



Easter Term
[2022] UKSC 14

On appeal from: [2020] EWCA Civ 617

JUDGMENT

**Competition and Markets Authority (Respondent) v
Flynn Pharma Ltd and another (Appellants)
Competition and Markets Authority (Respondent) v
Pfizer Inc and another (Appellants)**

before

**Lord Hodge, Deputy President
Lord Sales
Lord Leggatt
Lord Stephens
Lady Rose**

**JUDGMENT GIVEN ON
25 May 2022**

Heard on 22 and 23 February 2022

Appellants (Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd)

Daniel Jowell QC

Tom Pascoe

(Instructed by Macfarlanes LLP)

Appellants (Pfizer Inc and Pfizer Ltd)

Mark Brealey QC

Tim Johnston

(Instructed by Clifford Chance LLP (London))

Respondent (Competition and Markets Authority)

Sir James Eadie QC

Rob Williams QC

David Bailey

Rupert Paines

(Instructed by Competition and Markets Authority)

*1st Interveners (Association of the British Pharmaceutical Industry (ABPI) and British Generic
Manufacturers Association (BGMA))*

(written submissions only)

Daniel Piccinin

(Instructed by Bristows LLP (London))

2nd Intervener (Office of Communications (Ofcom))

(written submissions only)

Josh Holmes QC

Jessica Boyd

(Instructed by OFCOM)

3rd Intervener (Solicitors Regulation Authority Ltd (SRA))

(written submissions only)

Andrew Tabachnik QC

Ruth Keating

(Instructed by Solicitors Regulation Authority Ltd)

4th Intervener (Oakridge Farms Ltd)

(written submissions only)

Charles Streeten

(Instructed by Woodfines LLP (Milton Keynes))

LADY ROSE: (with whom Lord Hodge, Lord Sales, Lord Leggatt and Lord Stephens agree)

1. INTRODUCTION

1. The appellants in these proceedings were successful in an appeal which they brought before the Competition Appeal Tribunal (“the CAT”) under section 46 of the Competition Act 1998. In that appeal they challenged a decision adopted by the Respondent (“the CMA”) fining them for an infringement of competition law.

2. The CAT allowed the appellants’ appeal in part, set aside part of the CMA’s decision and remitted the decision to the CMA for reconsideration. On the appellants’ application for their costs of the appeal, the CAT made an order that the CMA pay the appellants a proportion of those costs. The Court of Appeal in the judgment now under appeal before this court set aside the CAT’s costs order and directed that there be no order as to costs. The Court of Appeal held that the CAT had erred in ordering the CMA to pay the appellants’ costs because it had disregarded a principle derived from a line of cases starting with *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485. That principle was, the Court of Appeal held, that where, as here, a tribunal’s power to make an order about costs does not include an express general rule or default position, the starting point is that no order for costs should be made against a public body that has been unsuccessful in bringing or defending proceedings in the exercise of its statutory functions.

3. The appellants now appeal to this court arguing that the Court of Appeal was wrong to hold that the CAT’s discretion as to what costs order to make was constrained by any such principle. They argue that there is no such principle and that what is established by the case law is only that an important factor for a court or tribunal to take into account when considering costs is whether there is a risk that making adverse costs orders will have a “chilling effect” on the conduct of the public body concerned. By a risk of “chilling effect” they mean that the respondent public body might be so concerned about the risk of having to pay appellants’ costs in appeals against its decision that it is discouraged from making and standing by decisions which it takes reasonably in the performance of its statutory functions in the public interest. The appellants say further that the CAT is best placed to consider whether there is such a risk of “chilling effect” as regards the different public bodies that regularly appear as respondents before it, defending different kinds of regulatory or enforcement decisions. They argue that the CAT was right to conclude in its earlier case law, applied to their application for the costs of this appeal, that there is no reason to adopt a “no order as to costs” starting point in appeals like this one and

every reason in general to award costs to a successful appellant in the absence of any particular circumstances pointing to a different result.

4. The CMA resists the appeal and supports the reasoning of the Court of Appeal.

2. BACKGROUND

(a) The CMA's infringement decision

5. The CMA's decision giving rise to these proceedings was published on 7 December 2016 entitled *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK*. Following a three year investigation, the CMA found that the appellants ("Flynn" and "Pfizer") had abused their dominant position in the supply of the prescription epilepsy drug, phenytoin sodium, by charging excessive prices for the drug in capsule form. This was an infringement of section 18 of the Competition Act 1998 and of article 102 of the Treaty on the Functioning of the European Union. The CMA imposed a fine of £84.2m on Pfizer and £5.2m on Flynn. The decision included directions requiring Pfizer and Flynn to reduce their prices.

6. Both Flynn and Pfizer appealed against the infringement decision to the CAT. The hearing of the appeal lasted 13 days. The CAT (chaired by Peter Freeman CBE QC (Hon)) held that the CMA was right to find that the appellants held a dominant position in the relevant market but that the CMA had made errors in its assessment of whether the appellants had abused that dominant position. Part of the CMA's decision was set aside and the CAT remitted the issue of abuse to the CMA for reconsideration in accordance with the CAT's judgment: see the main substantive judgment of the CAT at [2018] CAT 11 and its ruling on remittal [2018] CAT 12.

7. The CMA appealed to the Court of Appeal against the substantive judgment of the CAT and there was a cross-appeal by Flynn. Both the appeal and the cross appeal were in large part dismissed by the Court of Appeal: [2020] EWCA Civ 339; [2020] Bus LR 803.

8. While the appeal from the CAT's substantive judgment was pending before the Court of Appeal, the CAT dealt with the issue of the costs of the proceedings before it. The CAT delivered its ruling on costs on 29 March 2019: [2019] CAT 9 ("the CAT's Costs Ruling"). The CAT had regard to what it described as "the relative successes and failures of the parties" and accepted that the appropriate overall approach would be to award the CMA its costs of defending Pfizer's and Flynn's claims in respect of market

definition and dominance and to award Pfizer and Flynn a percentage of their costs in respect of the part of the appeal relating to abuse. The CAT decided “on a broad-brush basis” that approximately one third of the assessed costs should be deemed to relate to market definition/dominance, and two thirds to abuse. The CAT therefore considered that the CMA should pay Pfizer 58% of its allowable costs and Flynn 55% of its allowable costs.

9. In calculating what those allowable costs were, the CAT deducted some of the costs claimed by the appellants from the base sum to which the percentages would be applied. Pfizer’s and Flynn’s costs were limited to those incurred after the CMA’s decision so did not include costs incurred during the investigation stage. Pfizer’s costs of its expert economist were reduced by 40% on the basis that they were too high. The CAT noted that further substantial discounts might be made when the costs went to be assessed, given the high level of Pfizer’s costs.

10. The CMA appealed to the Court of Appeal against the CAT’s Costs Ruling and that appeal was successful. In a judgment handed down on 12 May 2020, the Court of Appeal (Lewison, Floyd and Arnold LJ) allowed the appeal, set aside the CAT’s Costs Ruling and replaced it with no order for the costs of the proceedings before the CAT. That judgment (“the CA Judgment”) is at [2020] EWCA Civ 617 and is the judgment now before this court. Permission to appeal was granted by this court on 17 December 2020.

11. Permission was granted to a number of interveners to make written submissions to the court. The Association of the British Pharmaceutical Industry and the British Generic Manufacturers Association made a joint submission in support of the appellants. The Office of Communications (“Ofcom”) had been refused permission by the CAT to intervene in the costs applications ([2019] CAT 2) but was permitted to intervene in this appeal in support of the CMA. The Solicitors Regulation Authority Ltd (“SRA”) also intervened in support of the CMA. Those interveners need no introduction.

12. A company called Oakridge Farms Ltd (“Oakridge”) also intervened in support of the appellants. Oakridge is a farming enterprise which successfully appealed (under section 80 of the Environmental Protection Act 1990) against an abatement notice which alleged that the application of fertiliser to the land it farms was causing an odour nuisance. The magistrates’ court awarded Oakridge its costs of that appeal under section 64 of the Magistrates’ Courts Act 1980. The local authority appealed against the award of costs by way of case stated. That appeal is stayed, pending the decision of this court on this appeal.

(b) The CAT's jurisdiction and its power to award costs

13. The CAT in its current form was established by section 12 of and Schedule 2 to the Enterprise Act 2002 ("the Enterprise Act"). It replaced the earlier appellate body the Competition Commission Appeal Tribunals which formed part of the Competition Commission with appeal panels convened as and when necessary. That in turn had replaced the Restrictive Practices Court which was established under the Restrictive Practices Court Act 1976 as the appellate body under the very different competition regime set up under the Restrictive Trade Practices Act 1976 and the Fair Trading Act 1973.

14. The Restrictive Practices Court Rules 1976 (SI 1976/1897) conferred a power on that court to order the payment of costs only in limited circumstances. Rule 58 provided that the court could make an order for costs against a party which had "been guilty of unreasonable delay, or of improper, vexatious, prolix or unnecessary steps in any proceedings ... or of other unreasonable conduct (including, but without prejudice to the generality of the foregoing, a refusal to make any admission or agreement as to the conduct of the proceedings which he ought reasonably to have made)".

15. When the Competition Commission Appeal Tribunals came into being, their rules made in 2000 (SI 2000/261) conferred the broad discretion that has been carried forward ever since. Rule 26(2) of those 2000 Rules provided:

"(2) The tribunal may at its discretion, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay the tribunal may take account of the conduct of all parties in relation to the proceedings."

16. The Enterprise Act established the CAT as entirely independent of the enforcement bodies whose decisions it reviews. A number of different jurisdictions were conferred on the CAT when it was first established and these have been added to over the years. There are now four main elements in the CAT's case load.

17. First there are appeals from decisions taken by the competition enforcement authorities under the Competition Act 1998 ("the Competition Act"). The primary enforcement authority is now the CMA, which, broadly, took over these functions from

the Office of Fair Trading (“the OFT”). The OFT itself took over the functions of the Director General of Fair Trading (“the DGFT”). These appeals include challenges like Flynn’s and Pfizer’s appeals against decisions which find that the addressee undertakings have committed infringements under section 2 of the Competition Act (anti-competitive agreements) known as the Chapter 1 prohibition or under section 18 of that Act (abuse of dominant position) known as the Chapter 2 prohibition. An appeal against an infringement decision under the Competition Act may challenge both liability and the penalty imposed or only the penalty. The sectoral regulators have concurrent jurisdiction to enforce the Chapter 1 and 2 prohibitions in their sector: see section 54(1) of the Competition Act and the Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536).

18. Secondly there are appeals from decisions of the sectoral regulators, in particular Ofcom exercising functions under the Communications Act 2003 (“the Communications Act”). Most of the challenges to Ofcom decisions with which the CAT has been concerned arise from the exercise of Ofcom’s ex ante regulatory powers in the telecoms sector, that is to say its decisions about how telecoms providers should act in the future rather than investigating and punishing past conduct. One distinction that has been made in the cases is between Ofcom’s regulatory decisions and its dispute resolution decisions. Dispute resolution decisions are those taken under section 185 of the Communications Act. Section 185 provides, broadly, that a communications provider may refer a dispute it has with another communications provider to Ofcom, if the dispute concerns a matter specified in section 185. Such disputes can include disputes about the terms on which one provider gives access to its network to another provider, including how much it can charge to the provider seeking access. Regulatory decisions include the many different decisions that Ofcom makes under the Communications Act which implemented the EU Regulatory Framework for communications. This comprised five different EU directives requiring member states to confer powers and duties on a national regulatory authority (which is Ofcom in the UK) to set the terms and conditions on which the regulated companies supply services to customers and to each other. Section 192 of the Communications Act provides a route of appeal to the CAT from many of these decisions including both regulatory decisions and decisions resolving disputes under section 185.

