Neutral citation [2019] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1274-1275-1276/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

29 March 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED

Applicants in Case No: 1274/1/12/16 (IR)
Appellants in Case No: 1275/1/12/17
Interveners in Case No: 1276/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

(1) PFIZER INC.
(2) PFIZER LIMITED

Appellants in Case No: 1276/1/12/17
Interveners in Case No: 1275/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (COSTS)

INTRODUCTION

1. This Ruling, which adopts the same defined terms as the Tribunal's judgment of 7 June 2018 in the appeals in Cases 1275/1276 ([2018] CAT 11) (the "Judgment"), concerns applications by:

   (1) Pfizer that the CMA should be ordered to pay Pfizer's costs of its appeal in Case 1276 (the "Pfizer Appeal");

   (2) Flynn that the CMA should be ordered to pay Flynn's costs of its appeal in Case 1275 (the "Flynn Appeal") and its application for interim relief in Case 1274 (the "Interim Relief Proceedings"); and

   (3) the CMA that the costs of the Pfizer Appeal and the Flynn Appeal should be reserved pending the final determination of any appeals of the Judgment to the Court of Appeal; alternatively, that there should be no order as to costs save for in respect of the Interim Relief Proceedings, and that Flynn should be ordered to pay the CMA's costs of those proceedings.

2. On 19 January 2017, the Tribunal handed down a ruling refusing Flynn's application in the Interim Relief Proceedings ([2017] CAT 1). The CMA applied, on 19 May 2017, for its costs of those proceedings. On 23 June 2017, having received further submissions from Flynn and the CMA, the Tribunal ordered that the costs of the Interim Relief Proceedings be reserved pending a decision in the Flynn Appeal ([2017] CAT 13).

3. The Pfizer Appeal and the Flynn Appeal were heard together in October-November 2017. The Tribunal found, in particular, that while the CMA was correct to conclude that Pfizer and Flynn each held a dominant position, the CMA erred in its conclusions on abuse. In overview, the Tribunal rejected Pfizer's and Flynn's grounds of appeal insofar as they related to market definition/dominance but upheld certain of Pfizer's and Flynn's grounds of appeal insofar as they related to abuse. In view of the conclusion on abuse, Pfizer's and Flynn's grounds of appeal relating to penalties did not fall to be considered expressly by the Tribunal although the requirement to pay these penalties lapsed with the setting aside of the Decision.

4. On 28 June 2018, each of Pfizer, Flynn and the CMA applied for permission to appeal in respect of the Judgment (the "PTA Applications"). All three PTA Applications were refused by the Tribunal on 25 July 2018 and the issue of abuse and any consequential matters (including penalties and directions) were remitted to the CMA for reconsideration in accordance with the Judgment ([2018] CAT 12). Costs were reserved pending written submissions from the parties. In early August 2018, the parties renewed their PTA Applications to the Court of Appeal. Permission to appeal was granted to Flynn (in part) and to the CMA by the Court of Appeal on 12 December 2018.[1] We deal with the significance of these appeals being current at the end of this Ruling.

5. The parties filed written submissions on costs (including costs schedules) on 17 September 2018 and responsive submissions on 9 October 2018.[2] Following the Court of Appeal's decision in *BT v Ofcom* ([2018] EWCA Civ 2542), at the Tribunal's invitation, the parties on 11 December 2018 filed further submissions.[3] On 18 December 2018, Ofcom applied for permission to intervene for the purposes of making submissions on costs. The Tribunal refused that application by a ruling of 23 January 2019 ([2019] CAT 2).

THE TRIBUNAL'S GENERAL APPROACH

6. The Tribunal's jurisdiction to award costs is governed by Rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules") which provides, so far as is relevant:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales […].
>
> (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 in respect of the whole or part of the proceedings.

[1] Pfizer was refused permission to appeal (Case reference: C3/2018/1873). The other Court of Appeal case references are C3/2018/1847 (Flynn) and C3/2018/1874 (CMA).
[2] Further to a direction of the Tribunal, Pfizer filed a more detailed costs schedule on 28 September 2018.
[3] On 21 December 2018, Pfizer made a request to put in short written reply submissions to the CMA's 11 December 2018 submissions. That request was granted and Pfizer filed those submissions on 24 January 2019.

[…]

(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;

[…]

(e) whether costs were proportionately and reasonably incurred; and

(f) whether costs are proportionate and reasonable in amount.

(5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—

(a) assessed by the President, a chairman or the Registrar; or

(b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales […]".

7. The Tribunal has a wide discretion under Rule 104 in relation to costs awards (see, for example, *Quarmby Construction Co Limited v OFT* [2012] EWCA Civ 1552 at [12] and [37][4]). In appeals against decisions concerning the Chapter I or Chapter II prohibitions under the CA 98 (and/or Articles 101 or 102 TFEU), notwithstanding the absence of any general rule to this effect in the Tribunal Rules (although the Civil Procedure Rules do contain such a provision in Rule 44.2(2)), the Tribunal's practice has been to adopt the starting point that the successful party should obtain a costs award in its favour. The general approach was summarised in *The Racecourse Association v OFT* [2006] CAT 1 as follows (at [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

[4] Pre-October 2015 case law refers to Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372) which was in materially the same terms as Rule 104.

> 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."

8. In *Eden Brown Limited v Office of Fair Trading* [2011] CAT 29, in the context of an appeal against the penalty imposed, the Tribunal considered at some length the question of whether the OFT should, as a starting point, be liable for an award of costs in the case where it had been unsuccessful. The Tribunal stated (at [18]):

> "[…] we consider that the starting point for a penalty only appeal, as for an appeal against liability for infringement of the Chapter 1 or Chapter II prohibition, is that the successful party should recover its reasonable and proportionate costs. However, we emphasise that this approach addresses only the starting point. As indicated above, there may in any particular case be specific considerations that justify departure from this starting point. Furthermore, the question of "success" should generally be considered on an issues basis, by analogy with the approach under CPR [44.2(4)]. Where a party has failed on part of its case, that will generally lead to the making of an appropriate deduction of a proportion of the costs that it can recover."

