tax, shown in the Overview document, as relating to the activities for which Bossland is accountable, in each of those years; the assumption being that the same proportion, as between tax paid and notional tax, could be applied across the other years of the account.

80. On that assumption, I should, or could, make some, he says small, deduction from the known figures for tax paid in the two years where those figures are available, to reflect that some part of that tax will, or may, have related to non-Blizzard related business, determine what proportion those reduced figures bear to the figures in the Overview, for those years and then apply the 3.6 percentage, which reflects United

Kingdom sales of the relevant software, to that proportion of the Overview figure, for each year of the account, in order to reflect the tax paid by Bossland in respect of the profit on those sales.

81. With some hesitation, I have decided that that approach is correct and that the fact that in each of 2010 and 2011 there is to be found the same broad relationship between actual tax and Overview figure entitles me, properly, to infer, or assume, that that relationship, or something close to it, obtained in respect of the other years relevant to the account.
82. I am fortified in that approach by the fact that, as I see it, without some allowance, to reflect tax which has been paid, over and above the tax paid in 2010 and 2011, in respect of Blizzard-related activities, the figure, for which the Defendants will be accountable, arising from this account, will knowingly over-estimate the profit, net of tax, derived by Bossland from the activities for which it is accountable. That would be to penalise Bossland and that is not the function of this account.
83. On the other side of the balance, an over-generous allowance for tax will, also, offend, in principle, by providing a possible element of unjust enrichment.
84. To obviate the latter possibility, the solution, as I see it, is to make a significant deduction from the tax paid in 2010 and 2011, to reflect tax on non-Blizzard related activities. Such a deduction, given that, according to Mr Kirk's evidence, the bulk of Bossland's 2010 and 2011 profit arose from Blizzard related activities, will serve to ensure that Blizzard does not bring into account, against accountable profits, tax paid on other activities.
85. Following that deduction, which I will place at one-third, the parties can determine the proportion that the tax paid bears to the postulated Overview tax figure, in those two years, and, then, apply to that proportion of the overall tax Overview figure, in

respect of the period of the account, the percentage (3.7%) that reflects the proportion that United Kingdom sales of the relevant software bears to overall sales of that software, across the accounting years.

86. I am satisfied that a tax deduction calculated as above will not unjustly enrich Bossland and, while, as with proportionate deductions made in respect of overheads, where such deductions are allowable, the figure to be deducted will be an approximation, I am, further, satisfied that it will give rise to a figure which, on the limited materials available, is likely to broadly reflect the tax that Bossland will have paid on its accountable profits and which will not knowingly penalise Bossland by failing to adequately reflect that tax.

87. I turn, finally, to the question of interest.

88. Mr Hicks rightly conceded that his client, being a major commercial concern, did not fall into the category of small businesses, or small borrowers, contemplated by Warren J, in **Reinhard v Ondra [2015] EWHC 2943 (Ch)**. In consequence and given that, as recently re-stated by Hamblen LJ, in **Carrasco v Johnson [2018] EWCA Civ 87**, the function of an award of interest, in the context of commercial claimants, is to compensate them for the cost of the additional borrowing that they may have been required to undertake to make good the monies that they have been held out of, he further accepted that, in assessing the rate of interest payable upon the accountable profits, my assessment was not contingent, or dependent, upon the borrowing rates available to small borrowers. Likewise, Mr Hicks did not seek interest other than on a simple basis; no question of compounding arose. His suggestion, given that base rate in the period covered by this claim varied as between 0.25% and 0.75% and that, in the bulk of the period, it stood at 0.5%, was that a

mesne base rate of 0.4% should apply across the relevant period. Mr Moody-Stuart did not challenge that approach.

89. In regard to rate, Mr Moody-Stuart, while acknowledging that the long established practice, in commercial cases, of fixing interest, payable to large commercial concerns, at 1% above base, did not fetter my discretion, submitted that there was no good reason, in this case, why that practice should not apply.

90. I agree. I consider that in a case of this nature, where it is, in fact, inherently unlikely that the monies involved have impacted at all upon Blizzard's borrowing requirement, it would be wrong to award interest above the well understood commercial norm.

91. In the result, therefore, I will award Blizzard interest at 1.4% across the whole period covered by the account. That interest will, of course, be payable on each year of the accountable profits as they accrued. Where, as with affiliate costs and tax, there is to be a single deduction against the entirety of Bossland's relevant United Kingdom sales in the relevant period, that deduction should be apportioned equally across each year of the account.