19. Thirdly the CAT determines applications for the judicial review of decisions mostly made by the CMA in respect of merger and market investigations under the Enterprise Act. Under the merger control regime, there may be appeals by parties whose merger has been blocked but also by companies complaining that a merger has been cleared when, they assert, it should have been blocked. A market investigation can be carried out by the CMA, again broadly, where there are features of a market for goods or services in the UK which may be generating an adverse effect on competition. If the CMA finds that the market is not operating competitively it can impose remedies

to mitigate those effects. Those remedies may take the form of orders requiring undertakings to cease specified conduct. The CAT can hear appeals from the imposition of such remedies. The CMA took over these functions which were previously performed by the OFT, the Competition Commission and the Secretary of State in 2014.

20. Finally, the CAT has a rapidly burgeoning first instance jurisdiction to hear claims for damages brought by a private party against another private party seeking compensation for losses arising from the defendant's infringement of the competition rules. These include collective proceedings brought under sections 49A and 49B of the Competition Act claiming damages for competition law infringements.

21. The CAT has many other jurisdictions from regulators including other decisions of Ofcom in its role as the regulator of broadcasting, of the use of the radio spectrum and of postal services, some decisions of the Gas and Electricity Markets Authority, the Civil Aviation Authority and the Payment Systems Regulator. Its jurisdiction covers the whole of the United Kingdom.

22. The statutory power to make rules governing the CAT's proceedings is conferred by section 15 of the Enterprise Act which reads (as amended):

“15(1) The Secretary of State may, after consulting the President [of the CAT] and such other persons as he considers appropriate, make rules (in this Part referred to as ‘Tribunal rules’) with respect to proceedings before the Tribunal including proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act.

(2) Tribunal rules may make provision with respect to matters incidental to or consequential upon appeals provided for by or under any Act to the Court of Appeal or the Court of Session in relation to a decision of the Tribunal.

...

(4) The power to make Tribunal rules is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

...”

23. Schedule 4 to the Enterprise Act makes further specific provision about Tribunal rules including, by paragraph 10, that Tribunal rules may make different provision for different kinds of proceedings.

24. The CAT’s original rules (the Competition Appeal Tribunal Rules 2003 (SI 2003/1372)) provided for costs and expenses as follows:

“55(1) For the purposes of these rules ‘costs’ means costs and expenses recoverable before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.

(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

(3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.

(4) Unless the Tribunal otherwise directs, an order made pursuant to paragraphs (1) and (2) may be made in the decision, if the parties so consent, or immediately following delivery of the decision.

(5) The power to award costs pursuant to paragraphs (1) to (3) includes the power to direct any party to pay to the Tribunal such sum as may be appropriate in reimbursement of any costs incurred by the Tribunal in connection with the summoning or citation of witnesses or the instruction of experts on the Tribunal's behalf. Any sum due as a result of such a direction may be recovered by the Tribunal as a civil debt due to the Tribunal."

25. That was the rule which applied in the period during which the CAT's case law about costs orders developed, as I describe below.

26. In 2014 there was a review chaired by Sir John Mummery of the CAT's Rules prompted by the Government's consultation on *Streamlining Regulatory and Competition Appeals* published in June 2013. The Expert Working Group formed by Sir John (of which I was a member) focused particularly on developments in the CAT's jurisdiction in areas other than the ones with which this appeal is concerned, in particular the growth of the CAT's case load in damages claims and the need to review the operation of the rules governing collective proceedings. Sir John's report led to the promulgation of the Competition Appeal Tribunal Rules 2015 (SI 2015/1648) ("the 2015 Rules").

27. Rule 4 of the 2015 Rules sets out the governing principles for the CAT's procedure. They give a flavour of how the CAT runs its proceedings, with an emphasis on written cases and active management soon after the commencement of the proceedings and throughout. The CAT aims to identify the main issues early on, limiting the scope and length of oral proceedings and encouraging the parties to cooperate with each other and with the CAT:

"4(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

- (c) dealing with the case in ways which are proportionate -
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly;
 - (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
 - (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.
- (3) Each party's case shall be fully set out in writing as early as possible.
- (4) The Tribunal shall actively manage cases.
- (5) Active case management includes -
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
 - (b) identification of and concentration on the main issues as early as possible;

- (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;
 - (d) adopting fact-finding procedures that are most effective and appropriate for the case;
 - (e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
 - (f) ensuring that the main hearing is conducted within defined time-limits.
- (6) The Tribunal may -
- (a) encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate;
 - (b) dispense with the need for the parties to attend any hearing; and
 - (c) use technology actively to manage cases.
- (7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule.”

28. As to costs, rule 104 is the rule currently in force and provides:

“104(1) For the purposes of these rules ‘costs’ means costs and expenses recoverable before the Senior Courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland, as appropriate, and include payments in respect of the representation of a party to

proceedings under section 47A (claims for damages) or 47B (collective proceedings) of the 1998 Act, where the representation by a legal representative was provided free of charge.

(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.

(3) For the purposes of paragraph (2), applications made under rule 62 or 63 are considered to be proceedings of the Tribunal.

(4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of -

- (a) the conduct of all parties in relation to the proceedings;
- (b) any schedule of incurred or estimated costs filed by the parties;
- (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
- (d) any admissible offer to settle made by a party which is drawn to the tribunal's attention, and which is not a rule 45 offer to which costs consequences under rules 48 and 49 apply;
- (e) whether costs were proportionately and reasonably incurred; and
- (f) whether costs are proportionate and reasonable in amount."

29. One can see, therefore, that from the start of the CAT's jurisdiction, the costs rule has been different both from the generally applicable rule under the Civil Procedure Rules ("CPR") governing costs in High Court litigation and from the rules applicable in many other tribunals.

30. In the High Court, CPR rule 44.2 also confers a discretion to decide whether costs are payable from one party to another and the amount of those costs. But CPR rule 44.2(2) then provides that if the court decides to make an order about costs "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party" though the court may make a different order.

31. CPR rule 44.2(4) lists the factors that a court will have regard to when deciding what, if any, order to make about costs. The first three factors listed in CPR rule 44.2(4) are effectively the same as rule 104(a)-(c) above but rule 104 is different because there is no "general rule" that costs follow the event. This has, the parties accepted, led to a slight drafting glitch by the inclusion in rule 104 of factor (c) which mirrors CPR rule 44.2(4)(b) without following on from the general rule that a *wholly* successful party should receive all its costs. But both sides recognised that factor (c) in rule 104 must be read as allowing the CAT to take account of complete success by one party, not just partial success.

32. As to other tribunals, the Employment Tribunal Rules of Procedure 2013 as amended, for example, provide that no order for costs should be made in the absence of any procedural or substantive unreasonableness. The First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008 provide that the tribunal may make an order for costs only where there have been wasted costs or where the tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. Some costs regimes expressly apply an asymmetric regime, for example the qualified one-way costs shifting costs provisions in CPR rule 44.14 for personal injury cases.

(c) The development of the CAT's case law on the exercise of its discretion

33. The first occasion on which the exercise of the broad discretion to award costs was considered was by the Competition Commission Appeal Tribunal ("CCAT"), chaired by its President, Sir Christopher Bellamy QC in *The Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2002] CAT 2 ("*GISC*"). The DGFT had taken a decision that the rules of the General Insurance Standards Council did not infringe the Chapter 1 prohibition of the Competition Act. This clearance was successfully challenged by the appellants. The CCAT set aside the DGFT's decision and

went on to hold that the GISC rules restricted competition and fell within the prohibition.

34. The CCAT made some general observations which, although made in the context of the CCAT's rule, rule 26(2), have often been cited as equally relevant to the CAT's original rule 55 and to the current rule 104. The CCAT in *GISC* started with the fact that rule 26(2) appeared on its face to give the CCAT an unfettered discretion as to costs, leaving it to the tribunal to develop the relevant principles in the light of circumstances and experience. The CCAT noted that this was different from costs regimes applicable in other courts and tribunals where costs could only be awarded against a party behaving unreasonably; these costs regimes "normally reflect a specific policy decision on the part of Parliament that the particular objectives of the legislation in question can best be met by restricting the circumstances in which costs may be awarded": para 41.

35. The CCAT held that the wide discretion conferred must be exercised judicially. The CCAT should avoid formulating rigid rules at this stage of its new jurisdiction and the principal aim was to deal with cases justly: para 48. To that end, the judgment in *GISC* set out some general propositions: para 52.

a. An obvious factor to take into consideration was financial prejudice, that is to say "the fact that a successful appellant has been put to expense in exercising his rights under the Act is a factor relevant to the exercise of our discretion, even though we accept that it is not necessarily a decisive factor".

b. There may be no outright winner of the case, in which case costs should lie where they fall if neither side has prevailed in a decisive way.

c. The award may be affected if a party has lost on particular issues or has incurred costs on matters that were irrelevant or if the party has acted unreasonably.

d. Different considerations are likely to apply to different kinds of cases: "Cases involving regulated industries where the costs of statutory regulation are recovered, in one way or another, from the industry itself may also raise separate issues."

36. The CCAT said further at para 53 that any analogy there may be with the rule in civil litigation that the losing party should pay the winning party's costs, should be

displaced where the CCAT was satisfied that such a rule would frustrate the objects of the Competition Act. In that regard, the CCAT considered that a “costs follow the event” rule by which an unsuccessful appellant would have to pay the DGFT’s costs “could be seriously counter-productive from the point of view of achieving the objectives of the Act, particularly as regards smaller companies, representative bodies and consumers”: para 54.

37. The *GISC* judgment concerned an appeal by a third party challenging a clearance decision under the Competition Act. An early appeal by an addressee of an infringement decision under that Act was heard by the CAT in *The Racecourse Association v The Office of Fair Trading* [2006] CAT 1 (“*Racecourse*”). The appellant successfully challenged the decision of the OFT that the sale of certain media rights infringed the Chapter 1 prohibition. The CAT referred to the guidance in *GISC* noting that the CCAT in *GISC* had emphasised that it was not formulating any rigid rules and that each case must be dealt with on its own merits, with the CAT retaining flexibility to meet particular circumstances: para 7.

38. The CAT in *Racecourse* referred to the first factor listed in *GISC*, namely that a successful appellant has been put to expense. The CAT interpreted this as reflecting a starting point for the exercise of the discretion that a successful appellant ought, subject to all other relevant considerations, to be entitled to be compensated for the costs it has incurred in vindicating its rights. One can see from the CAT’s summary of the position that it was aware of the need to ensure that the exercise of discretion did not frustrate the objectives of the Competition Act:

“10. ... First, as in all cases, there is no immutable rule as to the appropriate costs order; and how the discretion will be exercised in any case will depend on its particular circumstances, one relevant consideration being whether any award of costs may be perceived as frustrating the objects of the Act. Second, subject to this, the starting point is that a successful appellant who can fairly be identified as a ‘winner’ is entitled to recover his costs. Third, such an appellant will not necessarily be entitled to recover all his costs, and may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal’s decision, or which involved unnecessary prolixity or duplication, and he may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part. Fourth, the OFT is not entitled to any special protection from vulnerability to costs orders in favour of

successful appellants save such protection as it may obtain by appropriate case management of the appeal directed at ensuring that the costs of the appeal are kept within proportionate bounds.”

39. Since that case, the CAT has in general applied a starting point that costs follow the event in appeals under the Competition Act. The CAT revisited the role of the OFT specifically in such appeals in *Eden Brown Ltd v Office of Fair Trading* [2011] CAT 29 (“*Eden Brown*”). In that case the CAT (chaired by the then President Roth J) was considering costs following its judgment determining three appeals brought by six appellants against a decision of the OFT. The OFT had imposed fines totalling £39m on six recruitment agencies for price-fixing and the collective boycott of another company. The appeals were limited to the penalty and resulted in a very substantial reduction of the fines imposed because of errors the CAT found in the way the OFT had calculated the fines.