9. The Court of Appeal's ruling in *BT v Ofcom* (see paragraph 5 above) may cast some doubt on the general approach hitherto adopted by the Tribunal. In reviewing a number of the Tribunal's previous decisions, the Court of Appeal said the Tribunal had been wrong to regard as irrelevant the line of authority culminating in *Regina (Perinpanathan) v City of Westminster Magistrates Court* [2010] EWCA Civ 40. The correct approach established by these cases was, in the Court's view, the following (at 83):

> "Thus, if Ofcom has acted purely in its regulatory capacity in prosecuting or resisting a claim before the CAT and its activities 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."

10. In relation to past CAT decisions on the point, the Court said (at [78]):

> "In general terms, in our judgment, the CAT costs authorities that wholly disregarded the 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."

11. The Court was not attracted by arguments based on the nature of the authority's regulatory function or the precise form of appeal. In this context it said (at [75]):

> "Thus, while there is certainly a distinction between the regulator acting as the primary decision maker as between two market participants, and the regulator acting under legislative authority to make a market determination and a decision as to whether a party has significant market power, in many cases this may be a distinction without a difference. In a market determination case, Ofcom is obliged to make certain decisions between competing positions, just as in a dispute resolution appeal it has to decide between two competing parties. Likewise in a case under sections 120 and 179 of the Enterprise Act 2002, Ofcom may have an obligation to make a decision. It is notable that the local authority has a similar regulatory obligation to decide on a licensing application, the Solicitors' Regulation Authority to prosecute misconduct claims, and the police to seek forfeiture orders where appropriate. As we have said, fine distinctions as to the way in which a regulator appears before a court or tribunal does not seem to us much to assist the debate. It is the substantive nature of the proceedings which matters."

12. This decision was handed down after we had received written submissions from the parties. None of those submissions had questioned the CAT's hitherto generally applied approach to the starting point for an award of costs in a case such as the present. However, in view of the obvious possible relevance of the Court of Appeal's decision in *BT v Ofcom*, we invited further submissions from the parties, which are considered below.

THE PARTIES' SUBMISSIONS IN OUTLINE

13. Pfizer seeks an order that the CMA pay its costs of the Pfizer Appeal, which it estimates to be, at a maximum, £4,705,621.75.[5] Were the Tribunal minded to order a detailed assessment of costs, as Pfizer contends it should, Pfizer seeks an interim payment of £1.3m within 14 days of any such order of the Tribunal.

14. Pfizer submits that it is entitled to all of its costs because it was the successful party overall, and the correct approach is to look at the question of overall success, rather than to atomise by issue. The fact that the market definition/dominance part of the Decision was confirmed by the Tribunal should not have the effect that the CMA was considered to have succeeded on an issue that justified some costs award in the CMA's favour (or some disallowance of Pfizer's costs). In the alternative, a very high percentage of Pfizer's costs should be awarded because Pfizer succeeded on the core and practically significant issues (abuse and penalties). Pfizer further submits that the CMA's conduct in the course of the administrative proceedings, in refusing to engage

[5] As set out in Pfizer's schedule of costs dated 28 September 2018, this includes solicitors' costs of £2,338,239.22 converted from USD 3,054,909.54 at the rate of 1 GBP = 1.30650 US$ shown on Oanda Currency Converter as at 17 September 2018.

with legal points put to it by Pfizer in respect of which the Tribunal subsequently found the CMA to have erred in law, is relevant conduct for the purpose of Rule 104(4)(c) of the Tribunal Rules which the Tribunal should take account of in considering Pfizer's costs application.

15. In relation to the appropriate starting point, Pfizer submits that BT *v Ofcom* does not materially affect its other submissions. It argues first that the principles and authorities set out in the Court of Appeal's decision do not apply in this case as it concerned a situation where Ofcom was acting as a regulatory body obliged to act in furtherance of its duty to regulate as opposed to the CMA taking an infringement decision following a decision to investigate. The CMA had a discretion not to investigate any particular case. The funding arrangements for the CMA and Ofcom were different and the authorities referred to by the Court of Appeal had been specifically considered in the *Eden Brown* case (see above) and found to be inapplicable to competition infringement cases brought by the OFT (predecessor to the CMA).

16. If *BT v Ofcom* did apply to CMA cases under the CA 98, Pfizer claims that in any event it was the successful party and is entitled to its costs under the Tribunal's discretion set out in Rule 104. It repeats its claim that the CMA had acted unreasonably in ignoring the evidence put to it at the administrative stage. As to the alleged 'chilling effect' of awarding costs against an authority, Pfizer says the reverse is the case and not awarding costs would inhibit companies from appealing wrong decisions.

17. In a further submission in response to the CMA, Pfizer emphasises the particular nature of the CMA's competition enforcement powers and the discretionary nature of the CMA's functions in the enforcement of competition law, in contrast to the regulatory functions considered in *BT v Ofcom*. It claims that the CMA had operated for many years without any apparent chilling effect under a costs regime in which it accepted liability for costs in the event of losing an appeal in the CAT. Moreover, Pfizer alleges, the CMA in a parallel case[6] was seeking to recover costs from an appellant company on the basis that it was a private litigant entitled to recover costs on a commercial basis.

[6] *Ping Europe Limited v Competition and Markets Authority*. A Ruling on costs in those proceedings was recently handed down ([2019] CAT 6).

18. Flynn seeks an order that the CMA pay its costs of the Flynn Appeal and the Interim Relief Proceedings which amount in total to £3,071,274.58. Were the Tribunal minded to order a detailed assessment of costs, Flynn seeks an interim payment of 50% of its costs, that is, a rounded-down figure of £1.5m.

