CMA SUFFERS MAJOR BLOW IN SUPREME COURT COSTS CASE

On 25 May 2022, the Supreme Court handed down an important judgment relating to appeals against decisions by public authorities (*Pfizer and Flynn v CMA* [2022] UKSC 14) (**here**). There is no generally applicable principle that all public bodies should enjoy protected status as parties to litigation where they lose a case they have brought or defended in the exercise of their public functions in the public interest. Instead, it is important that a court or tribunal considers the risk that there will be a 'chilling effect' on the conduct of a public authority, if costs orders are made routinely against it in those kinds of proceedings. The Competition Appeal Tribunal ("**CAT**") was right to distinguish Competition Act 1998 ("**CA98**") appeals from appeals against public authorities where there might be a risk of a chilling effect. The starting point in CA98 appeals is that costs follow the event, but the question of success is generally considered on an issue-by-issue basis.

Background

The appellants (Pfizer and Flynn) were successful in an appeal which they brought before the CAT challenging a Competition and Markets Authority ("**CMA**") decision under the CA98, which had found that they had abused a dominant position in relation to the supply of phenytoin (an epilepsy medicine). In its substantive judgment (**here**) the CAT set aside the abuse part of the CMA's decision, the fines (totalling £89.4m), and remitted the decision to the CMA for reconsideration. The CMA's appeal against the substantive judgment was in large part dismissed by the Court of Appeal (**here**). In 2020 the CMA decided to reinvestigate the matter and that investigation is ongoing.

The CAT also made an order that the CMA pay the appellants a proportion of their costs, having regard to the relative successes and failures of the parties on various aspects of the case (**here**). Importantly, the CAT concluded that a recent judgment of the Court of Appeal (in *BT v Ofcom*) did not justify a departure from the established jurisprudence in the CAT that the correct starting point in CA98 appeals was that 'costs follow the event'. It held that appeals against CA98 decisions have significant differentiating characteristics from the application of the regulatory regime for communications (such as in the *BT v Ofcom* case), or a CMA market investigation, or other situations considered in *R v Perinpanathan v City of Westminster Magistrates' Court* [2010] EWCA Civ 40. The CAT went on to make an issues-based order finding that that approximately one third of the assessed costs related to market definition/ dominance (on which the appellants had been unsuccessful) and two thirds to abuse (on which they had been successful) ordering that the CMA should pay 58% and 55% of Pfizer's and Flynn's respective allowable costs.

On appeal, the Court of Appeal set aside that order (**here**), finding that the CAT had disregarded a principle that had developed through the common law, in particular in the cases of *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485, *Baxendale-Walker v Law Society* [2007] EWCA Civ 233, and *Perinpanathan* (the "**Booth Line of Cases**"). The principle was that, in the absence of an express rule, the starting point is that no order for costs should be made against a public body that has been unsuccessful in defending proceedings in the exercise of its statutory functions (the "**Principle**"). The default position may be departed from for good reason (e.g. unreasonable conduct by the regulator or financial hardship), but the mere fact that a regulator has been successful is not, without more, a good reason. Permission to appeal was granted by the Supreme Court, with interventions from a number of third parties including the Office of Communications ("**Ofcom**") and the Solicitors Regulation Authority ("**SRA**") culminating in a two-day hearing in February 2022.

The appeal before the Supreme Court

Before the Supreme Court the appellants argued that there was no such Principle and that the Court of Appeal was wrong to hold that the CAT's discretion should be constrained by any such Principle. The Booth Line of Cases established 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 an adverse costs order will have a chilling effect on the relevant public body (i.e. that they might be discouraged from making and standing by decisions which they take reasonably in the public interest). Further, the appellants argued that the CAT was best placed to consider whether there was a risk of such a chilling effect, as regards the different public bodies that regularly appear before it. There was, furthermore, 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 her judgment, Lady Rose agreed with *Perinpanathan* that even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, as in this appeal, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances [94]. The main issue raised in the appeal was whether there is a general principle that a court or tribunal, exercising such 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 which 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) [95]. If there was no such general principle, the next question was whether the CAT nonetheless erred in adopting a starting point of costs follow the event in CA98 appeals by failing to give adequate consideration to the position of the CMA and the risk of a chilling effect on the CMA [96].

Is there a general principle protecting public bodies defending decisions taken in the public interest from adverse costs orders?

In its judgment the Supreme Court found that there was no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation. Instead, where a public body is unsuccessful in proceedings, an important factor that a court or tribunal should take into account is the risk that there will be a chilling effect on the conduct of the public authority, if costs orders are made routinely against it in those kinds of proceedings. The court does not have to consider the point afresh each time it exercises its discretion.