40. The OFT contended that as a matter of principle, there should be no order as to costs in penalty appeals in the absence of particular circumstances. It argued that it was important that there was no undue burden on the OFT and the wider public purse by reason of the OFT taking penalty decisions conscientiously and in good faith. The CAT was not persuaded by these arguments and held that the starting point should be that the successful party should recover its costs:

“10. Furthermore, we do not consider that having this principle as the starting point should deter the OFT from imposing appropriate penalties. The OFT does not contend that its potential liability for the costs of a successful appeal deters it from taking decisions finding infringements of the 1998 Act and articles 101 and 102 TFEU. ... we consider that the OFT should be able to fulfil its role as the primary enforcer of competition law in the United Kingdom with equal vigour. However, if the potential liability to costs should deter the OFT from imposing excessive and disproportionate penalties, as were imposed in the present cases, that would be a benefit to result from this general principle.”

41. Often the CMA has been awarded its costs when it successfully defends an appeal under the Competition Act. Recently, for example, in *Generics (UK) Ltd v CMA* [2021] CAT 20 there were five appeals brought by addressees of the decision of the CMA concerning findings of infringements of competition law arising from agreements

concerning the pharmaceutical drug, paroxetine. All the appeals against infringement were dismissed but all the appeals against penalty were allowed with smaller fines substituted. The CMA applied for an order for costs of nearly £3m. The CAT awarded the CMA 68% of its costs with one appellant paying a further 7.5%.

42. In the light of these cases, it was common ground in the appeal before this court that the CAT has generally adopted a starting point of costs follow the event in appeals brought under the Competition Act. That has not been the case, however, in other kinds of appeals. In some kinds of appeals the CAT has adopted a starting point of no order as to costs, for example in dispute resolution decisions taken by Ofcom. Further, the CAT usually makes no order as to costs either in favour of or against an intervening party in an appeal. In *Ryanair Holdings plc v Competition Commission* [2012] CAT 29, para 7 the CAT explained this practice as reflecting a concern “to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties”.

43. The rulings of the CAT on costs across the range of different kinds of proceedings have, since the early cases, stressed two factors in particular: first, that the broadly worded discretion may need to be exercised in different ways in different kinds of cases and secondly that it is important to strike a balance between on the one hand, avoiding the development of “rigid rules” about costs and on the other, the need to provide consistency and predictability in costs decisions.

44. This approach has been approved by the Court of Appeal in *Quarmby Construction Co Ltd v Office of Fair Trading* [2012] EWCA Civ 1552. Quarmby had been unsuccessful in its appeal against liability for infringement of the Chapter 1 prohibition but had succeeded in having the penalty imposed by the OFT reduced by more than 75%. The CAT had decided that neither side was the overall winner and there should be no order as to costs. Lloyd LJ (with whom Jackson and Laws LJ agreed) noted that it was plain that rule 104 gave the CAT a wide and general discretion. He rejected the submission that the CAT should adopt the general rule in the CPR that costs follow the event:

“23. It seems to me that the approach taken by the tribunal in general, both in the earlier cases that we have been shown and in some more recent cases we have been shown, is prudent and sensible and allows proper regard to be had to the considerable variety of the types of dispute that come before the tribunal, almost all of them by way of appeal from one regulator or another.

24. That said, the tribunal did in this case, and often does, consider whether there was a winner in the proceedings before it ...”

45. Laws LJ agreed that in deciding to make no order as to costs, the CAT had “not remotely exceeded the generous ambit of discretion which it enjoyed.”

46. The need for consistency was referred to, as I have said, in the early decision of *GISC* and has been repeated often. For example, in *Federation of Independent Practitioner Organisations v CMA* [2015] CAT 10, the CAT dismissed a challenge to the CMA’s report following a market investigation into private healthcare. The CAT said that the starting point in these circumstances was an expectation that the losing party should pay the costs of the successful party. There was no general rule to this effect as there was in the CPR rule 44, but there were strong reasons relating to fairness as between the parties and to the need to promote a properly disciplined approach to complex litigation why the wide discretion as to costs should be exercised in this way, absent good reason being made out to justify a departure from that approach on the facts of an individual case: para 3. The CAT explained the importance of starting points:

“4. The importance of the Tribunal adopting a known and reasonably uniform starting point to this effect in relation to costs is reinforced by the need to keep the risk of discordant decisions within reasonable bounds: [*Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19 at para 17]. It is also reinforced by the need for parties before the Tribunal to understand the position with reasonable clarity when they litigate. This enables them to make informed choices and to adjust their behaviour in the knowledge of what the Tribunal is likely to do when it comes to deciding issues of costs. It also helps to minimise the cost and expense which might otherwise arise if the costs discretion were regarded as unstructured and wholly at large, so that parties felt that it was advantageous or necessary for them to present and respond to wide-ranging and unstructured arguments about costs.”

47. The CAT held that FIPO had brought the unsuccessful challenge to promote the commercial interests of its members and it took the risk of success or failure with its eyes open as to the CAT’s approach to costs. There was no injustice in making it pay the CMA’s costs of defending the proceedings.

(d) The main cases relied on by the CMA

48. It is in the context of that evolution of the CAT's case law on how to apply rule 104 that the relevance of the line of cases relied on by the CMA in the present appeal must be assessed. There are four cases principally relied on in submissions which were successful in the Court of Appeal. I shall refer to them as the *Booth* line of cases.

(i) Booth and the licensing cases following Booth

49. The first is *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485, a judgment of Lord Bingham of Cornhill CJ and Silber J ("*Booth*"). The issue in that case was whether justices in the magistrates' court had erred in the exercise of their discretion by awarding costs against a local authority on Mr Booth's successful complaint against a vehicle licensing decision taken by the local authority. The justices had decided that Mr Booth had not breached the conditions of his licence and that the local authority had been wrong to refuse to renew it. It was accepted, however, that the local authority had not acted unreasonably or in bad faith in making the decision challenged by Mr Booth. Mr Booth applied for his costs against the local authority under section 64 of the Magistrates' Court Act 1980. That section conferred on the magistrates' court a broad power in its discretion to make such order as to costs as it thinks just and reasonable.

50. The local authority appealed against the order submitting that the correct principle was that a local authority "ought never to be ordered to pay costs in a situation of this kind unless it has acted unreasonably, improperly or dishonestly". Counsel for the local authority drew the court's attention to the wide range of licensing functions which the local authority is required by statute to carry out. He submitted that it would be gravely detrimental to the protection of the public if local authorities were to be deterred from making whatever decisions they thought right by the fear that they would have to pay the costs of a successful challenge. Counsel argued that Mr Booth's costs should be regarded by him as an ordinary business expense.

51. Lord Bingham referred to two earlier authorities concerned with decisions on the licensing of public houses, *R v Merthyr Tydfil Crown Court, Ex p Chief Constable Dyfed Powys Police* (9 November 1998); [2001] LLR 133 and *R v Totnes Licensing Justices, Ex p Chief Constable of Devon and Cornwall* (1990) 156 JP 587. In both those cases the High Court had overturned decisions awarding costs against the justices to the successful licensee.

52. Lord Bingham held that the submissions of counsel for the local authority went “too far the other way since to give effect to the principle for which he contends would deprive the justices of any discretion to view the case in the round which is in my judgment what section 64 intends.” Having therefore rejected the submission that there was any rule of the kind proposed by the local authority, Lord Bingham summarised the proper approach in three propositions which have been cited many times since (“the *Booth* propositions”):

“(1) Section 64(1) confers a discretion upon a magistrates’ court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.

(2) What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.

(3) Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.”

53. We were referred to a number of licensing costs decisions in which *Booth* has been applied, though not always with the result that the local authority escaped liability for costs. In *R (Cambridge City Council) v Alex Nestling Ltd* [2006] EWHC 1374 (Admin), the respondent had succeeded in part in an appeal in respect of permitted licensing hours. The magistrates had awarded him half his costs in exercise of their discretion under section 64 of the Magistrates’ Courts Act 1980. The Administrative

Court (Richards LJ and Toulson J) set aside the order on the local authority's appeal. Toulson J set out the *Booth* propositions and went on:

“Although as a matter of strict law the power of the court in such circumstances to award costs is not confined to cases where the Local Authority acted unreasonably and in bad faith, the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor.”

54. By contrast in *The Mayor and Burgesses of the London Borough of Tower Hamlets v Thames Magistrates' Court* [2012] EWHC 961 (Admin), Burnett J, having set out the *Booth* propositions, noted that the District Judge had directed herself by reference to them and had recognised that the default position in a licensing appeal was no order as to costs. However, he upheld the judge's finding that the local authority had acted unreasonably and that an adverse costs order was appropriate. He then awarded the costs of the appeal to the respondent and summarily assessed them.

(ii) *Booth applied in professional disciplinary appeals*

55. The second case on which the CMA relies is *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; [2008] 1 WLR 426 (“*Baxendale-Walker*”). The Law Society had brought disciplinary proceedings against the then solicitor, Mr Baxendale-Walker, before the Solicitors Disciplinary Tribunal (“the SDT”) on two counts of conduct unbecoming a solicitor. One of the counts was admitted. The tribunal dismissed the case on the contested count but suspended Mr Baxendale-Walker from practice for three years on the admitted count. Section 47(2) of the Solicitors Act 1974 conferred on the tribunal a power to make such order as it may think fit including the payment of costs in such amount as the tribunal may consider reasonable. The tribunal ordered the Law Society to pay 30% of Mr Baxendale-Walker's costs in defending the unproven allegation. On appeal to the Divisional Court (Moses LJ and Stanley Burnton J ([2006] EWHC 643 (Admin); [2006] 3 All ER 675)), the order was reversed requiring Mr Baxendale-Walker to pay 60% of the Law Society's costs. Moses LJ held that the principles to be applied in a case where a disciplinary body or regulator brings proceedings in the public interest in the exercise of its public function “differed from those which applied in ordinary civil litigation”. Moses LJ continued (para 43):

“Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that

the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.”

56. On appeal to the Court of Appeal (Sir Igor Judge P, Laws and Scott Baker LJJ), Sir Igor contrasted what Moses LJ had said there with a statement by Waller LJ in *Law Society v Adcock* [2006] EWHC 3212 (Admin); [2007] 1 WLR 1096. The judgment in *Adcock* had been handed down after the Divisional Court’s decision in *Baxendale-Walker* but before the hearing of the appeal. Waller LJ had said at para 39 of *Adcock* that Moses LJ in *Baxendale-Walker* had put the matter too high in favour of the regulator. Waller LJ did not agree that Moses LJ’s statement was supported by the *Booth* propositions. Rather, he thought, Lord Bingham did not suggest that there should be a presumption one way or another; “he simply makes clear that there are particular circumstances to bear in mind when a public body or a regulator is concerned.”

57. Sir Igor addressed what he described as this “apparent difference of approach” between Moses LJ in *Baxendale-Walker* in the Divisional Court and Waller LJ in the *Adcock* case. He started with the fact that section 47(2) undoubtedly vested the tribunal with a very wide costs discretion and that a costs order adverse to the Law Society was neither prohibited nor expressly discouraged by that section. That said, the ambit of the Law Society’s responsibility when deciding whether to bring a formal complaint to the tribunal was far greater than it would be for a litigant deciding whether to bring civil proceedings: para 34. The Law Society had an independent obligation of its own to ensure that the disciplinary tribunal was able to fulfil its statutory responsibilities of ensuring high standards in the profession. Sir Igor referred to the earlier case of *R (Gorlov) v Institute of Chartered Accountants in England and Wales* [2001] EWHC Admin 220 where the professional appeal panel’s decision to make no order as to costs was quashed and remitted to the panel, in part because the disciplinary proceedings brought by the professional body “were a shambles from start to finish”: per Jackson J at para 37 of *Gorlov*. Having reviewed the authorities, Sir Igor concluded at para 39 of *Baxendale-Walker*:

“Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov’s* case [2001] ACD 393, as a ‘shambles from start to finish’, when the Law Society is discharging its responsibilities as a regulator of the

profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. Accordingly, Moses LJ's approach to this issue did not go further than the principles described in this judgment."