19. Flynn submits that it is entitled to all of its costs because it was the clear winner of its appeal. The Tribunal had set aside the CMA's findings on abuse and, in consequence, the penalty imposed by the CMA. That the Tribunal found against Flynn on the issue of dominance should not lead to a different conclusion; alternatively, any reduction to Flynn's costs should be modest because the upholding of the CMA's finding of dominance had no effect on the overall outcome of the appeal, and the Tribunal found that certain of Pfizer's and Flynn's criticisms of the CMA's evidence on dominance were justified. Flynn also draws attention to the CMA's conduct at the administrative stage, and at the hearing before the Tribunal insofar as it adopted positions which were inconsistent with the Decision. Finally, Flynn submits that the natural consequence of its success in the substantive appeal is that it should be awarded its costs of the Interim Relief Proceedings, as Flynn should never have been required to reduce its prices and has suffered financial hardship by being required to do so.

20. In relation to the correct starting point, Flynn also submits that *BT v Ofcom* does not affect its claim for costs. First the Court of Appeal's judgment related to an appeal against a decision by Ofcom under section 192 of the 2003 Act, and not a competition infringement decision, none of which was referred to in the judgment. Secondly, the judgment merely requires the CAT to take the relevant authorities into account and then to decide whether a different approach is justified. The CAT has expressly done this on many occasions in competition infringement cases, most notably in *Eden Brown* (see above). Thirdly, whilst the judgment emphasises the importance of the substantive nature of the proceedings rather than their form, the substantive nature of a competition infringement case was very different from the Ofcom situation considered by the Court of Appeal, in particular because of the CMA's discretion as to whether to investigate a case and make an infringement finding. Fourthly, the CMA never previously claimed any chilling effect in this case; and finally, the CMA acted unreasonably by continuing to adopt a fundamentally flawed approach in the face of clear evidence to the contrary.

21. The CMA's costs in defending the main proceedings totalled £1,870,039.13. The CMA's primary position is that the Tribunal should reserve the issue of costs until after the final determination of any appeals to the Court of Appeal. If, however, the Tribunal is not minded to reserve the issue of costs, the CMA submits that the just outcome in the circumstances of this case would be no order as to costs save for in respect of the Interim Relief Proceedings. In the CMA's submission, the outcome of this case is exceptional: it is neither a clear-cut case where the Decision has been quashed and found unlawful, nor is it one where the Decision has been upheld in full. In support of its contention that there was no clear "winner", the CMA submits that:

(1) The Tribunal dismissed the Pfizer Appeal and the Flynn Appeal in respect of market definition and dominance, and partially allowed them in respect of abuse.

(2) Even in respect of abuse, it could not be said that Pfizer and Flynn scored a clear "win". In the Judgment, the Tribunal emphasised (at [469]) that "this Judgment does not imply any finding by the Tribunal as to whether there has been an abuse by Pfizer or Flynn of their respective dominant positions".

(3) A broad-brush assessment of the length of time and amount of expense spent on the preparation and presentation of the issues gives no clear outcome. For example, the CMA estimates that four of the thirteen hearing days were spent on market definition/dominance, and much of the expert and factual evidence on the issue of abuse was directed to arguments which were ultimately dismissed by the Tribunal.

(4) The respective successes and failures of the parties on the specific grounds of appeal shows how mixed the result in this case was. Pfizer was successful or partially successful on two of its five grounds of appeal. It lost on two grounds and one ground was not determined. Flynn was successful on at best two of its twelve grounds of appeal; it lost on seven grounds and three grounds were not determined.

(5) The parties have all sought permission from the Court of Appeal to appeal the Tribunal's order giving effect to the Judgment.[7]

22. In the further alternative, the CMA submits that there should be an issues-based costs order, such that the CMA is granted its costs of defending Pfizer's and Flynn's claims in respect of market definition/dominance and Pfizer and Flynn are granted a percentage of their costs of challenging the CMA's findings in respect of abuse. Under this approach, the CMA contends that the payment of costs should be stayed pending the final determination of any appeals to the Court of Appeal to ensure that the parties, and in particular the public purse in respect of the CMA, are protected from unnecessary expenditure in the event that any of the appeals are successful. Further and in any event, if costs are to be determined, the CMA submits that it is entitled to its costs of the Interim Relief Proceedings, which amounted to £118,473.85.

23. In relation to the correct starting point (which would only apply in relation to the CMA's further alternative submission), the CMA submits that *BT v Ofcom* requires the Tribunal to reconsider its approach to possible costs awards against a public authority defending a decision in the public interest; that the CMA defended these appeals pursuant to its statutory functions in the public interest and its actions were reasonable; that the starting point and default position should be no order for costs; and there is no unreasonable conduct or bad faith on the CMA's part.

24. The CMA submits it acts as a law enforcement agency, advancing the public interest, and acted in this capacity in defending the appeals. The Tribunal itself recognised the importance of the case for the public interest; the CMA's functions were not the same as those of Ofcom, but *BT v Ofcom* made clear that drawing fine distinctions between regulatory functions was not helpful. The CMA was "*carrying through what was essentially an administrative decision".*

25. The CMA further submits that it did not act unreasonably in this case by defending rather than conceding these appeals. The Tribunal had not found against it on every point and there is no suggestion of bad faith. The system of statutory appeals would be imperilled if authorities were discouraged by fear of undue financial prejudice from

[7] See paragraph 4 and footnote 1 above.

standing by their decisions made in the public interest. This applies even more in cases where, as with the CMA, the authority has a discretion whether to intervene in a particular case.

DECISION

Should the issue be deferred until determination of the appeals?

26. We are not persuaded by the CMA's submission that the Tribunal should reserve the issue of costs until after the final determination of any appeals to the Court of Appeal. The case relied on by the CMA in this context, *AXA PPP Healthcare Limited v CMA* [2014] CAT 23, was one in which the Tribunal ordered a remittal to the CMA after the CMA had conceded the first ground of appeal. The Tribunal reserved costs on the other grounds of appeal, which had not been heard but were likely to be considered by the Tribunal at a later date. That situation is not analogous to the present case, in which full appeals on the merits have been heard. We see no reason to depart from the normal practice of the Tribunal which is to decide the costs of the Tribunal proceedings, even if appeals are in progress.

Should an order for costs be made at all?

27. We next consider the CMA's submission that the just outcome in the circumstances of this case would be for the Tribunal to make no order as to costs. Pfizer and Flynn have opposed this course in their responsive submissions and have re-iterated their views that they were the clear winners of their respective appeals.

