Case No: A3/2018/0709

Neutral Citation Number: [2018] EWCA Civ 2542

IN THE COURT OF APPEAL
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
THE HONOURABLE MR JUSTICE SNOWDEN, DR CLIVE ELPHICK AND PROFESSOR JOHN CUBBIN

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 14 November 2018

Before:
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEGGATT
and
LORD JUSTICE HADDON-CAVE

- - - - - - - - - - - - - - - - - -

B E T W E E N

BRITISH TELECOMMUNICATIONS PLC

Applicant/Respondent

and

THE OFFICE OF COMMUNICATIONS

Respondent/Appellant

- -

Ms Dinah Rose QC, Mr Josh Holmes QC and Mr Mark Vinall (instructed by the Office of Communications) appeared for the Appellant, Ofcom

Mr Daniel Beard QC and Mr Robert Palmer (instructed by BT Legal) appeared for the Respondent, BT

Hearing date: 23rd October 2018

- -

Judgment

Sir Geoffrey Vos, Chancellor of the High Court (delivering the judgment of the court):

Introduction

1. The issue raised by this appeal is whether the Competition Appeal Tribunal (the "CAT") was right to adopt the starting point that costs should follow the event in an appeal brought under section 192 ("section 192") of the Communications Act 2003 (the "2003 Act"). The Office of Communications ("Ofcom") is appealing the CAT's decision dated 25th January 2018 (the "Costs Decision"), which required Ofcom to pay 50% of the bulk of the costs incurred by British Telecommunications PLC ("BT") in bringing its successful section 192 appeal against Ofcom's 2016 Business Connectivity Market Review (the "Market Review").

2. In essence, the CAT's main substantive determinations ([2017] CAT 25) were that Ofcom had been wrong to conclude that it was appropriate to define a single product market for contemporary interface symmetric broadband origination ("CISBO") services of all bandwidths, and that the "Rest of the UK" outside London comprised a single geographic market. These decisions concerned Ofcom's regulation of the "business connectivity" market.

3. Ofcom's main submission was that the CAT ought to have proceeded on the basis that costs would not ordinarily be awarded against Ofcom in the context of a successful appeal under section 192 in the absence of unreasonableness or bad faith. It submitted that the starting point adopted by the CAT was inconsistent with authorities in other contexts and with the previous consistent practice of the CAT prior to its decision in *British Sky Broadcasting Ltd v. Office of Communications* [2013] CAT 9 ("*PayTV*"). Ofcom submitted that *PayTV*, like the CAT's Costs Decision which followed it, was wrong in law and based on a fundamental misunderstanding of the applicable authorities.

4. Conversely, BT submitted that *PayTV* and the Costs Decision were right to draw a distinction between appeals against decisions made by Ofcom under its dispute resolution function conferred by section 185 of the 2003 Act ("dispute resolution appeals") on the one hand, and appeals against decisions made by Ofcom in the regulatory context ("regulatory appeals") on the other hand. BT submitted that the appeal in the present case was a regulatory appeal from Ofcom's market determinations following its decision to impose conditions on BT under sections 45, 47 and 87-91 of the 2003 Act and its conclusion that BT had significant market power ("SMP"). As such, the authorities from other contexts relied upon by Ofcom were inapplicable and certainly not binding on the CAT, and, properly understood, the earlier authorities were only consistent with a "no order as to costs" starting point for dispute resolution appeals.

5. It may be noted at the outset that Lord Neuberger MR said in *Regina (Perinpanathan) v. City of Westminster Magistrates' Court* [2010] EWCA Civ 40, [2010] 1 WLR 1508, ("*Perinpanathan*") at paragraph 75, admittedly in a slightly different context, that there were respectable arguments both (a) for a presumption that a successful party should recover some costs against the authority (the police in that case), and (b) for a starting point that costs should only be recoverable in so far as they were the result of unreasonable conduct by that authority (see paragraph 55 below).

6. Neither side 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. In our view, however, this aspect will need to be considered further once the disputed legal position is resolved. We shall return to it in due course.