58. He held therefore that the tribunal had misdirected itself when it ordered the Law Society to pay part of Mr Baxendale-Walker's costs. Such an order overlooked not only the public obligations of the Law Society but also the additional fact that the solicitor brought the proceedings on himself and had been guilty of misconduct which justified a three year suspension.

59. A different stance has been taken in Scotland where, in the past, the Scottish Solicitors Disciplinary Tribunal has adopted a practice of awarding expenses against the Council of the Law Society of Scotland, the Scottish counterpart to the SRA. This was discussed recently in *Ahmed-Sheikh v Scottish Solicitors' Discipline Tribunal* [2019] CSOH 104 in the Outer House, Court of Session. The power conferred on the tribunal to award expenses is expressed as a power to make such order as it thinks fit. The solicitor involved had been found guilty of professional misconduct but resisted any order that she pay the expenses. Lord Ericht noted that the conventional line on costs in English proceedings before the SDT was significantly different from that followed in the Scottish Tribunal and that a solicitor in Scotland "is in a more favourable position than his counterpart south of the border" in that no order for costs is usually made regardless of who succeeds in the proceedings. By contrast the Scottish Tribunal does make awards against the Law Society of Scotland: see para 50. He held that:

"52. ... The question of what particular conventional line a disciplinary tribunal will take on expenses is a matter of the discretion of the Tribunal. The Tribunal differs from a civil

court in that it is performing a regulatory function. The Tribunal differs from a civil court in that both the Tribunal and the Law Society in its role as prosecutor are funded by members of a profession. In view of these differences, it is not *Wednesbury* unreasonable for the Tribunal to follow a different conventional line on expenses than the Scottish civil courts, nor is it *Wednesbury* unreasonable for the Tribunal to follow the particular conventional line which it does.”

60. Aside from the different approach adopted in Scotland, I also note here the point made by the Association of the British Pharmaceutical Industry and the British Generic Manufacturers Association in their written intervention. The “no order as to costs” principle applied in proceedings before the first instance professional tribunal does not apply to any appeal from that decision. In *Walker v Royal College of Veterinary Surgeons* [2008] UKPC 20 the Privy Council had allowed Dr Walker’s appeal against the order of the Disciplinary Committee of the Royal College of Veterinary Surgeons ordering his removal from the register. The Board substituted an order suspending him for six months. Dr Walker applied for an order that the Royal College pay the costs of his appeal to the Board. The Royal College resisted the order citing *Booth*, *Gorlov* and *Baxendale-Walker*. The Board stated that that principle was not relevant to appellate proceedings; the principle applied only to costs before disciplinary tribunals or before a court upon a first appeal against an administrative decision by a body such as a police or regulatory authority. The Disciplinary Committee had made no order as to costs of the proceedings before it and no one had challenged that. The Royal College was ordered to pay Mr Walker his costs of the appeal to the Board.

(iii) *Booth applied in other contexts: Perinpanathan*

61. The third case on which the CMA relies is *R (Perinpanathan) v City of Westminster Magistrates’ Court* [2010] EWCA Civ 40; [2010] 1 WLR 1508 (“*Perinpanathan*”). In that case the claimant’s 15 year old daughter was stopped at Heathrow Airport by the police with a bag containing over £150,000 in cash. The police seized and retained the cash under the Proceeds of Crime Act 2002 on the basis that there were reasonable grounds to suspect that it was intended for use in terrorism. Subsequently the magistrates dismissed the Chief Constable’s application for forfeiture of the money, accepting evidence produced by the claimant that the cash was intended for a lawful purpose. They refused to make an order for costs in Ms Perinpanathan’s favour under section 64 of the Magistrates’ Courts Act and she sought judicial review of that decision.

62. The Divisional Court (Goldring LJ and Sweeney J ([2009] EWHC 762 (Admin); 173 JP 379)) dismissed the claim and that decision was upheld by the Court of Appeal (Lord Neuberger of Abbotsbury MR, Maurice Kay and Stanley Burnton LJ). In that appeal the claimant challenged the correctness of the *Booth* propositions as well as their application to the facts of the case. Stanley Burnton LJ noted at para 28 that the principle in *Booth* had been consistently applied in the Divisional Court in licensing cases and had been approved in *Baxendale-Walker*. He cited at length from the judgment of Sir Igor in that case as well as referring to judgments in different contexts including the CAT and proceedings for the disqualification of company directors. He expressed his conclusions on the authorities as follows (para 40):

“40. I derive the following propositions from the authorities to which I have referred.

(1) As a result of the decision of the Court of Appeal in [*Baxendale-Walker*], the principle in [*Booth*] is binding on this court. Quite apart from authority, however, for the reasons given by Lord Bingham CJ I would respectfully endorse its application in licensing proceedings in the magistrates’ court and the Crown Court.

(2) For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest: see *Baxendale-Walker v Law Society*.

(3) Whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions.

(4) The principle does not apply in proceedings to which the CPR apply.

(5) Where the principle applies, and the party opposing the order sought by the public authority has been successful, in relation to costs the starting point and default position is that no order should be made.

(6) A successful private party to proceedings to which the principle applies may none the less be awarded all or part of his costs if the conduct of the public authority in question justifies it.

(7) Other facts relevant to the exercise of the discretion conferred by the applicable procedural rules may also justify an order for costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so.

...

42. I would also comment that there may have been a tendency to focus more on Lord Bingham CJ's answer to the straightforward issue defined in para 1 of his judgment than to the more nuanced propositions set out under para 23. Ultimately, the duty of the magistrates' court is to make such order as to costs as is just and reasonable, subject to the constraint imposed by section 64."

63. Stanley Burnton LJ therefore decided that a similar approach to that adopted in *Booth* should be applied to the appeal before him. He approved what Goldring LJ had said in *Perinpanathan* in the Divisional Court at para 29 of his judgment that it was crucial that the police make and stand by honest, reasonable and apparently sound decisions in the public interest without fear of exposure to undue financial prejudice.

64. Lord Neuberger gave a concurring judgment. As Oakridge rightly point out in their written intervention, he also cited with approval the passage where Goldring LJ had emphasised the limits of what was said in *Booth*: it was not "setting out any sort of a test" (see para 45 of his judgment quoting para 32 of Goldring LJ's judgment). Lord Bingham was merely setting out a series of factors which the court should take into account in the application of section 64 of the 1980 Act. He noted at para 54 the contrast between the principle being applied there and the normal and very well established rule in civil litigation that costs follow the event "even when it results in a regulatory or similar body, which has acted reasonably, having to bear the costs of pursuing a reasonable but ultimately unsuccessful claim": para 53. There was no wording in section 64 similar to that about costs following the event in CPR rule 44; the section conferred "an ostensibly unfettered discretion". He continued:

“59. The fact that section 64 contains no fetter on the magistrates’ discretion as to whether, and if so to what extent, to award costs in favour of a successful party does not mean that a court of record cannot lay down guidance, or indeed rules, which should apply, at least in the absence of special circumstances. It is clearly desirable that there are general guidelines, but it is equally important that any such guidelines are not too rigid. There is a difficult, if not unfamiliar, balance to be struck, namely between flexibility, so a court can make the order which is most appropriate to the facts of the particular case and the circumstances and behaviour of the particular parties, and certainty, so that parties can know where they are likely to stand in advance, and inconsistency between different courts is kept to a minimum.”

65. Such guidance had been given, he said, by the *Booth* propositions and had been applied in the context of other decisions of magistrates where costs were governed by section 64 and where costs were governed by similarly worded provisions. Kay LJ agreed with both judgments.

(iv) *BT v Ofcom (Business Connectivity)*

66. The fourth case on which the CMA relies is the decision of the Court of Appeal in *British Telecommunications plc v Ofcom* [2018] EWCA Civ 2542; [2019] Bus LR 592 (“*BT v Ofcom (Business Connectivity)*”). That was an appeal under section 192 of the Communications Act in which BT had been successful in its challenge to Ofcom’s 2016 Business Connectivity Market Review. The CAT held that Ofcom had wrongly defined the relevant market and ordered Ofcom to pay 50% of the bulk of the costs incurred by BT.

67. To understand the Court of Appeal’s decision in *BT v Ofcom (Business Connectivity)* one must first consider the CAT’s decision in the earlier case of *British Sky Broadcasting Ltd v Ofcom (PayTV)* [2013] CAT 9 (“*PayTV*”).

68. *PayTV* was not an appeal arising in the telecoms sector but a challenge by four appellants to a decision taken by Ofcom in its capacity as the regulator of PayTV broadcasting. Ofcom had imposed on Sky certain obligations to make its programme content, particularly live sports coverage, available to other broadcasters on fair and reasonable terms. BT’s interest (in this case aligned with Ofcom) was as a provider of a

wholesale platform streaming programmes to televisions over the internet. In this it competed with Sky in the retail market to provide PayTV to consumers.

69. The CAT upheld some of the challenges to the Ofcom decision. On further appeal against the CAT's judgment by BT and Ofcom, the Court of Appeal allowed BT and Ofcom's appeal and remitted the matter to the CAT: [2014] EWCA Civ 133; [2014] Bus LR 713. However, the case settled before the CAT reconsidered the remitted matter, following Ofcom's withdrawal of the disputed conditions. The CAT therefore dealt with costs only following its initial *PayTV* judgment (which was then overturned in part on appeal) and there was no appeal against the CAT's costs ruling.

70. In that costs ruling in *PayTV*, the CAT addressed directly the issue of the "chilling effect" that the threat of costs orders might have on future decision-making by Ofcom: (para 25). The CAT concluded that the threat did not override other factors:

"... we do not believe that the possibility of an award of costs in a section 192 appeal poses so substantial a risk of deterring Ofcom from taking appropriate regulatory action as to justify a *general principle* that such an award should not normally be made. However, the nature and extent of the risk that an award in a particular case could create a chilling effect is a relevant factor when the Tribunal is considering whether to make an award against Ofcom and if so on what terms it should be made."

71. The CAT in *PayTV* referred to *Baxendale-Walker* and *Perinpanathan* but held that they did not provide close analogies with the instant case which was much closer to cases involving challenges to market investigation decisions taken by the OFT. The CAT's conclusion was that the starting point should be that costs follow the event, even where Ofcom was the loser in the appeal. However, the CAT went on to say in *PayTV* that "the position and duties of Ofcom as a regulator, together with the extent of any risk that an order for costs might have a chilling effect on Ofcom's activities in pursuit of its statutory duties, including its willingness to defend regulatory decisions made in pursuit of the public interest, are always likely to be included in the relevant factors when considering whether to make such an order and the amount thereof": para 52.

72. In *BT v Ofcom (Business Connectivity)* the Court of Appeal reviewed the reasoning of the CAT in *PayTV*. Sir Geoffrey Vos, Chancellor of the High Court delivering the judgment of the court, noted at the outset that neither side had

concentrated their submissions on the power of the CAT, as a UK tribunal, to regulate its own procedure and to adopt costs starting points that it regarded as appropriate in the context of its specific and specialist functions: para 6. Rather the arguments focused on whether, according to Ofcom, the *PayTV* decision had wrongly signalled a departure from the CAT's earlier practice of making no order as to costs where Ofcom lost an appeal or judicial review in the CAT. Ofcom submitted that a costs follow the event starting point was inconsistent with the regulatory framework and risked having a chilling effect on regulation: para 20. BT (its interests opposed to those of Ofcom in this appeal) argued that that earlier practice had only ever related to dispute resolution appeals where Ofcom was "performing a unique quasi-judicial role". Since the challenge to the Business Connectivity Review was purely a regulatory decision, BT submitted that the other cases relied on by Ofcom such as *Booth* and *Perinpanathan* were inapplicable.