28. The CMA has referred us to two previous costs rulings of the Tribunal in which no order for costs was made following appeals on the merits. In *Quarmby Construction Company Limited v OFT* [2011] CAT 34 the appellants' grounds of appeal on liability failed but certain of the grounds of appeal on penalty were upheld, such that the original penalty was reduced by around 75%. The Tribunal's decision to make no order as to costs, primarily on the basis that neither party could be considered a winner in the case, was upheld by the Court of Appeal.[8] In *Durkan Holdings Limited v OFT* [2011] CAT 17 the Tribunal made no order as to costs in circumstances where the appellants brought

[8] As cited at paragraph 7 above.

a partially successful appeal on liability and obtained a reduction in the penalty, but were overall successful on only two of their five grounds of appeal.

29. Neither of those cases is directly analogous to the case at hand, particularly as, in this case, we have set aside the finding of infringement made by the CMA. In any event, the manner in which the Tribunal exercises its discretion in relation to costs awards in any given case will obviously depend on the particular circumstances of the case at hand. We see some force in the CMA's submission that this case is one in which there is no binary result, particularly as we have remitted the issue of abuse to the CMA for re-consideration. Nonetheless, in our view, it cannot fairly be said that there is no "winner" in the case in circumstances where Pfizer and Flynn have succeeded in having the CMA's finding of abuse (and, in consequence, the penalties imposed on them) set aside on the grounds that the CMA made serious errors of law and assessment. We are not persuaded that the circumstances of this case justify a departure from the Tribunal's usual approach that an award of costs should be made.

What should be the correct starting point for our assessment?

(a) The issue

30. We therefore have to decide on what, if any, should be the correct starting point for an award, and in particular whether that should be that costs follow the event, even where the unsuccessful party is a public authority such as the CMA carrying out its statutory functions in the public interest. In deciding this issue, we have given full and careful attention to the Court of Appeal's recent judgment in *BT v Ofcom* and to the parties' respective submissions.

31. The specific issue is whether a competition infringement case decided by the CMA is a "similar regulatory situation" to that in which Ofcom was discharging its regulatory functions in the manner considered by the Court of Appeal in *BT v Ofcom.* That issue has two parts; first whether this is a regulatory situation at all; and second, if it is, whether it is sufficiently similar to that considered by the Court of Appeal. If it is such a similar regulatory situation, then there should be no starting point, or default point, of an order for costs against the CMA and we would only so order if there were particular circumstances in this case that would justify doing so under Rule 104. If it is not, then

the present case falls outside the scope of *BT v Ofcom* and we are not bound by the decision, although we are free to apply its reasoning if we think it appropriate to do so. A broader question is whether the Court of Appeal had the competition infringement regime as a whole in mind when deciding, as it did, in the particular circumstances of *BT v Ofcom.*

(b) Points of guidance

32. The answers to these questions are not totally clear. Nevertheless, there are some points of guidance.

33. On the question of whether the Court of Appeal had competition infringement appeals in mind, it does not appear that the question of the wider competition enforcement regime figured prominently, if at all, in the arguments put to the Court of Appeal. The point is not specifically addressed in its decision. Whilst there was discussion of the Tribunal's judgment in *Tesco v Competition Commission* [2009] CAT 26, that judgment arose from a Market Investigation decision made by the Competition Commission and was not an infringement case. None of the cases on costs relating to the activities of the Office of Fair Trading was referred to by the Court of Appeal and it does not appear that the Court of Appeal was asked to consider whether the general terms of its decision applied to the activities of the CMA in enforcing competition law as successor to the Office of Fair Trading.

34. Some of the more general statements in *BT v Ofcom* 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.

(c) The Eden Brown case

35. As we have noted, cases where the Tribunal, in the context of competition infringement cases, had previously considered the authorities mentioned in *BT v Ofcom* were not

brought to the Court of Appeal's attention. An important example is the *Eden Brown* judgment of 2011. In that case the Tribunal, under the chairmanship of Roth J (now President of the Tribunal), carefully examined the Court of Appeal's *Perinpanathan* judgment, and the cases reviewed in it, together with the observations of Lord Neuberger MR and Stanley Brunton LJ.

36. The Tribunal noted that one of the cases reviewed by Stanley Brunton LJ was the Privy Council case of *Walker v Royal College of Veterinary Surgeons*, in which the successful appellant *had* been awarded the costs of his appeal, for the reason that this was an appeal to a separate body against a sanction awarded by a disciplinary body, rather than a decision made by a regulatory body in the course of its duties.

37. The Tribunal in *Eden Brown* looked carefully at the nature of the OFT's role and activities, and the significance of an appeal to the Tribunal in the context of competition law enforcement framework. Specifically, it said (at [16]):

> "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 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 an 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".

38. This decision shows a careful consideration by the Tribunal of the legal framework, the context of the competition enforcement regime, the nature of the OFT's role within it, and the kind of decision that it makes - involving an assessment of infringement, a decision to that effect and the imposition of a penalty. It also shows that the Tribunal gave careful consideration to its own role in hearing the appeal against the OFT's decision, stressing that the OFT did not bring a case before it merely to obtain the imposition of a penalty. As mentioned above, this consideration took place in the

context of analysis of many of the cases relied upon by the Court of Appeal in *BT v Ofcom.*

39. The present case is not a penalty only appeal, but is also against the substance of the CMA's decision. In addition, the OFT has been succeeded by the CMA. However, the overall legal context and the authority's and the Tribunal's role have not changed. It is far from clear that the judgment of the Court of Appeal in *BT v Ofcom*, which did not, as discussed above, consider the situation of competition enforcement, provides a basis on which we should depart from the established practice of this Tribunal as set out clearly in *Eden Brown*.[9]

(d) Possible differences between the two regimes

40. We have to consider whether an appeal to the Tribunal against a competition infringement decision by the CMA is a 'regulatory situation' at all. Both Flynn and Pfizer argue that the differences between the competition law enforcement regime and the regulatory regimes considered in *BT v Ofcom* are both real and substantial. A key difference, as argued by Pfizer, is that, in a regulatory situation, the authority is obliged by its regulatory duties to take action against a particular person and, if it cannot itself impose any sanction, to apply to a further body, whether a court or a tribunal, to obtain that sanction. In the present case, by contrast, the CMA has a discretion whether to take action against a particular company, and is not obliged to do so in any particular case. Its discretion in this respect was confirmed by the Tribunal in the *Cityhook* case ([2007] CAT 18). The CMA states in response that it is a public authority carrying out its duties in the public interest and should not be penalised for defending its decisions on appeal.