7. Before returning to deal with the central issue as to the correct costs starting point, we shall consider (a) some of the essential procedural background, (b) the applicable procedural rules, (c) the CAT's Costs Decision in this case, (d) a brief summary of the parties' detailed arguments, and (e) the authorities that underlie the legal dispute between the parties.

Procedural Background

8. Ofcom undertook the Market Review pursuant to sections 84 and 84A of the 2003 Act. It made its Final Statement on 28th April 2016 (the "Final Statement"). Under the 2003 Act, Ofcom was required (a) to identify the relevant product and geographic market(s) in accordance with EU law and guidelines (section 79), (b) to carry out an analysis as to whether there was a lack of effective competition in the defined market by reason of an entity's dominance (section 80), and (c) to decide what remedies to impose.

9. On 29th June 2016, BT appealed to the CAT in relation to some of Ofcom's decisions contained in the Market Review. BT had also challenged Ofcom's proposed remedies, but that issue was adjourned for a future hearing. Between 10th April and 24th May 2017, the CAT heard evidence regarding BT's challenges to Ofcom's decisions concerning market definition.

10. In a short ruling on 26th July 2017, the CAT quashed certain determinations made by Ofcom concerning market definition in its Final Statement. As a result, the remedies hearing became unnecessary. The CAT's full reasons were given in its decision dated 10th November 2017.

11. The CAT's Costs Decision was promulgated on 25th January 2018. The CAT awarded BT 50% of its recoverable costs, after discounting those costs relating to the reports of one of BT's experts, Dr Bruno Basalisco, and those costs incurred for a hearing on 20th November 2017, in respect of which BT was ordered to pay Ofcom's costs. The CAT decided that the starting point for an assessment of costs under Rule 104(4) ("Rule 104(4)") of the Competition Appeal Tribunal Rules 2015 (the "Rules") was that costs should follow the event. The CAT also ordered Ofcom to pay £500,000 on account.

12. On 9th March 2018, the CAT granted Ofcom permission to appeal the Costs Decision on the question of the correct starting point. It observed that Lewison LJ had granted permission to appeal the costs decision in *PayTV*, even though that appeal never took place because the substantive judgment was overturned by the Court of Appeal in *British Sky Broadcasting Ltd v. Office of Communications* [2014] EWCA Civ 133. The CAT thought that the Court of Appeal's definitive guidance in this case would be valuable to both the CAT and the regulated sector in general, bearing in mind that the costs of appeals against regulatory decisions are large, and appeals are not infrequent.

The Competition Appeal Tribunal Rules 2015

13. Rule 104(2) of the Rules gives the CAT the discretion to make "any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings".

14. Rule 104(4) provides the following list of factors that the CAT may take into account when making an order under Rule 104(2) determining the amount of costs:-

> "(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."

15. It may be noted that, unlike Rule 104, the general rule in normal civil proceedings is defined by CPR Part 44.2(2)(a) as being that "the unsuccessful party will be ordered to pay the costs of the successful party". Thereafter, however, CPR Parts 44.2 and 44.3 makes similar factors to those included in Rule 104(4) relevant considerations. It is particularly noteworthy that CPR Part 44.2(4)(b) is in identical terms to Rule 104(4)(c). Even though the statutory general rule is the general discretion in Rule 104(2) rather than costs following the event, Rule 104(4)(c), like the CPR, allows the CAT to take account of whether a party has succeeded on part of its case, even if that party has not been wholly successful.

The CAT's Costs Decision

16. The CAT first considered Rule 104 and CPR Part 44 and cited *Quarmby Construction Co Ltd v. OFT* [2012] EWCA Civ 1552 as having held that the CAT had a wide and general discretion as to costs under the previous Rule 55, which had been substantially reproduced by Rule 104. The CAT then said that "[a]lthough there is no express starting point in Rule 104, for certain categories of case the [CAT] now has an established practice in relation to costs". It gave an appeal against Ofcom's decision resolving a price dispute under section 185 of the 2003 Act as an example of a case where the starting point was that there should be no order for costs against Ofcom if it had acted reasonably and in good faith (citing *The Number (UK) Ltd v. Ofcom* [2009] CAT 5 at paragraphs 5-6 (the "*Number*")). It said, however, that in the case of infringement decisions and applications for judicial review of merger decisions and market investigations under sections 120 and 179 of the Enterprise Act 2002, the CAT had taken the view that the starting point should be that costs should follow the event, citing the CAT's decision in *Tesco plc v. Competition Commission* [2009] CAT 26 ("*Tesco*").