73. The Court of Appeal in *BT v Ofcom (Business Connectivity)* considered *Booth*, *Perinpanathan* and *Baxendale-Walker*, as well as CAT rulings from a range of jurisdictions. These included *Tesco plc v Competition Commission* [2009] CAT 26; [2009] Comp AR 429 where Tesco had succeeded in its judicial review of a recommendation made in the Competition Commission's market investigation report into the supply of groceries in the UK. The CAT had used a "costs follow the event" starting point although they ordered the Commission to pay only a small fraction of the costs Tesco had claimed. The Court of Appeal also referred to *PayTV* and to several costs rulings in the telecoms sector in regulatory and dispute resolution appeals.

74. The first question addressed by the Court of Appeal in *BT v Ofcom (Business Connectivity)* was whether the CAT had taken inadequate account of *Perinpanathan* and that line of authority. The Court of Appeal emphasised that tribunals should be in charge of their own procedure fashioned in accordance with their own procedural rules, always provided that that procedure was not in conflict with any applicable legal principles: para 64.

75. The court considered that the principles enunciated in *Booth*, *Perinpanathan* and *Baxendale-Walker* were of significance and application outside directly analogous situations. The CAT had therefore fallen into error in *PayTV* and in *Tesco* in dismissing the relevance of the principles enunciated in those three cases: paras 70 and 71. The Court of Appeal held therefore that: para 72.

"... The question was whether there were specific circumstances of the costs regime in the particular kind of appeal before the CAT that made inapplicable the principles enunciated by the Court of Appeal as to the correct starting

point in an application for costs against a regulator acting reasonably and in good faith.”

76. The court did not regard fine distinctions between dispute resolution appeals and regulatory appeals or between appeals where the test was a judicial review test and appeals on the merits to be particularly helpful; what mattered was that the regulator was acting in that capacity in bringing or resisting proceedings. In an important passage the Court of Appeal said: (para 78)

“In general terms, in our judgment, the CAT costs authorities that wholly disregarded Court of Appeal authorities in similar regulatory situations were in error, and those which took the authorities into account and then decided whether the specific situation, in which the CAT was expert, demanded a different procedural approach, were entitled to act as they did.”

77. The Court of Appeal then said at para 83:

“In conclusion, then, on this issue, we need only reiterate the importance of the fact that the regulator is acting in that capacity in bringing or resisting proceedings. Thus, if Ofcom has acted purely in its regulatory capacity in prosecuting or resisting a claim before the CAT and its actions are reasonable and in the public interest, it is hard to see why one would start with a predisposition to award costs against it, even if it were unsuccessful.”

78. The court then turned to the consequences of its conclusion that the CAT had erred. Although the costs decision could not stand, it was open to the CAT to conclude that there were good reasons why the principles in the three cases to which it had referred were inapplicable in this kind of appeal: para 86

“The CAT will itself be best placed to consider in detail the arguments on the ‘chilling effect’ advanced by both sides before us. It will need also to be astute to ensure that it is adopting a consistent and sustainable approach, based not on fine distinctions between the routes by which cases reach the CAT, but on applicable legal principle, the specific

industry position best understood by the CAT itself, and its own procedural rules.”

79. The appropriate course was therefore to remit the case to the CAT “for reconsideration of the applicable starting point and its consequent decision”. According to the CAT’s website, BT subsequently withdrew its application for costs so there was no further decision by the CAT as to the appropriate starting point, having regard to the guidance provided by the Court of Appeal.

(e) The judgments below in Flynn’s and Pfizer’s appeal

(i) The CAT’s Costs Ruling

80. The costs sought by the parties in the Flynn and Pfizer appeals were £4.7m for Pfizer and over £3m for Flynn. The CMA’s costs were £1.8m.

81. In arriving at the costs order, the CAT referred to the earlier cases that had established “costs follow the event” as the starting point in appeals under the Competition Act, particularly *Racecourse* and *Eden Brown*. The CAT noted that the Court of Appeal’s judgment in *BT v Ofcom (Business Connectivity)* was handed down after the written submissions had been received on the issue of costs in *Flynn Pharma* and the CAT had invited further submissions from the parties on it.

82. Unsurprisingly, the appellants argued that the *BT v Ofcom (Business Connectivity)* judgment did not affect the starting point for costs under the Competition Act. The CMA argued that that judgment required the CAT to reconsider its approach to possible costs awards against a public authority defending a decision in the public interest: para 23.

83. The CAT addressed the effect of *BT v Ofcom (Business Connectivity)* posing the question whether the CMA was in a “similar regulatory situation” to Ofcom. It regarded the answer to that question as not totally clear but highlighted some points of guidance. The CAT observed that none of the cases on costs to which the Court of Appeal had referred were cases in which the OFT or CMA were enforcing competition law; *Tesco* had been a market investigation appeal not an infringement case:

“34. Some of the more general statements in [*BT v Ofcom (Business Connectivity)*] are, in literal terms, capable of

applying in the context of competition enforcement. An example would be the broad terms in which it refers to a public authority carrying out its functions in the public interest. However, those statements were not applied to competition enforcement and, had the Court of Appeal intended its decision to apply also to that specific field, we would perhaps have expected a much clearer conclusion to that effect following a more detailed consideration of the issues.”

84. The CAT noted in particular that the CAT’s ruling in *Eden Brown* had not been drawn to the attention of the Court of Appeal. In that ruling the CAT had looked carefully at the nature of the OFT’s role and activities having examined the judgment in *Perinpanathan* and the other *Booth* cases.

85. The CAT concluded that there were significant differences between the regime operated by Ofcom and that operated by the CMA. The CMA has a substantial measure of discretion as to how it carries out its statutory duty of promoting competition and was not obliged by law to take infringement decisions against particular undertakings. The CMA’s powers to impose very substantial fines were quasi-criminal in nature and the parties had to bear the costs of the investigation into their conduct, whatever its outcome: para 46.

“The appeal to the Tribunal is the parties’ first opportunity to put their case to an independent and impartial appeal body and for the CMA to defend its decision. It is an appeal ‘on the merits’. It is thus an essential part of the system by which competition authorities, in return for receiving extensive enforcement powers, are held to account by the courts. Such a competition appeal therefore appears to us to have significant differentiating characteristics from the application of the regulatory regime for communications, or a market investigation, or indeed the other situations considered in the *Perinpanathan* case.”

86. The CAT concluded that the judgment in *BT v Ofcom (Business Connectivity)* did not justify a departure from the established jurisprudence as summarised in *Eden Brown* that the correct starting point was “costs follow the event”. The CAT went on to make an issues-based order and to determine various other disputes about particular items of costs claimed.

(ii) *The Court of Appeal's judgment*

87. On appeal by the CMA, the Court of Appeal expressed the principle for which the CMA was contending as follows: para 5

“that in proceedings by or against a regulator in the exercise of its statutory functions, the default position (or starting point) is that no order for costs should be made against the regulator, except for good reason. The mere fact of an outcome adverse to the regulator is not, of itself, a good reason. But a good reason would include unreasonable conduct by or on behalf of the regulator, or financial hardship likely to be suffered by a successful party if no costs order is made.”

88. The Court then analysed the *Booth* line of cases. They recognised at para 22 that *Booth* itself did not explicitly support the proposition that the starting point is that no order for costs should be made. The need to encourage public authorities to make and stand by decisions is no more than a factor to be considered. But Sir Igor's preference for the statement of Moses LJ in the Divisional Court in *Baxendale-Walker* over Waller LJ's statement in *Adcock* did amount to the approval of no order as to costs as a starting point or default position: para 28. That was, Lewison LJ thought, clearly recognised in *Perinpanathan*.

89. The Court then turned to the CAT's jurisprudence starting with *GISC*. Lewison LJ read the judgment in *GISC* as a rejection of the argument based on *Booth* that the public interest element bore on the question whether to make a costs order at all, rather it should be dealt with by controlling the level of costs through active case management. *Racecourse* had then elevated the relevance of the appellant's expense in exercising his right to appeal from one of the factors listed in *GISC* to a starting point. This, he thought, was where the CAT lost sight of the *Booth* propositions and of the *GISC* observation that a general costs follow the event rule could deter appeals. The Court then analysed the judgment in *BT v Ofcom (Business Connectivity)* and concluded that the court there had intended its decision to apply to all merits appeals including cases under the Competition Act where the regulator was acting purely in its regulatory capacity rather than its own commercial interest: para 74. Lewison LJ concluded further that the Court of Appeal had “comprehensively rejected the proposition that the starting point, even in a merits or judicial review appeal in the CAT, is that costs follow the event”. He summarised the applicable legal principles to be derived from these cases as follows:

“79(i) Where a power to make an order about costs does not include an express general rule or default position, an important factor in the exercise of discretion is the fact that one of the parties is a regulator exercising functions in the public interest.

(ii) That leads to the conclusion that in such cases the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity.

(iii) The default position may be departed from for good reason.

(iv) The mere fact that the regulator has been unsuccessful is not, without more, a good reason. I do not consider that it is necessary to find ‘exceptional circumstances’ as opposed to a good reason.

(v) A good reason will include unreasonable conduct on the part of the regulator, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made.

(vi) There may be additional factors, specific to a particular case, which might also permit a departure from the starting point.”

90. Lewison LJ therefore disagreed with the CAT’s conclusion at para 34 of the CAT’s Costs Ruling (which I have set out above). He concluded (para 91) that the CAT had misinterpreted *BT v Ofcom (Business Connectivity)* since he regarded the reasons given by the CAT for adopting a different approach in competition infringement cases as not compelling. He also referred to the arguments put forward on chilling effect, stating at para 100 that:

“I would not regard the ‘chilling effect’ on the CMA as self-evident. But in so far as it has potential to exist, I consider

that it is already accommodated within the principles developed by the cases in this court.”

91. Lewison LJ referred to the appellants’ argument that the CMA had continued to seek orders for costs against unsuccessful appellants and was proposing an asymmetric approach. He rejected the submission that this was contrary to rule 4 of the CAT’s Rules which requires the CAT to apply the Rules in a way which ensures that the parties are “on an equal footing”.

92. However, in reformulating the proposition which he was approving in the concluding paragraphs of his judgment, Lewison LJ confirmed that he was not in effect approving the submissions of counsel in *Booth* which Lord Bingham had rejected. He said:

“105. Rather, in my judgment, the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity. That starting point may be departed for good reason; but the mere fact that the regulator has been unsuccessful is not enough.”

93. He then considered whether the court should remit the question of costs to the CAT as the Court of Appeal had done in *BT v Ofcom (Business Connectivity)*. He did not see that any useful purpose would be served by remission. Floyd LJ agreed with Lewison LJ’s judgment and Arnold LJ delivered a short concurring judgment. The appeal was therefore allowed and an order for no costs was substituted.

3. THE PRINCIPLES TO BE APPLIED

94. I respectfully agree with Lord Neuberger’s statement in the passage from his judgment in *Perinpanathan* that I have cited above, that even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances.

95. The main issue raised by this appeal is, therefore, whether the Court of Appeal was right to hold that there is a general principle or rule that a court or tribunal exercising such a discretion should adopt as its starting point that it will not make an order for costs where the unsuccessful respondent is a public body defending a

decision it has taken in the exercise of its functions in the public interest unless there is some good reason to do so; the lack of success not being of itself a good reason to depart from that starting point.

96. If there is no such general principle, the next question is: has the CAT nonetheless erred in adopting a starting point of costs follow the event in Competition Act appeals by failing to give adequate consideration to the position of the CMA and the risk of a “chilling effect” on the CMA?

(a) Is the principle asserted by the CMA supported by the *Booth* line of cases?

97. In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the *Booth* line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in the kinds of proceedings dealt with directly in *Booth*, *Baxendale-Walker* and *Perinpanathan*, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.

98. Where I depart from the CMA’s argument and from the decision of the Court of Appeal in this case is in making the jump from a conclusion that in some circumstances the potential chilling effect on the public body indicates that a no order as to costs starting point is appropriate, to a principle that in every situation and for every public body it must be assumed that there might be such a chilling effect and hence that the body should be shielded from the costs consequences of the decisions it takes. An appeal is not sufficiently analogous to the *Booth* line of cases merely because the respondent is a public body and the power to award costs is expressed in unfettered terms. Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending - it cannot be assumed to exist. Further in my judgment, the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.