41. The two regimes do appear to have material differences. In the first place, the CMA has a substantial measure of discretion as to how it carries out its statutory duty to "seek to promote competition…for the benefit of consumers". Taking infringement decisions against particular undertakings is one means of giving effect to this function, but the CMA is not obliged by law to act in this way in any given case.

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[9] *Eden Brown* has been applied in subsequent competition infringement cases under the CA 98. See: *Kier Group v Office of Fair Trading* [2011] CAT 33, para 14 and *GMI Construction Holdings plc v Office of Fair Trading* [2011] CAT 36, para 7.

42. A further difference claimed by Pfizer, and again noted in *Eden Brown*, is the nature of the CMA's powers, which are extensive, as shown by the imposition in this case of a very substantial financial penalty of a quasi-criminal nature. As the Tribunal noted, in the passage cited above, these powers are exercised by the CMA through an administrative procedure in which objections are put to the parties accused of infringement, their responses considered and a decision taken. The parties bear the entire cost of their participation in that process, whatever its outcome.

43. What occurs thereafter is not just a review or endorsement of what the CMA has done. 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.

44. 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.

(e) is this a distinction without a difference?

45. We also have to consider the CMA's contention that the features we have identified are merely a fine distinction without, in the Court of Appeal's words, 'a difference'. We note Pfizer's claim that the Court of Appeal was referring in this context exclusively to differences between regulatory situations, not to differences between a regulatory situation and something else. We do not find this approach helpful. The question remains, did the Court of Appeal intend its decision to apply to competition infringement cases?

(f) Our assessment

46. We have considered these competing arguments carefully. Our conclusion is that although the Court of Appeal phrased its decision in *BT v Ofcom* widely (such that it

could apply to all cases in which a public authority defends its decision in the Tribunal), it certainly did not expressly extend its reasoning to competition infringement cases. Such cases appear to us to be different in significant respects from purely regulatory decisions: they were not considered by the Court of Appeal, there was no detailed consideration of the relevant features of the competition enforcement regime and no examination of the respective roles of the CMA and the Tribunal within it. Accordingly, we do not feel that it is appropriate for us, in the current state of the development of the law, to depart from the established jurisprudence of the Tribunal in this area, as summarised in *Eden Brown*, and to reject the starting point that costs should follow the event. We accept that this view is not free from doubt and that it is open to the CMA to seek to raise this on appeal.

(g) Possible 'chilling effects'

47. Given the conclusion that we have reached we do not think it necessary to consider the parties' arguments on any possible 'chilling effect'.

48. We have, however, considered two further points that arise from *BT v Ofcom,* namely the conduct of the authority and possible financial hardship to the Appellants.

(h) The conduct of the CMA

49. On the first point, which we would in any case consider under our own Rules of Procedure, if it were shown that the CMA had acted unreasonably, unfairly or in bad faith, then even if we were wrong in our view that *BT v Ofcom* did not apply to this case, we might nonetheless take a possible award of costs against the CMA as our starting point. However, we do not consider that the CMA acted unreasonably, unfairly or in bad faith in pursuing its investigation or in seeking to defend its decision before us. We note that neither Flynn nor Pfizer claims that the authority acted unfairly or in bad faith, although they each claim that it acted unreasonably in some aspects of the administrative proceedings.

50. Given the complexity of the issues at hand, we do not think the CMA can be criticised simply for not accepting points or arguments advanced by the Appellants. The fact that

some of these have been found by us on appeal to be justified does not speak to the reasonableness or good faith of the CMA's consideration of them at the time. These are matters on which some disagreement is inevitable. We therefore do not accept Flynn's and Pfizer's submissions on this aspect.

(i) Financial hardship

51. On the question of financial hardship to the Appellants, we do not think that in the case of Flynn and Pfizer this consideration arises, and neither party has claimed that it does.

(j) Conclusion

52. For the reasons given, our starting point is that costs should follow the event, even where this involves the CMA as the losing party, but we emphasise that it is only a starting point.

An issues-based approach

53. We must now consider the CMA's further submission that there should be an issues-based approach, that is to say one that takes account of the extent to which each party has been successful on different aspects of the case. Pfizer and Flynn object to this approach but it seems to us that this is clearly appropriate in this case, given that the respective successes and failures of the parties present a mixed picture overall. We have well in mind that the Tribunal Rules permit us to take into account whether a party has succeeded on part of its case, even if it has not been wholly successful (Rule 104(4)(c)).

54. We do not accept Pfizer's and Flynn's submissions that as clear 'winners' they should be entitled to recover all of their costs. The CMA successfully defended the grounds of appeal in relation to market definition and dominance. While Pfizer and Flynn succeeded in having the findings of abuse set aside, they were in fact unsuccessful on the majority of their grounds of appeal, and the issue of abuse has not yet been determined but has, rather, been remitted to the CMA.

55. Whilst overall success is obviously important as far as the Appellants in this case are concerned, it remains the case that very large sums of costs were incurred in respect of

grounds of appeal that were ultimately dismissed or not required to be decided by the Tribunal. The market definition and dominance grounds took up a significant part of the hearing, as did certain of the grounds of appeal on abuse on which Pfizer and Flynn were ultimately unsuccessful.

56. To the extent that Pfizer and Flynn have criticised the CMA's conduct at the administrative stage and/or at the hearing, we said earlier that we reject this criticism. We referred in the Judgment to the importance of this case for the public interest. That the CMA relied on legal arguments at the administrative stage which were ultimately not upheld on appeal is not, in our view, a relevant factor that points to an adverse costs award against the CMA. We referred in the Judgment to the fact that the jurisprudence in this area is not extensive or easily applied, and indeed that a materially relevant case (*Latvian Copyright)* which would have contained useful guidance for the CMA was handed down after the Decision and before the appeals.