17. The CAT then made the point that *Bradford MDC v. Booth* [2000] 164 JP 485 ("*Bradford*") had been distinguished by the CAT in *Tesco*. Moreover, the CAT in *PayTV* had considered the same arguments, and had still held that the starting point under section 192 should be that costs follow the event. The Costs Decision cited from each of *Bradford*, *Baxendale-Walker v. Law Society* [2007] EWCA Civ 233 ("*Baxendale-Walker*"), and *Perinpanathan*. Despite the fact that the CAT accepted that it was not bound to follow its own *PayTV* decision, it decided to do so (citing Gloster J's decision in *Lornamead Acquisitions Ltd v. Kaupthing Bank HF* [2011] EWHC 2611 (Comm) in support of judicial comity). It concluded as follows at paragraph 29:-

> "We have carefully considered Ofcom's arguments and, in particular, Ofcom's criticism of the [CAT's] analysis of the relevant authorities in [*PayTV*]. Ofcom has not convinced us that the [CAT] erred in the analysis of the authorities it undertook in [*PayTV*]. Nor are we persuaded that the [CAT] erred in taking the view that the appropriate starting point in section 192 appeals is that costs should follow the event. In the light of those considerations and in the interests of judicial comity and the deployment of judicial resources, we consider the appropriate course is to follow [*PayTV*] and to proceed on the basis that the starting point is that costs follow the event."

18. The Costs Decision then considered in detail how it should exercise its discretion in the light of other relevant factors including those in Rule 104. The CAT said that, whilst it

did not think that the "chilling effect" argument advanced by Ofcom should displace the starting point that costs should follow the event, it did think it was relevant when considering whether to depart from the starting point having regard to the parties' success or failure on particular issues.

19. The CAT also referred to the statement produced by Ofcom's General Counsel, Ms Frances Weitzman, explaining how Ofcom operates within a budget subject to an overall expenditure cap set by the Treasury, and the potentially damaging effect that a high award of costs would have on Ofcom's work. It accepted Ms Weitzman's evidence as a true statement of her belief as to the consequences of an adverse costs order against Ofcom, but observed that operating within a budgetary cap was a restraint shared by most public authorities. The CAT also referred to BT's submission (which was repeated before us) that Ofcom routinely seeks to recover its own costs from other parties if it is successful in litigation.

Ofcom's submissions

20. In support of its sole ground of appeal, namely that the Costs Decision adopted the wrong starting point, Ofcom submitted, as we have said, that the CAT had based its decision on a fundamental misunderstanding of the applicable authorities. We will deal with those authorities in some detail below. In addition, however, Ofcom submitted that a "costs follow the event" starting point was inconsistent with the regulatory framework and risked having a chilling effect on regulation. Ofcom submitted that it is charged with supervising the communications sector and is required to take decisions in the public interest and in the interests of consumers. Operators participate in the sector on the basis that they accept Ofcom's regulation and must fund its costs. Moreover, the EU and Parliament have determined that the very large operators who control the infrastructure need to be subject to *ex ante* regulation. Regulatory decisions are often appealed on the merits. Once Ofcom has made its decisions on the basis of representations made to it, there is a full adversarial trial which can show up honestly made errors and omissions as a result of the new evidence at the trial which is tested in cross-examination. Since it is hard for the CAT to understand what the evidence looked like before the contested appeal hearing, it should start from the position that Ofcom will only have to pay the costs if it behaved unreasonably or in bad faith.

BT's submissions

21. BT emphasised that the starting point did not amount to a presumption, as the CAT had correctly noted at paragraph 30 of the Costs Decision. As the CAT had said in *Merger Action Group v. Secretary of State for Business Enterprise and Regulatory Reform* [2009] CAT 19 ("*Merger Action Group*") at paragraph 19: "[i]t 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…".