99. The high points of the CMA's case are the statement of Lord Neuberger MR in *Perinpanathan* about the kinds of cases in which the *Booth* propositions will apply and the decision of the Court of Appeal in *BT v Ofcom (Business Connectivity)*.

100. In *Perinpanathan* Lord Neuberger said:

“73. So far as principle is concerned, the judgment of this court in *Baxendale-Walker v Law Society* [2008] 1 WLR 426 has given strong support to the notion that Lord Bingham CJ's three principles should apply where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event. The effect of the reasoning is that, just because a disciplinary body's functions have to be carried out before a tribunal with a power to order costs, it does not follow that there is a presumption that the tribunal ought to order the disciplinary body to pay the costs if it is unsuccessful, and that, when deciding what order to make, the tribunal should approach the question by reference to Lord Bingham CJ's three principles. It is hard to see why a different approach should apply to a regulatory or similar body carrying out its functions before a court - unless the rules of that court have any presumptive principle inconsistent with those principles, such as CPR rule 44.3(2)(a).”

101. Lord Neuberger did not refer to the CAT's case law in his judgment in *Perinpanathan*, and his statement at para 73 was focused on confirming the absence of any presumption that costs follow the event and directing the attention of courts to the *Booth* propositions.

102. I do not read the judgment of Stanley Burnton LJ in *Perinpanathan* as establishing the principle on which the CMA relies. He cited with approval the decision of the CAT in *British Telecommunications plc v Office of Communications* [2005] CAT 20. That was a dispute resolution case under the Interconnection Regulations where the CAT had made no order as to costs in an appeal against a decision by Ofcom determining a dispute between BT and Vodafone: para 30. But in the passage I have set out at para 62 above, Stanley Burnton LJ emphasised that whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions. The judgments in *Perinpanathan* do not support the proposition for which the CMA contends in this appeal.

103. Similarly, as regards *BT v Ofcom (Business Connectivity)*, I do not agree that the judgment of the Court of Appeal is authority for the proposition that in all cases where the party to an appeal before the CAT is a public body, there must be a presumption or starting point that no order for costs should be made against that body. That is not what the judgment mandates even where the public body is a regulator such as Ofcom rather than an enforcement body like the CMA. The CMA relies on the final sentence of para 83, quoted above, as establishing a principle for which they contend. That places too much weight on that sentence and ignores the other clear indications in the judgment that the Court of Appeal recognised the expertise of the CAT in deciding the outcome of any particular case. As Sir Geoffrey said at para 64:

“Even in the context of a consideration of whether the CAT is bound by English Court of Appeal decisions in analogous spheres, it is important to understand the nature of the CAT’s particular jurisdiction. The higher courts have repeatedly emphasised that the CAT is a specialist tribunal which sits with judges alongside expert and distinguished economists, accountants and/or industry experts. Tribunals should be the masters of their own procedure, fashioned in accordance with their own procedural rules, always provided that that procedure is not in conflict with any applicable legal principles (see, for example, *Sainsbury’s v MasterCard* [2018] EWCA 1536 (Civ) at para 357; *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, at para 16 per Hale LJ; *Regina (Cart) v Upper Tribunal* [2012] 1 AC 663; [2011] UKSC 28; *Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 41 per Lord Carnwath).”

104. It also disregards the fact that the issue remitted by the Court of Appeal to the CAT in *BT v Ofcom (Business Connectivity)* was not simply whether there was any reason to depart on the facts of that case from a presumption of no order as to costs. The decision was remitted expressly so that the CAT could reconsider the applicable starting point, bearing in mind the *Booth* line of authority. That was because, as the Court of Appeal in that case recognised, the CAT is itself best placed to consider in detail the arguments on the “chilling effect” advanced by both sides. The Court of Appeal in *BT v Ofcom (Business Connectivity)* did not, as the CMA contends, take the incremental step of cementing a starting point of no order as to costs for every public body by requiring a court or tribunal to assume that there will be a chilling effect on its future conduct and making that the overriding factor in the exercise of the statutory unfettered discretion.

(b) The CAT's approach to "chilling effect"

105. Having rejected the CMA's contention that the *Booth* line of cases mandates the adoption of a "no order as to costs" starting point where the unsuccessful respondent is a public body, I consider now how the CAT has responded in its case law to arguments about "chilling effect" by the CMA and Ofcom.

106. Since the introduction of the wide costs discretion before the CCAT and the CAT, the CMA (formerly the DGFT and the OFT) and Ofcom have sought to resist adverse costs orders by raising the twin issues of their role in promoting the public interest and the risk that a fear of having to pay successful appellants' costs might deter them from making decisions in the public interest. The CAT has therefore considered the relevance of the potential "chilling effect" of costs orders on respondents before it. Sometimes it has done this by reference expressly to the *Booth* line of cases and sometimes without such reference.

107. In the early case of *GISC* which I have described above, the DGFT argued that a single decision under the Competition Act could be subject to challenges from several addressees on a wide range of grounds. Such potential exposure to multiple claims for costs could, the DGFT said, have serious implications for the public purse and, further, might influence his decision whether to take a formal, appealable, decision in marginal cases rather than deal with the matter informally: para 28. The DGFT fairly also argued that a "costs follow the event" rule might have a chilling effect on prospective appellants with a legitimate interest in challenging decisions including smaller companies and consumers: para 24. He recognised that this too could undermine the effective operation of the Competition Act.

108. The CCAT in *GISC* referred to *Booth* although it had not been cited to them, setting out Lord Bingham's three propositions. The CCAT was sympathetic to the DGFT's concern, acknowledged the public interest described by Lord Bingham in *Booth* and accepted that the factors urged on it by the DGFT were potentially relevant to the exercise of its discretion. But these factors could not, the CCAT held, be decisive when considerations of fairness pointed in the opposite direction:

"We also bear in mind that the Act endows the Director, in the public interest, with wide ranging and draconian powers, exercised on behalf of the State, which may substantially affect the civil rights and obligations of those concerned. The costs of the administrative procedures under the Act are not recoverable by the persons affected. However, the Act

provides that the exercise of the Director's powers may be challenged, on grounds of both fact and law, before a judicial tribunal. The Tribunal has been given the power to award costs. That power, it seems to us, is a counterbalancing element in the system which both imposes a necessary discipline on all concerned, and enables the Tribunal to deal with the issue of costs as fairly as possible according to the particular case."

109. The CCAT then looked at the history of the proceedings, the fact that the DGFT's position on the legality of GISC's rules was not supported by authority, the nature of the parties and the resources available to them and the extent to which they had succeeded in the appeal. It also ordered GISC (which had benefited from the negative clearance decision and had intervened in the appeal in support of the DGFT) to pay a proportion of the appellants' costs with the DGFT paying the remainder. Even though it adopted a starting point of costs follow the event, the CCAT therefore clearly took into account the role of the DGFT in crafting the costs order in fact made.

110. In *Eden Brown* where the CAT established that the starting point in appeals from infringement decisions under the Competition Act was that costs follow the event, the CAT referred to *Booth*, *Baxendale-Walker* and *Perinpanathan* which had been relied on by the OFT. The CAT said:

"The imposition of sanctions for breach of the Chapter I or Chapter II prohibition under the 1998 Act, which constitute criminal penalties for the purpose of article 6 of the European Convention on Human Rights, cannot be regarded as remotely comparable to licensing decisions of a more administrative nature. And although the OFT is a competition authority acting in the public interest, under the regime of the 1998 and 2002 Acts it does not bring proceedings before this Tribunal in order to obtain the imposition of a sanction. The OFT puts the allegations of infringement to the parties involved, receives submissions from them in response and then itself takes a decision as to whether an infringement occurred and, if so, whether to impose a penalty and what the amount of that penalty should be. Hays and Eden Brown are not entitled to recover, nor have they claimed, any of the no doubt significant costs of contesting these issues before the OFT at that administrative stage. In our judgment, the approach set out in the *City of Bradford* case, as considered

and explained by the Court of Appeal in *Perinpanathan*, should have no application to an appeal before this Tribunal against a decision of the OFT finding infringement and imposing a penalty with regard to the Chapter I or Chapter II prohibitions (and/or articles 101 and 102 TFEU), irrespective of whether or not that appeal concerns only the question of the penalty.”

111. The CAT therefore took costs follow the event as its starting point but emphasised that the question of success should generally be considered on an issue by issue basis.

112. The CAT has adopted a different starting point in other cases in response to concerns raised about chilling effect among other things. For example, in *BT v Ofcom (RBS Backhaul)* [2005] CAT 20 the Director General of Telecommunications (the predecessor of Ofcom) determined a dispute between Vodafone and BT. The CAT noted that in arriving at his determination the DG Telecoms “took into account what he believed to be wider benefits to the public interest such as greater network efficiency, facilitating innovation and investment in voice and data services, and ultimately benefits to end-users of mobile telephony services in terms of prices and quality”: para 58. The CAT concluded that where DG Telecoms had resolved a dispute by taking a decision, that decision may well be appealed by whichever side lost. It would not be right to order him to pay BT’s costs in circumstances where he defended the appeal entirely reasonably and wider public interests were involved. The CAT made no order as to costs. A similar result was reached in *The Number (UK) Ltd v Ofcom* [2009] CAT 5 where the CAT observed that it would be unsatisfactory if different tribunal panels placed radically different weight on Ofcom’s unique position as a regulator: para 3.

113. The importance of chilling effects has not been limited to dispute resolution cases. In *Hutchison 3G (UK) Ltd v Ofcom* [2006] CAT 8 the mobile operator successfully challenged a regulatory decision (rather than a dispute resolution decision) taken by Ofcom pursuant to its obligations under the telecoms Framework Directive, the CAT finding that Ofcom had erred in arriving at the conclusion that Hutchison 3G had significant market power in the market for terminating calls on its own network. In declining to order Ofcom to pay the appellant’s costs, the CAT commented that wider public interests were at stake not just the private interests of H3G.

114. There have been many other rulings of the CAT in which it has made no order as to costs in cases where Ofcom has lost an appeal. The CAT has arrived at this

conclusion in part because, as the CAT described in *RBS Backhaul*, many of the costs incurred by the parties should be regarded as the costs of doing business:

“60. It is also relevant in our view that in a regulated industry such as this, BT and the other principal parties to these proceedings will be in a constant regulatory dialogue with OFCOM on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of rule 55 of the Tribunal’s Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which BT and the interveners are, in their own interests, routinely incurring regulatory costs which are not recoverable.”

115. The CMA is not, of course, in the same position as Ofcom since it has no regulated community but can and does investigate undertakings in any sector of the economy. The CAT’s recognition of the different position of Ofcom is reflected in Ofcom’s own approach when applying for costs. When it wins an appeal and seeks to recover its own costs, Ofcom often asks only for its external legal costs and does not claim its internal legal costs: see *British Telecommunications plc v Ofcom (Partial Private Circuits)* [2011] CAT 35, para 26; *Telefonica UK Ltd v Ofcom* [2013] CAT 3, para 9 and *Everything Everywhere Ltd v Ofcom* [2011] CAT 45.

116. This self-restraint on the part of Ofcom is sometimes matched by a similar restraint on the part of a successful appellant. In the *T-Mobile* case in 2009, where unusually the CAT (which I chaired) ordered Ofcom to pay BT its costs, the costs claimed by BT were limited to the costs of its external advisers (counsel and expert witnesses). The CAT considered *Baxendale-Walker* which was cited to it by Ofcom but decided that the modest costs award it was making would not risk deterring Ofcom from standing by its decisions. Despite being critical of Ofcom in the substantive judgment, the CAT cut back BT’s external costs claimed of £315,000 to a total of £160,000 and one party was ordered to bear its own costs.