57. Accordingly, we consider that it is appropriate to award the parties a proportion of their costs to reflect their overall level of success. Before considering the appropriate proportions, however, we must first consider certain individual aspects of Pfizer's and Flynn's costs, to which the CMA objects.

The CMA's objection to certain individual aspects of Pfizer's/Flynn's costs

58. The CMA has pointed to certain specific aspects of Pfizer's/Flynn's costs as being particularly disproportionate. These are (i) the substantial costs incurred by both Pfizer and Flynn before the publication of the Decision; (ii) Pfizer's costs for its external economics expert; and (iii) the costs of the Kantar survey put forward by Pfizer which, the CMA contends, was of no material assistance to the Appellants' case. We make the following determinations, to be taken into account in any assessment of costs.

59. According to its costs schedule, Pfizer is seeking to recover $622,537.90 (approximately £476,492.84)[10] in solicitors' fees; £42,627.50 in counsels' fees; and £102,006 in experts' fees (a total of £621,126.34) for the period between 17 May 2016 and 6 December 2016 "on the basis that the CMA demonstrated no intention to adjust

[10] This GBP figure is coverted from $622,537.90 using the conversion rate set out in Pfizer's schedule of costs dated 28 September 2018 (shown on Oanda Currency Converter as at 17 September 2018) of 1 GBP = 1.30650 US$. See footnote 5 above.

its position as reflected in the SO". Flynn is seeking to recover £103,007 for the period between 6 July 2016 and 6 December 2016 for costs incurred "prior to and in anticipation of the issuance" of the Decision. These costs are said not to relate to the administrative stage of the proceedings, for which costs are not recoverable (see, for example, *Eden Brown* at [16]). Nonetheless, in our view there is a clear risk of wasted or duplicative costs in respect of work commenced prior to the issuance of the Decision. We have already rejected the Appellants' criticism of the CMA's conduct at the administrative stage and also note that the costs sought by Pfizer and Flynn for work on the notice of appeal subsequent to the issuance of the Decision are in themselves substantial. Had the CMA chosen not to proceed with the issuance of the Decision, such costs would obviously not have been recoverable. As such, we consider the recoverability of amounts claimed for work done prior to the issuance of the Decision to be wrong in principle and accordingly disallow the costs associated with that work (£621,126.34 in the case of Pfizer and £103,007 in the case of Flynn).

60. As to Pfizer's costs of its external economics expert, RBB, we note that, at £698,816.25 (for work done from the date of issuance of the Decision), these costs are substantially higher than the combined total of Flynn's three separate experts (around £400,000) and the amount of costs incurred by the CMA in respect of its single expert (also around £400,000). Although we found Mr Ridyard's expert evidence to be helpful, we consider that, on any view, the amount of costs incurred is disproportionate. We accordingly disallow £300,000 of RBB's costs to bring the maximum recoverable amount (£398,816.25) into line with that of the experts for the other parties.

61. In relation to the costs of the Kantar survey, we do not agree with the CMA that this was of no material assistance, and decline to make any specific disallowance in respect of the amount of costs incurred by Pfizer in that regard (claimed by Pfizer at £43,000).

62. Taking these disallowances into account, we therefore proceed on the basis that the maximum amount recoverable by Pfizer is £3,784,495.41[11](in round figures £3.8 million) and by Flynn is £2,968,267.58[12].

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[11] That is, £705,621.75 (overall amount claimed at the rate set out in Pfizer's statement of costs of 28 September) less £621,126.34 (pre-Decision costs) less £300,000 (RBB deduction).We note in this respect that other exchange rates on the same date used by Pfizer (17 September 2018) produce different GBP figures. It is for the costs judge undertaking a detailed assessment to verify and select the exchange rate to be used.

[12] That is, £3,071,274.58 (overall amount claimed) less £103,007 (pre-Decision costs).

63. From this amount given for Flynn, it is necessary also to deduct the costs it incurred on the Interim Relief Application,[13] which we address separately below, giving a maximum total for Flynn of £2,782,907.10 (in round figures £2.8 million).

Overall success

64. Turning next to the relative successes and failures of the parties, and having regard to the discussion at paragraphs 30 to 57 above, we agree with the CMA's submission that an appropriate overall approach is 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. It appears to us that, on a broad-brush basis, it is fair to say that approximately one third of the assessed costs should be deemed to relate to market definition/dominance, and two thirds to abuse.

65. We therefore have a situation in which, in round figures, and subject always to more detailed assessment, Pfizer's maximum recoverable costs are £3.8 million and Flynn's £2.8 million whilst the CMA has incurred costs of some £1.9 million[14]. Given that we have found the Appellants to have succeeded on some, but not all, of their claims and the CMA to have succeeded on some, but not all, of its arguments in response, it would be open to us to make cross-orders for costs payable by each of Pfizer and Flynn and the CMA, which would then have to be set off against each other. However, we find it easier to make a single order for the CMA to pay a proportion of the costs of the Pfizer Appeal and the Flynn Appeal and to reflect the parties' varying fortunes in an overall deduction from Pfizer's and Flynn's maximum recoverable costs.

66. Given the linked nature of the Appellants' respective appeals and the allocation of issues and tasks between them, the most obvious proportional split between the two Appellants of any liability for the CMA's costs is one half each. As we have found that the CMA is entitled to recover one third of its claimed costs (subject to detailed assessment) this means that Pfizer and Flynn would notionally each pay one sixth of the CMA's assessed costs and these notional payments would be deducted from the

[13] £185,360.48. See paragraph 81 below.
[14] This sum for the CMA's costs does not include the costs incurred by the CMA in opposing Flynn's application for interim relief. That sum, referred to at paragraph 22 above, is £118,473.85.

amounts payable by the CMA. The same 50:50 split applies to any award in their favour.