22. BT elaborated on what it submitted was the important distinction between dispute resolution appeals and regulatory appeals. In deciding a dispute resolution appeal, Ofcom was performing a unique quasi-judicial role under section 185 of the 2003 Act. As Lord Sumption explained at paragraph 32 in *British Telecommunications plc v. Telefónica O2 UK Ltd* [2014] UKSC 42, section 190 of the 2003 Act distinguished between Ofcom's powers in the course of dispute resolution to declare the rights and obligations of the parties (section 190(2)(a)), to fix the terms of transactions between the parties (section 190(2)(b)) and to impose an obligation to enter into a transaction on

terms fixed by Ofcom (section 190(2)(c)). The first power was plainly adjudicatory, whilst the second and third were regulatory.

23. In this case, Ofcom was imposing regulation and conditions on BT following its conclusion that it has SMP. Ofcom's own decision was directly challenged on the appeal to the CAT. In voluntarily defending a decision it had made pursuant to its public functions, it must face the possibility of an adverse costs order just as any other public authority defending an appeal or judicial review of its decision. The threshold for an appeal to succeed was high, so that the CAT could not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong (see *BT v. Ofcom* [2014] EWCA Civ 133 at paragraph 88).

24. BT submitted that authorities relied upon by Ofcom were all explicable by the distinction between Ofcom acting in its dispute resolution capacity and in its regulatory capacity. The CAT had been entirely justified in following *Tesco* and *PayTV* in deciding that the starting point for awards of costs when Ofcom's regulatory decisions were appealed to the CAT was that costs follow the event.

25. BT submitted that it was fairer that the costs of challenging a flawed regulatory decision should be shared by all those within the regulated sector (by way of administrative charges and licence fees) than that they should be borne entirely by the individual challenger (see *PayTV* at paragraph 13).

26. BT asked us to note that there was no evidence that there had in fact been any "chilling effect" since *PayTV* in 2013. Costs orders have not been made routinely against Ofcom as it suggested. Ofcom would anyway have several possible means of funding litigation whatever the correct costs starting point.

27. BT also argued in its written skeleton, although not orally, that a Government consultation in 2013 had specifically canvassed the possibility of changing the Rules applicable to costs so as to provide the starting point suggested by Ofcom, and an asymmetric rule that if Ofcom were successful it would recover its costs save in exceptional circumstances. Ofcom supported those changes, and yet they were not made. We can say at once that, whilst this may be a compelling forensic point, it can hardly affect the position if it were to be held that the Costs Decision proceeded upon the basis of an erroneous view of the applicable law.

The relevant authorities

28. The parties are broadly agreed as to the relevant authorities. It is useful to consider them as Ms Dinah Rose QC, leading counsel for Ofcom, did in her oral submissions, in strictly chronological order.

Bradford MDC v. Booth [2000] 164 JP 485

29. *Bradford* was an appeal by way of case stated from a costs order made by magistrates against a local authority after the magistrates had allowed an appeal against a licensing decision made by that authority, where it had acted neither unreasonably nor in bad faith. The Lord Chief Justice, Lord Bingham, recited first that section 64 of the Magistrates' Courts Act 1980 gave the magistrates a discretionary power to make the costs order it thought just and reasonable (which Ms Rose submitted was similar to Rule 104(2) in this case, which allows the CAT to make any order it thinks fit). At paragraph 22, Lord Bingham held that the magistrates had misdirected themselves in relying on the principle that costs should follow the event. He then summarised the proper approach to "questions of this kind" in the following three 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."

30. Ms Rose relied particularly upon Lord Bingham's statement that the court should consider specifically the need to encourage public authorities to "make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest". Conversely, Mr Daniel Beard QC, leading counsel for BT, adopted the distinctions that had been drawn between *Bradford* and regulatory decisions in *Tesco*, as applied in *PayTV*. He said that the position was different where, as in *Bradford*, the appeal was a *de novo* rehearing and where the court exercised an original jurisdiction of its own. That was to be contrasted with the present case, where the CAT had identified clear, material errors in Ofcom's decision, and Ofcom had then defended its erroneous decision without recognising that those errors had been made.