(c) The CAT's starting point in Competition Act appeals

117. Has the CAT nonetheless erred in rejecting the analogy with the *Booth* line of cases to the extent that it has adopted a starting point of costs follow the event in Competition Act appeals? Stanley Burnton LJ said in *Perinpanathan* that whether the principle in the *Booth* line of cases applies in any particular jurisdiction depends on the substantive legislative framework and the applicable procedural provisions. I therefore turn to consider whether the CAT is entitled to conclude that its approach to the award of costs in appeals under the Competition Act is the right one.

(i) The applicable procedural provisions

118. When the first procedural Rules were promulgated for the CCAT and the CAT, it was clear that in many of the different kinds of appeals before it, the respondent would be a public body defending its decisions taken in the public interest and in the exercise of its public functions. Despite that, Parliament did not provide any steer in rule 26(2), rule 55 or rule 104 that that factor should dictate the exercise of the CAT's discretion. Indeed, that factor is not listed in rule 104 as one of the factors that the CAT may take into account. To the contrary, the success or failure of the parties is expressly stated to be a relevant factor and the CAT is enjoined by rule 4 to deal with cases justly by ensuring that the parties are on an equal footing and to have regard to the financial position of each party.

119. The power in paragraph 10 of Schedule 4 to the Enterprise Act to make different provision for costs in the rules for different kinds of proceedings has been used very sparingly indeed. The Schedule currently constrains what the Tribunal rules can say about costs in collective proceedings by providing, in paragraph 17(3) that Tribunal rules may not provide for costs or expenses to be awarded against someone on whose behalf a claim is made in a collective action save in the particular circumstances described in paragraph 17(1)(h), (ha), (2) and (2A). Apart from that, there is no statutory restriction on the kinds of costs rules that can be made for the different kinds of CAT proceedings. Since 2003, the CAT's costs rule has been drafted in very broad terms so that it can be applied across the whole range of varied jurisdictions.

120. The CAT's practice of adopting a starting point of costs follow the event in appeals under the Competition Act was well established by the time the rules were reviewed and revised in 2015. By that time it had become clear that the CAT had considered on many occasions the application of the *Booth* line of cases and the chilling effect arguments frequently put forward by the CMA and by Ofcom. The CAT had taken those arguments into account by adopting a no order as to costs starting

point in relation to some kinds of proceedings. In others, such as Competition Act proceedings, it had determined that those arguments did not militate against a costs follow the event starting point. Rule 104 adopted in 2015 carried forward the broad discretion into the 2015 Rules without adding the potential chilling effect to the list of factors and without taking away the reference in the list to the success or failure of the parties.

(ii) *The substantive legislative framework within which the CAT operates*

121. Turning to the substantive legislative framework in which the Competition Act appeals arise, the level of decision-making activity of local authorities, the police and the professional disciplinary bodies concerned in the *Booth* line of cases is of an entirely different order from that of the CMA. The CMA takes a limited number of decisions each year under the Competition Act. In the financial year 2020 to 2021, the CMA issued eight infringement decisions and accepted commitments to resolve one further investigation. It prohibited four mergers and cleared 21, having reviewed about 600 transactions. It also published reports in three sectors under its market study, investigation and review jurisdiction.

122. Of course, the CMA's statutory functions involve it in much other work but these are the kinds of decisions that it takes as a competition enforcement authority that might trigger an appeal and result in an adverse costs order. It is in a very different position from a local authority or other licensing authority. In its written intervention, the SRA points out that it undertakes about 120-130 prosecutions a year. It is funded predominantly by practising certificate fees and other fees paid by the solicitors' profession. Although, following *Baxendale-Walker*, it is not usually subject to an adverse costs order where the solicitor is successful, it does usually recover its costs from the unsuccessful solicitor when the Disciplinary Tribunal upholds the complaint. These costs can be considerable and if they were not recovered by the SRA from the unsuccessful solicitor, the costs would have to be borne by the profession. I recognise the importance of the *Baxendale-Walker* authority for the continued proper functioning of the SRA and I do not regard this judgment as casting any doubt on the correctness of that decision.

123. By contrast, the way that the functions of the CMA are funded dispels any plausible concern that its conduct will be influenced by the risk of adverse costs orders. In the published Financial Statement for the year 2020/2021, the CMA explains how appeal costs are dealt with. Where the CMA is successful and the appeal is dismissed, income is received by the CMA when the appellant pays the costs award made by the CAT. The costs award will likely cover not only the external disbursements incurred by the CMA in instructing counsel and expert witnesses but also a sum for its internal

legal costs, calculated in the way I describe further below. The CMA includes in its accounts only what is received from the opposing party in respect of the CMA's internal legal costs, not the disbursements since it has paid these out and is simply recouping them from the appellant. According to the financial accounts, the CMA received £1.1m in reimbursed costs in 2020/2021, substantially more than the £587,000 received in 2019/20.

124. When the CMA loses an appeal it does not, of course, recoup its disbursements from the appellant and may have to pay the appellant's costs. But although the financial statement includes a line for litigation costs, this shows a zero entry for both the current year and the previous year. A footnote explains why: "The CMA has approval to fully offset litigation costs against [the Competition Act] penalty income effectively meaning that these costs are fully funded which consequently results in nil litigation costs being recognised in the [Statement of Comprehensive Net Expenditure]". Thus, before accounting to the Consolidated Fund for the penalties it collects during the year, the CMA can deduct its own external legal costs and any disbursements that it has not recovered from the successful appellant and also the value of any costs award made against it in the successful appellant's favour. A later statement shows that litigation costs, that is primarily CMA's own external legal costs and disbursements not recovered from the appellant together with any costs it is ordered to pay to a successful appellant, amounted to slightly over £2m which was offset against the penalty income that year of £56.7m.

125. Two conclusions may be drawn from this arrangement that the CMA has with HM Treasury. The first is that there is no adverse effect on the CMA's finances arising from a liability to pay the costs of a successful appellant, provided that it properly performs its function of identifying and investigating significant infringements of the competition rules and that it is successful at least some of the time in imposing fines which are not challenged on appeal or where any challenge is unsuccessful. The fines it receives in decisions which withstand any potential for challenge pay for its costs of those decisions which it has taken, stood by and defended, albeit unsuccessfully.

126. Secondly the CMA is incentivised to investigate and sanction infringements by substantial undertakings even though they may be more likely to appeal against a decision and likely to spend more on that appeal. The level of penalty that the CMA can impose for an infringement is linked to the relevant turnover of the company and the penalty may be increased to ensure that it is sufficient to deter the infringing undertaking from breaching competition law in the future: see the recently revised *CMA's Guidance as to the appropriate amount of a penalty* (16 December 2021). The adoption of the costs follow the event starting point does not appear so far to have deterred the CMA from pursuing major market participants. The decision about

phenytoin sodium was one of a number of recent investigations in the pharmaceuticals industry and the subjects of recently opened investigations under the Competition Act include the conduct of Google and Apple.

127. The appellants also drew our attention to the fact that the CMA claims its internal costs against an unsuccessful appellant at an hourly rate that exceeds the actual cost of employing those staff. This issue was considered by the CAT in the costs ruling in *Ping Europe Ltd v CMA* [2019] CAT 6. Ping's appeal against a decision that it had infringed the Chapter 1 prohibition was dismissed save for a small reduction in its fine from £1.45m to £1.25m. The CAT held that the starting point was that costs follow the event in appeals brought under the Competition Act, citing *Eden Brown*. The CMA was the clear winner though a 10% deduction was made because of Ping's success in reducing the penalty.

128. The CMA sought to recover the costs of its internal salaried staff at Government solicitors' guideline hourly rates. At the CAT's request, the CMA filed a revised costs schedule providing an assessment of the hourly rate for its internal salaried staff recalculated on the basis of the annual cost of each individual including salary and attributable overheads. This showed that the hourly rates claimed represented a 145% uplift on the actual costs of employing the staff. Ping argued that recovery of the costs claimed would breach the indemnity principle since the sums claimed for particular lawyers were equivalent to several years of salary for that lawyer, even though the costs schedule showed that they only spent a few weeks or months working on the case.

129. The CAT considered that the disparity highlighted did give rise to concern that the indemnity principle would be infringed: para 47. But given that any reduction would be arbitrary, the CAT upheld the CMA's claim on the basis that it would be disproportionate to require the CMA to carry out a comprehensive analysis and allocation of its internal costs: para 50. This reasoning was applied by the CAT in *Tobii AB (PUBL) v CMA* [2020] CAT 6, an unsuccessful challenge to the CMA's decision to prohibit a merger.

130. In my judgment the CAT was right in the CAT's Costs Ruling to distinguish the nature of decisions taken by the public bodies concerned in the *Booth* line of cases from the decisions taken by the CMA under the Competition Act. As the CAT said at para 46 of that Ruling, the right of appeal conferred on an addressee of an infringement decision is "an essential part of the system by which competition authorities, in return for receiving extensive enforcement powers, are held to account by the courts".

131. In *Kier Group plc v OFT* [2011] CAT 33 (chaired by the then President of the CAT, Barling J) the OFT argued in addition to the risk of chilling effect, that the risk of a costs order would reduce the OFT's resources available to investigate and pursue infringements of the competition rules, which would ultimately be to the detriment of consumers: see para 10. The CAT rejected these submissions:

“14. ... The fact that an appellant has established that a penalty is excessive and disproportionate should in our view be a central consideration for the Tribunal when the question of costs of the appeal comes to be determined. To insulate the OFT in the way suggested from the costs discipline to which all public bodies are subject in the context of ordinary judicial review would not be conducive to the effective enforcement of the competition rules.”

132. Barling J's reference there to the policy reasons for holding public bodies to account when they unlawfully exercise their wide ranging powers echoes many statements to the same effect by senior courts in judicial review cases in the High Court. *In re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244 concerned director disqualification proceedings which were commenced but then withdrawn by the Secretary of State. The Court of Appeal rejected in robust terms the concept of “public interest litigation” holding that any public interest immunity for the consequences of unjustified initiation of the proceedings would be “entirely unwarranted”. Beldam LJ said he could think of no practice “less in the public interest or more calculated to encourage the indiscriminate initiation of proceedings at the unjustifiable expense on an individual”: p 254.

133. The High Court has regarded the prospect of an adverse costs order as beneficial on the basis that it will encourage better decision-making within Government, a more realistic appraisal by the respondent Department of the merits of defending any particular application and the efficient and proportionate conduct of proceedings. It is also considered just that a person wronged by the actions of a public body should be reimbursed his or her costs. Thus, Lord Neuberger MR said in *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 1 WLR 2607 that the costs follow the event rule applied in the Administrative Court just as much as to other parts of the civil justice system and it made no difference that a defendant was a public body:

“The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their

private law rights. And the fact that the defendants are public bodies should make no difference, as Pill LJ explained in the *Bahta* case [2011] 5 Costs LR 857, para 60.”

134. I accept of course, that the costs rule that the courts were applying in those cases stipulated costs follow the event as the starting point. But in my judgment, the policy justifying the adoption of that starting point in judicial review proceedings can be a factor in the CAT’s exercise of its discretion even where it is not expressly provided for.

135. The CAT was also entitled to take into account at para 42 of the CAT’s Costs Ruling the fact that the addressees will have incurred substantial expense in the investigation stage before the adoption of the decision. Those costs are not recoverable from the CMA even if the decision is set aside. This is a point emphasised by the Association of the British Pharmaceutical Industry and the British Generic Manufacturers Association in their written intervention. The ABPI and the BGMA cite one recent example from the pharmaceutical sector where, following an investigation lasting more than three years into the conduct of one company, the OFT closed its file with a “no grounds for action” decision in March 2019. Such an undertaking, which can be active in any sector of the economy, must bear those costs. If the investigation does result in an infringement decision but that decision is withdrawn or overturned on appeal, those costs of the investigatory phase are not recoverable even if an order for costs of the appeal is made in the party’s favour. Moreover, that investigatory stage enables the CMA to consider in great detail whether it should take action under the Competition Act and the CMA has an extended period in which to test and refine its justifications for any action it does decide to take. This also points in favour of subjecting the CMA to the discipline associated with having to pay the successful appellant’s costs if ultimately the CAT concludes that the infringement decision or the fine imposed was not well-founded.