The Supreme Court found that there is a general risk of a chilling effect in the kinds of proceedings dealt with in the Booth Line of Cases (*Booth* involved an appeal before the magistrates' court relating to a vehicle licensing decision taken by a local authority, *Baxendale-Walker* was a disciplinary proceeding against a solicitor before the Solicitors Disciplinary Tribunal, and *Perinpanathan* concerned a failed application by a Chief Constable for forfeiture of money seized and retained under the Proceeds of Crime Act 2002) and to analogous proceedings. However, it did not consider that in every situation and for every public body it must be assumed that there might be such a chilling effect and that the body should be shielded from the costs consequences of the decisions it takes. 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 [97-98]. The relevant court or tribunal is best placed to assess arguments on the risk of a chilling effect.

The Supreme Court did not agree that the Court of Appeal's judgment in *BT v Ofcom* was 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 [103]. Such an approach disregards the fact that, in *BT v Ofcom*, the Court of Appeal remitted to the CAT expressly so that the CAT could reconsider the applicable starting point. That was because the Court of Appeal recognised that the CAT is itself best placed to consider the arguments on chilling effect advanced by both sides [104].

Did the CAT fail to give adequate consideration of the risk of a chilling effect on the CMA?

The Supreme Court observed that the CAT had considered the relevance of the potential chilling effect of costs orders during various appeals. The CAT's practice of adopting a starting point of costs follow the event in appeals under the CA98 was well established by the time the CAT's rules were reviewed and revised in 2015. By that time the CAT had taken the chilling effect arguments into account by adopting a no order as to costs starting point in relation to some kinds of proceedings, but in CA98 proceedings, it had determined that those arguments did not militate against a costs follow the event starting point. The revised 2015 rules carried forward the broad discretion of the CAT and did not add a potential chilling effect to the list of factors the CAT might take into account when considering costs [120].

The Supreme Court found that the level of decision-making activity of local authorities, the police and professional disciplinary bodies is of an entirely different order from that of the CMA. The CMA takes a limited number of decisions each year under the CA98 [121]. Further, as a result of the arrangement between the CMA and HM Treasury (whereby any legal costs can be offset against the CMA's income from fines) there is no adverse effect on the CMA's finances arising from a liability to pay the costs of a successful appellant [125], which dispels any plausible concern that the CMA's conduct will be influenced by the risk of adverse costs orders [123]. Instead, 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 adoption of a costs follow the event starting point does not appear to have deterred the CMA from pursuing major market participants [126].

In the Supreme Court's judgment, the CAT was right to distinguish the nature of decisions taken by the public authorities in the Booth Line of Cases, from the decisions taken by the CMA under the CA98 [130]. 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 striking a balance between (a) maintaining flexibility whilst providing predictability and (b) ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime whilst ensuring a just result for both parties [153]. The analysis in the CAT's costs ruling in this case was a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors [154]. The CAT had 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 CA98 cases do not point towards a different answer [155].

Comment

The Supreme Court's judgment is important in the context of appeals against decisions by public authorities. It has found that there is no generally applicable principle that all public bodies should enjoy protected status as parties to litigation where they lose a case they have brought or defended in the exercise of their public functions in the public interest. Rather than a 'general principle', it is important that a court or tribunal considers the risk that there will be a chilling effect on the conduct of a public authority, if costs orders are made routinely against it in those kinds of proceedings. More specifically in relation to appeals against CA98 decisions, the CAT was right to distinguish these from the Booth Line of Cases. The starting point in these appeals is that costs follow the event, but the question of success is generally considered on an issue-by-issue basis.

The judgment is significant for appellants against CA98 decisions by the CMA and other competition authorities. Undertakings that have been found to have infringed competition law have already been subject to lengthy investigations, often lasting many years, and leading to significant costs none of which are recoverable. Had the Court of Appeal's judgment been upheld, even undertakings who had successfully appealed a CA98 decision before the CAT could not have recovered any of their costs, absent exceptional circumstances. Such a regime may have significantly deterred companies from appealing CA98 decisions even where they regarded the decisions as wrong. It must be hoped that the maintenance of costs risk for the CMA should it fail to defend its decisions will result in robust, fair and proportionate decision making. This judgment from the Supreme Court strikes the right balance in ensuring that, if an appellant succeeds in its appeal before the CAT, then it will be able to recover its reasonable costs from the CMA.

Clifford Chance acted for Pfizer in its appeal before the Supreme Court, during the CMA's investigation and Pfizer's subsequent successful appeals in phenytoin.

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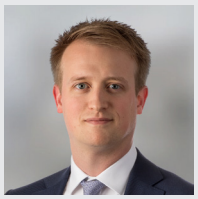

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