31. It is undoubted that the legal background to the appeal in *Bradford* is not the same as a regulatory appeal from a market determination made by Ofcom. We will, however, return to the relevance of the principles enunciated by Lord Bingham to the situation in this case in due course.

British Telecommunications v. Director General of Telecommunications (RBS backhaul) [2005] CAT 20 ("*RBS backhaul*")

32. *RBS backhaul* was an appeal by BT to the CAT (Sir Christopher Bellamy and two members) under section 192 of the 2003 Act in respect of a dispute between BT and Vodafone regarding wholesale connections between their networks resulting in a direction made by the Director General. BT (for whom Mr Gerald Barling QC, as he then was, acted) submitted that it was hard to see any principled reason why Ofcom should not be liable for BT's costs, since BT had been successful on a relatively clear-cut point of law where Ofcom had fallen into error. Ofcom submitted that there was a general principle that public authorities should be encouraged to "make and stand by reasonable decisions and should not be discouraged from doing so by the risk of substantial costs orders against them". But Ofcom actually relied in support of that submission on paragraphs 40 and 41 of *IBA Health Limited v. Office of Fair Trading: Costs* [2004] CAT 6 ("*IBA Health*"). Mr Beard, however, asked us to note that *IBA Health* was a case about a merger decision, and that it was now established that in such cases the starting point was that costs should follow the event.

33. Ultimately, the CAT emphasised in *RBS backhaul* the wide discretion that the predecessor of Rule 104 gave to the CAT, and that its decisions as to costs should not be allowed to harden into rigid rules. It held that, as appeals under the Competition Act 1998 made clear, there was no presumption under Rule 55 that costs should necessarily be borne by the losing party. The CAT took into account a number of factors including that, in a regulated industry, BT and other principal parties would be in a constant regulatory dialogue with Ofcom on a wide range of matters, and that BT was routinely incurring regulatory costs that were not recoverable. The CAT said this at paragraphs 62-3:-

> "62. … Our judgment is that where OFCOM has determined a dispute in accordance with the procedure in the 1997 Regulations, and could have been appealed against by either side, it would not be right to order OFCOM to pay BT's costs in circumstances where OFCOM defended the appeal entirely reasonably and wider public interests were involved. BT has benefited commercially from the stance which it legitimately took. We do not consider that BT will suffer material financial hardship if the costs of this case are treated as part of the general regulatory costs which BT incurs by virtue of the fact that it has significant market power.
>
> 63. We do not accept that, in those circumstances, our view as to costs would have a "chilling effect" on the bringing of appeals by companies in the position of BT. On the contrary, we have some concern at this early stage of the Tribunal's jurisdiction under the 2003 Act that an order against OFCOM would have a "chilling effect" in the opposite direction by making OFCOM less resolved to defend its decisions, or more ready to compromise, when faced with appellants with market power and large financial resources. Any such pressure on OFCOM would not be in the public interest."

34. Mr Beard submitted that *RBS backhaul* was distinguishable from the present case as it was a dispute resolution case. And it is true that the CAT made clear at paragraph 50 of its decision, before dealing with what it saw as the applicable principles, that it was turning "to consider the application of rule 55 [to] the circumstances of this particular case."

Hutchison 3G (UK) Ltd v. Ofcom [2006] CAT 8 ("*Hutchison 3G*")

35. In *Hutchison 3G*, the CAT (Mann J and two members) had partially upheld an appeal by Hutchison 3G under section 192 in respect of a determination by Ofcom that it had significant market power. Hutchison 3G submitted at paragraph 15 that *RBS backhaul* (with its 'no order as to costs' starting point) was distinguishable on the ground that it was decided on the basis of its particular facts and that it was a dispute resolution appeal. That submission was seemingly rejected at paragraph 41 where the CAT said in relation to *RBS backhaul* that: "unlike the position under the CPR, there is no *prima facie* rule that the unsuccessful party pays. That doubtless reflects the fact that the public interest has a larger part to play in litigation in this Tribunal than in most civil litigation governed by the CPR."