(d) Other ways in which the CAT takes account of the potential for “chilling effect” in its costs decisions

136. The Court of Appeal in this case was wrong, in my view, to dismiss the relevance of other ways in which the CAT takes into account the nature and functions of the respondent body. The factors considered in *Booth* may legitimately be accommodated by the outcome of a costs award even if costs follow the event is taken as the starting point. What emerges from a survey of the CAT’s rulings is that the result in cases where that starting point is applied is usually very different from the result that is likely to have been arrived at in the High Court applying the starting point in CPR rule 44. These seem to me legitimate ways in which the CAT can take account of the nature of

the body appearing before it. As the CAT said in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, para 19:

“It is axiomatic that all such starting points are just that - the point at which the court begins the process of taking account of the specific factors arising in the individual case before it - and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly.”

137. I highlight a number of these differences below.

138. The first difference is the detailed consideration and reasoning provided by the CAT in making its costs decisions. Most judges will recognise the description of the cost award under review in *Chief Constable of Derbyshire v Goodman* [2001] LLR 127, an appeal from the refusal of a gun licence. In examining the short passage of the transcript in which the judge had decided to award costs against the Chief Constable, May LJ sitting in the Divisional Court noted that the relevant case law had not been drawn to the judge’s attention. Further, he said:

“it is evident from the transcript, that the question of costs was, as so often happens, dealt with in fairly short order at the end of a long day, perhaps it was a Friday, and that the discussion was quite short.”

139. The CAT, by contrast, receives extensive written submissions from the parties following the hand down of its judgments; there is certainly no dearth of authorities cited and the reasoning for the decision is always fully considered and explained.

140. The second difference is that the CAT has been much readier than the High Court to make issues-based orders, by which I mean orders where a significant deduction is made from the winning party’s costs award to reflect costs spent by both parties on issues which were either decided in favour of the overall loser or were not dealt with in the judgment. Thus, in *Emerson Electric Co v Morgan Crucible Company plc* [2008] CAT 28 where the CAT confirmed costs follow the event as the starting point in a damages claim between two private parties, a 50% reduction in the costs awarded was made to reflect the time and costs that had been devoted to questions on which the successful defendants had lost: para 52.

141. In *British Telecommunications plc; CityFibre Infrastructure Holdings plc v Ofcom* [2018] CAT 1 the CAT considered costs where it had quashed certain determinations made by Ofcom about market definition. The CAT adopted a starting point of costs follow the event (see para 29). Despite that, and despite the fact BT had been the overall winner, an issues-based costs order was made. Particularly significant was the fact that BT's challenge to the remedy had not been determined at all because Ofcom's substantive decision was overturned. The CAT said that if it were simply applying the same costs follow the event approach as the High Court, Ofcom would be required to pay for BT's arguments on remedy. The CAT decided that the fairest solution was to apply the same proportional reduction to BT's costs of the remedy challenge as they applied to the market definition issues which were litigated and on which BT had won. BT was only awarded 50% of the costs once they had been assessed on the standard basis (not 50% of the claimed costs) and all the disbursements connected with one of the experts' reports were disallowed because of its prolixity and argumentative nature.

142. The third difference is that even where costs follow the event is the starting point and no issues-based costs order is appropriate, the CAT often makes very substantial reductions in the costs that the CMA or Ofcom is ordered to pay. The CAT sent a shot across the bows of appellants early on in *Unichem Ltd v OFT* [2005] CAT 31 when it observed at para 27:

“While it is, necessarily, open to a company which chooses to make an application to the Tribunal to assemble a legal team and to present its case in the manner it sees fit, and to incur any costs which it considers appropriate in doing so, it does not necessarily follow that the respondent, (or indeed any other party) against whom an order for costs is made should necessarily be liable for the full extent of those costs. A successful applicant is entitled to no more than reasonable and proportionate costs.”

143. Such reductions occurred in the two cases which confirmed costs follow the event as the starting point. In *Racecourse* the CAT disallowed 7.5% of one of the appellant's costs as being referable to an important point on which they had lost. As regards the other appellant, the CAT held that the costs claimed were manifestly disproportionate having regard to its role in the proceedings. Further, that party was not entitled to recover the costs which it had incurred in supporting or duplicating arguments already advanced by the primary appellant. Having cut down the recoverable costs of a party's expert evidence to about a fifth of that claimed, the CAT ordered the OFT to pay only 50% of the remainder.

144. In *Eden Brown*, having rejected the OFT's reliance on chilling effect arguments, the CAT then looked carefully at the costs claimed. They disallowed the costs claimed by one appellant, Hays, associated with the instruction of a second senior Queen's Counsel - not only his fees but all the solicitors' costs of instructing him in the case. They also disallowed the costs of Hays' instruction of an expert accountant. They awarded Hays 65% of their remaining costs to be subject to detailed assessment, commenting for the assistance of the costs judge that some of the figures in Hays' costs schedule were remarkably high.

145. One can see that in the two cases for which the CAT was criticised in *BT v Ofcom (Business Connectivity)* for paying too little attention to chilling effect, the costs actually awarded were a small fraction of those claimed, despite the CAT adopting a costs follow the event starting point. In *Tesco* where the CAT upheld Tesco's judicial review challenge to a market investigation report, part of the decision was quashed and the matter remitted to the Commission. Tesco applied for its costs of the CAT proceedings. On the exchange of costs statements, it emerged that Tesco's costs were about six times the costs incurred by the Commission in respect of the main hearing and nearer to seven times in relation to the separate hearing on relief. Some of the items claimed were "such as to cause a sharp intake of breath" on the part of the CAT: para 45. Tesco's claimed costs of £1.5m were reduced to £342,000, the CAT taking the Commission's costs as a benchmark with an uplift to reflect the greater burden that falls on the applicant with the conduct of the proceedings.

146. As we have seen, the CAT in *PayTV* took as its starting point that costs follow the event. It then considered whether either side had won and held that Sky had achieved everything that it could have hoped to achieve in its appeal. The CAT expressly considered the risk that costs of the order of magnitude claimed "might conceivably have some influence on Ofcom's approach should a similar case arise in future": para 56. On balance, depriving Sky of all its costs would not be justified by the risk of a chilling effect on Ofcom's future regulatory action in accordance with its statutory obligations: para 58. Despite being the very clear winner, Sky was not awarded its costs in relation to an issue on which it lost nor on issues which the CAT did not have to decide. Sky was also not awarded its costs of the consequential orders and relief proceedings. The CAT concluded at para 64: "This will no doubt still be a substantial amount, but we do not consider that it will carry a significant risk of a 'chilling' effect on Ofcom's regulatory action in the future such as to justify depriving Sky of this more limited costs award". Ofcom was not ordered to pay the FAPL's (the Football Association Premier League) costs nor the costs or any of the interveners.

147. The possibility of a chilling effect was therefore well in view in *PayTV* and clearly influenced the outcome of Sky's costs application even where the starting point of costs follow the event was adopted.

148. In the present case, the application of the costs follow the event starting point of which the CMA complains in fact resulted in an issues-based order. Pfizer and Flynn did not recover their costs of the dominance issue on which they lost and there was a further substantial cutting back of the costs to which the percentage that the CMA would be required to pay was applied.

149. Fourthly, the variety of factors which the CAT takes into account when considering costs, and in particular whether to depart from the starting point, is very varied. Some of these factors are the same as those arising in any legal proceedings, such as the unreasonable conduct of the parties or financial hardship. Others are factors that arise because of the particular nature of the proceedings, for example:

- a. the speed at which the proceedings challenging a merger clearance had to be prepared; this may justify the inclusion of what turn out to be peripheral issues in the notice of application: *IBA Health v OFT* [2004] CAT 6, para 55;
- b. the great disparity in resources between the appellants and the competition authority and the fact that the costs though high were small relative to the total turnover of the appellants: *Mastercard UK Members Forum Ltd v OFT* [2006] CAT 15, para 63;
- c. the fact that the work done for the proceedings would be useful for the appellant in an investigation into the same conduct being conducted in another forum: *Mastercard*, above, para 66;
- d. the importance of not deterring small undertakings from bringing reasonable appeals from infringement decisions of the OFT: *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 11, para 26;
- e. the importance also of not deterring competitors from challenging a decision to clear a proposed merger where potential applicants may be very much smaller than the parties to the merger: *IBA Health*, paras 36, 40 and 41 (where the CAT expressly referred to *Booth*);

f. the need on the other hand to discourage “spoiling tactics” by a third party seeking to disrupt merger proposals between its competitors: *Celesio AG v OFT* [2006] CAT 20;

g. the fact that the undertaking challenging a merger had no personal or private interest in the outcome of proceedings and had brought to the appeal genuine concerns that were shared by many people and were a legitimate matter of public interest: *Merger Action Group*;

h. the fact that the reasoning in the challenged decision had been unclear until expanded upon in the evidence lodged by the OFT in the appeal: *Celesio AG and IBA Health*, para 49.

150. Fifthly and finally, in *GISC* the CCAT said that concerns over costs were best addressed by other means, in particular by careful case management which focused as early as possible on identifying the main issues to avoid unnecessary escalation of costs. A useful illustration of that practice at work in the CAT was in the rulings in the appeals brought by 25 of the 103 addressees of the OFT’s 2009 decision entitled *Bid rigging in the construction industry in England*. The CAT set up three panels to hear the appeals which were managed in a proactive way. There were strict time limits for oral submissions and three panels delivered a total of nine judgments on 15 April 2011. The appeals against liability were dismissed but the appeals against penalty succeeded, resulting in a substantial reduction in the penalties imposed, in some cases to less than a tenth of the fine imposed by the OFT.

151. The CAT considered in each case that as a matter of principle, the starting point in appeals against a decision under the Competition Act should be that costs follow the event where it is possible to identify a clear winner. The appellants were the clear winners and claimed their costs, the costs incurred varying greatly between them.

152. All three panels cut back the costs that the OFT was ordered to pay. The CAT applied a costs cap of £200,000 to each appellant. The overall costs award was reduced in *Keir* from over £1.9m claimed to just over £1m. In the appeals decided in the *G F Tomlinson Group Ltd v OFT* [2011] CAT 32 (which I chaired), the costs awarded against the OFT were cut down from £720,094 claimed to £485,292. The two appellants in *Quarmby Construction Co Ltd v OFT* [2011] CAT 34 were not awarded any costs.

153. All these cases show that the CAT is well aware of the many competing factors pulling in different directions in the different jurisdictions in which it operates. It has developed a sophisticated approach to costs awards, building on the original guidance provided by *GISC* about the need to strike a balance between maintaining flexibility whilst providing predictability and between ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime whilst ensuring a just result for both parties.

4. CONCLUSION

154. The analysis in the CAT's Costs Ruling and the order it made disposing of the costs of the appeal brought by the appellants was, in my judgment, a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors.

155. The CAT was entitled to apply the starting point it had established in the earlier *Eden Brown* decision. The CAT's assessment as to the appropriate starting point in *Eden Brown* is consistent with what the Court of Appeal said in *BT v Ofcom (Business Connectivity)*. The CAT in *Eden Brown* and in this case has in effect undertaken precisely the task that was remitted to the CAT by the Court of Appeal in *BT v Ofcom (Business Connectivity)*. It has, to paraphrase the Chancellor's words in that case, considered in detail the arguments on "chilling effect" advanced by both sides and adopted a consistent and sustainable approach, based not on fine distinctions between the routes by which cases reach the CAT, but on applicable legal principle, the specific industry position best understood by the CAT itself, and its own procedural rules. The CAT was entitled to conclude that the substantive legislative framework and the applicable procedural provisions relevant to assessing the starting point in Competition Act cases do not point towards a different answer.

156. I would therefore allow the appeal.