67. The result of this is that Pfizer and Flynn should each be awarded two thirds of their maximum recoverable costs less one sixth of the CMA's maximum allowable costs, subject in each case to detailed assessment as provided below if not agreed. As a very rough calculation, and before any more detailed assessment, this means in the case of Pfizer an entitlement to approximately 58% of its maximum allowable costs (in round figures £2.22 million, being two thirds of £3.8 million less one sixth of £1.9 million)[15] and in Flynn's case approximately 55%, (in round figures £1.54 million, being two thirds of £2.8 million less one sixth of £1.9 million).[16]

Proportionality and the indemnity principle

(a) The overall level of the Appellants' costs

68. Although the precise amount of recoverable costs will be a matter for the costs officer of the Senior Courts of England and Wales if the parties are unable to reach agreement, we should state our concern at the level and scale of the costs incurred by the Appellants in this case. It appears to us that the Appellants' costs are disproportionately high. There is a considerable disparity in the respective levels of costs incurred by Pfizer and Flynn, on the one hand, and the CMA on the other. We agree with the CMA's submission that while the Appellants are free to spend whatever they wish in bringing their appeals, it does not follow that the CMA should be required to bear the full burden of their legal costs out of public funds.

69. In the light of the limited information available to us in the costs schedules, we are not in a position ourselves to form a view on the precise level of costs that would be reasonable and proportionate, but we would expect the costs officer to scrutinise whether the costs were reasonably and proportionately incurred. We would expect this detailed scrutiny to lead to further substantial discounts to the high level of costs contended for by Pfizer and Flynn in addition to the specific adjustments that we have made above.

[15] i.e. £2.53m less £0.32m.
[16] i.e. £1.87m less £0.32m.

(b) transparency of Pfizer's professional fees

70. We also have concerns about Pfizer's statement that its global fee arrangement with Clifford Chance is confidential, and the lack of transparency in relation to the manner in which the allocation of fees arising from that agreement has apparently been made. The level of recoverable fees sought by Pfizer in this regard should, in our view, even after the discount we have made, be carefully scrutinised, bearing in mind the need to comply with the indemnity principle, by which any recovery of costs must be limited to costs that have actually been incurred in relation to these appeals.

(c) The CMA's in-house lawyers' charging rates

71. Finally, each of Pfizer and Flynn have objected as a matter of principle to the CMA's seeking to recover its in-house costs by reference to the Solicitors' Guideline Hourly rates set by HM Courts and Tribunal Service (the "GHRs"), to the extent this does not reflect the CMA's actual costs of defending the appeals.

72. It is not clear whether Pfizer objects to the CMA seeking any payment at all in respect of the costs of CMA employees who happened to work on the case, as they are civil servants doing their job based on fixed salaries or merely to the manner of its calculation.

73. We note the reference by the CMA to the decision of the Court of Appeal in *Re Eastwood (dec'd); Lloyds Bank Ltd v Eastwood and others* [1975] Ch 112, the principles set out therein and the development of those principles in subsequent cases.[17] We also note the CMA's reference to the Tribunal's recent *Intercontinental Exchange* ruling[18]. The Tribunal's very recent ruling in *Ping Europe Limited v Competition and Markets Authority* [2019] CAT 6 deals with this point explicitly. The approach set out in the *Ping* ruling is that unless there is a clear indication that the use of a notional hourly rate for internal legal costs breaches the indemnity principle, the Tribunal is not going to probe further and require a detailed assessment of the actual direct and indirect costs involved.

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[17] *Leopold Lazarus v Secretary of State for Trade and Industry* [1976] Costs LR 62; *Maes Finance Ltd v WG Edwards & Partners* [2000] 2 Costs LR 198.
[18] [2017] CAT 8 [at 43].

74. We adopt the same approach here. The hourly rates applied by the CMA (the GHRs) do not on their face seem unreasonable and we regard them as a fair basis for further assessment. As with those of Pfizer and Flynn we expect the CMA's cost claims to be scrutinised on a detailed assessment by the relevant costs officer to ensure that they reflect time reasonably spent by the individuals concerned and are not otherwise disproportionate. Subject to that we make no further direction on this matter.

INTERIM PAYMENT

75. It is the Tribunal's normal practice[19], in cases where a party is ordered to pay all or part of the other parties' costs and the final amount has to be either assessed or agreed, for an interim payment to be ordered on account of the final award, and indeed the Appellants have asked for this in the present case.

76. We see no reason to depart from the normal practice in this case and accordingly order the CMA to pay on account of the final award of costs a proportion of what we would expect the Appellants to recover on a final award. Pfizer has asked for an interim award of £1.3 million against an overall total claimed of some £4.7 million (roughly equivalent to 28%), and Flynn asked for half of its total of some £3 million, i.e. some £1.5 million, to be paid on account. We note that Flynn seeks a higher interim payment than does Pfizer, despite its overall costs claim being lower.

77. We have already disallowed some parts of these amounts claimed, and found that the appropriate basis for an award should be that Pfizer should receive no more than 58% and Flynn 55% of their maximum allowed recoverable costs, subject to detailed assessment if not agreed. In round figures that would mean, without the further reductions that we have said may be necessary, Pfizer receiving approximately 58% of £3.8 million i.e. £2.2 million and Flynn approximately 55% of £2.8 million ie £1.554 million. Applying the same proportions as were originally submitted of interim amount to total claim (approximately 28% and 50%) would thus lead to interim awards for Pfizer of £611,000 and Flynn of £772,000 in round thousands.

[19] For a recent example, see the Tribunal's ruling in *BT/Cityfibre v Ofcom* [2018] CAT 1 at paras 60-62. The Court of Appeal's decision discussed earlier does not affect this point.

78. However, we have expressed strong concern as to the reasonableness and proportionality of both Appellants' cost claims and as to the transparency of Pfizer's professional fee arrangement and ask that these aspects be taken into account on any detailed assessment. This means we doubt that the round figures we have referred to would be the amounts that would emerge from such detailed scrutiny and would instead anticipate further substantial reductions in what the Appellants might ultimately recover.

79. Taking all these considerations into account we think it appropriate to make interim awards of £200,000 in the case of Pfizer and £250,000 in the case of Flynn, subject in Flynn's case to the interim payment to be made by it to the CMA as explained below, and subject to this requirement being stayed according to paragraph 92 below.

COSTS OF THE APPLICATION FOR INTERIM RELIEF

80. We now consider the question of the costs of the application made by Flynn for interim relief from the CMA's requirement that it should reduce its prices in compliance with the Decision. Flynn's application was unsuccessful but the Tribunal decided subsequently that the question of costs should be reserved pending the outcome of the main appeals that had by then been brought by both Flynn and Pfizer.[20]

81. Flynn asks for its entire costs to be paid (£185,360.48) on the grounds that it has been successful in its main appeal, the Decision has been set aside, and it should never have been required to reduce its prices. The CMA similarly asks for its entire costs (£118,473.85) to be awarded against Flynn on the grounds that it was successful in relation to the application for interim relief. Pfizer makes no claim for costs in relation to this aspect of the case.

82. We note first that although the application for interim relief and the decision to defer the question of costs were made by the Chairman sitting alone, given the then constitution of the Panel hearing this case, the Tribunal as now constituted is fully competent to decide the question of these interim application costs and we do not understand this to be disputed by any party.

[20] [2017] CAT 13.

83. Flynn's case is essentially that it was successful on the merits of the main appeal. We have already explained that we do not find that any party was completely successful and have noted in particular that a number of Flynn's points of contention were not accepted by the Tribunal. In any event, the application for interim relief was considered and decided in the light of the circumstances then applying and was made principally on the basis of the balance of harm.[21] Although, as Flynn has pointed out, the Tribunal observed when ordering that costs be reserved[22] that Flynn's application for interim relief was not entirely without merit and that the decision was finely balanced, that balance related to the different categories of harm under consideration, not the relative merits of each party's case in the main action, which in any case had not begun at that time. This is not a case where, such as in the *Genzyme* case[23] cited by Flynn, the merits of decision on the main appeal are of great assistance in deciding the costs of an interim application for relief.

84. We therefore agree with the CMA on this point and allow the award of costs as claimed by the CMA, but again subject to further agreement, and in any event a detailed assessment by the relevant costs officer of the amounts claimed by the CMA.

INTERIM PAYMENT

85. The CMA has not requested any interim payment of costs from Flynn, but in view of our award of interim payments by the CMA in favour of Pfizer and Flynn, we think it fair and reasonable to exercise our discretion under Rule 104 and make a corresponding order in the CMA's favour so that in due course this sum may be netted off against what the CMA must pay. Having considered the likely amount to be finally awarded, and bearing in mind that the CMA's claim for costs in relation to the Interim Relief Application does not appear to be excessive, we order that Flynn pay to the CMA £55,000 (i.e. approximately half the amount claimed) as an interim payment on account of costs subject to this requirement being stayed according to paragraph 92 below.

[21] [2017] CAT 1 at paras 102-112.
[22] [2017] CAT 13 at para 7.
[23] [2003] CAT 9.

INTEREST

86. We do not accept the CMA's request for interest to be paid on the amount awarded as the Tribunal does not have the power to award interest on costs.[24]

ORDER

87. For the reasons given we order the CMA in respect of the main proceedings to pay to Pfizer and Flynn respectively such sums as shall be agreed on the basis of the terms of this ruling or, failing such agreement, as shall be set by a costs officer of the Senior Courts of England and Wales in accordance with rule 104 (5) (b) of the Tribunal's Rules of Procedure; and to pay to Pfizer £200,000 and to Flynn £250,000 as interim payments less in Flynn's case £55,000 payable as an interim payment by Flynn to the CMA (see below).

88. In respect of the Interim Relief Application we order Flynn to pay to the CMA the full amount of the CMA's costs less such deduction as shall be agreed having regard to the terms of this ruling or, failing such agreement, shall be set by a costs officer as above. We order Flynn to pay to the CMA £55,000 as an interim payment, as provided at paragraph 85 above.

STAYING THE RULING

89. Finally, the question arises whether this Ruling should have immediate effect. We rejected the CMA's request to defer consideration of the issue of costs pending determination of the appeals of the Judgment currently pending before the Court of Appeal.[25] The CMA also requested that the effect of any award be stayed to avoid unnecessary risk to the public purse.[26] We have considered carefully whether in this case there are grounds for delaying the practical effect of this Ruling.

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[24] See para 23 of the Tribunal's costs ruling in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 27.
[25] See paragraph 26 above.
[26] CMA's submissions on costs dated 17 September 2018, para 21(c). See paragraph 22 above.

90. The normal rule under the CPR is that an award of costs subject to detailed assessment is not stayed pending an appeal unless the court so orders and that such an order will normally only be made in particular circumstances. This is to ensure that the question of costs is resolved as soon as possible: a stay is only appropriate if injustice would otherwise be caused. The Tribunal is not governed by the CPR in this respect (although it obviously pays attention to the principles underlying the CPR's approach) and has a wide discretion. It is open to any party, in the event of an appeal, to apply either to us or to the Court of Appeal to stay the effect of any award.

91. Every award of costs against the CMA would, if implemented when an appeal is pending, carry a level of impact on, or risk to, the public purse. This Tribunal does not, either, as a matter of course, stay an award of costs pending the conclusion of an appeal. However, in the specific circumstances of this case, in particular, our direction that the issue of abuse be remitted to the CMA but where the basis of the legal test to be applied in that process is, itself, to be considered by the Court of Appeal, and where the amounts of costs claimed are sizeable, we consider that it is fair that, as the the CMA argues, the implementation of this Ruling should be stayed.

92. Accordingly, in the exercise of our discretion under Rule 104(2), we order that the implementation of this Ruling, including the detailed assessments and interim payments that we have required to be made, should be stayed until the Court of Appeal has ruled on the appeals in this case.[27]

[27] See paragraph 4 and footnote 1 above.

Peter Freeman CBE QC (Hon) Paul Lomas Prof. Michael Waterson
Chairman

Charles Dhanowa OBE QC (Hon) Date: 29 March 2019
Registrar