36. Thereafter, however, the CAT said that the correct approach was not to proceed by way of analogy with other cases and that it should apply the clearly established principle that costs have to be determined on a case by case basis (see paragraph 42). Ms Rose fairly accepted that this meant that one could not extract from *Hutchison 3G* any particular starting point, though she did rely on what was said at paragraphs 45-7 about regulatory decisions generally as follows:-

> "45. None of the other relevant factors detracts from that conclusion [no order as to costs], in our view. Indeed, they probably reinforce it. We reiterate that this appeal took place in the context of a new European regulatory framework for electronic communications networks and services which entered into force in the United Kingdom on 25 July 2003 and was the first appeal in the context of the detailed market reviews required within that framework to be undertaken by each NRA. In particular we note that under that framework, the Decision was made in the context of a market review which the Director General of Telecommunications (OFCOM's predecessor) was obliged to carry out in the public interest. We also note that the Decision was endorsed by the European Commission. Whilst this context of itself might not mean that OFCOM should not pay costs if it gets something wrong and loses an appeal, it must be borne in mind that so far as OFCOM is concerned this is not commercial litigation.
>
> 46. This was a case in which wider public interests were at stake, not just the private interests of H3G. In particular, the Tribunal notes that the starting point of a determination of [significant market power] is the definition appearing in Article 14(2) of the Framework Directive … The public interest element means that costs might not follow the event to the same extent as in other litigation."
>
> 47. The point relied on by OFCOM that an order for costs against OFCOM at this early stage under the 2003 ACT may have a "chilling effect" also supports the order that we propose to make, even if it would not, by itself, be sufficient to justify depriving [Hutchison 3G] of costs to which it might otherwise be entitled (as to which we do not express a view)."

37. Mr Beard relied on paragraphs 43 and 44 of the CAT's decision in *Hutchison 3G* as demonstrating a "costs follow the event" starting point in a regulatory appeal. In our judgment, however, that would not be a justifiable interpretation. We agree with Ms Rose's submission that *Hutchison 3G* does not advance a case for a starting point at all. It simply emphasises the wide discretion and the regulatory context in which the appeal came to the CAT, which led it ultimately to make no order for costs.

Baxendale-Walker v. The Law Society [2007] EWCA Civ 233, [2008] 1 W.L.R. 426

38. *Baxendale-Walker* was an appeal to the Divisional Court and thence to the Court of Appeal from a decision of the Solicitors' Disciplinary Tribunal under the Solicitors Act 1974. The costs power in section 47(2) allowed the Tribunal to make "such order as it may think fit". The Court of Appeal decided that a "costs follow the event" starting point had no place in litigation of that kind relying on *Bradford*. Sir Igor Judge, then President of the Queen's Bench Division (giving the judgment of the court alongside Scott Baker and Laws LJJ), said this:-

> "34. [The Solicitors' Disciplinary Tribunal] … is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, section 47 (2) of the Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. … the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation — dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party — would appear to have no direct application to disciplinary proceedings against a solicitor. …

> 39. … 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. …"

39. Ms Rose described the decision in *Baxendale-Walker* as hardening Lord Bingham's approach in *Bradford* into a stronger principle unconstrained by the factual context. She submitted that the CAT was bound by these statements of principle. Mr Beard, on the other hand, submitted that the case was not binding on the CAT and did not establish that it had made any error of law in not following the approach the Court of Appeal had indicated. He relied specifically on the holding that the Law Society was under an independent obligation of its own to bring proceedings where there was a sufficient case to answer, even if that case was ultimately dismissed by the Tribunal.

40. In *Baxendale-Walker*, the Solicitors' Disciplinary Tribunal was deciding a case of misconduct between the solicitor and the Law Society, then the prosecuting authority, but it is nonetheless hard to see how that aspect of the background could detract from the Tribunal's and the Law Society's regulatory roles that the Court of Appeal emphasised. The distinction between the roles played by the Law Society and the Tribunal may complicate the position, particularly as the case was heard before the separation of the regulatory and representative roles of the Law Society (the former now being vested in the Solicitors' Regulatory Authority) under the Legal Services Act 2007. But none of that can deprive the decision of its precedential effect in relation to costs orders made under section 47(2) of the Solicitors Act 1974. We will return to its impact on cases in the CAT.

Vodafone Ltd v. Ofcom [2008] CAT 39 ("*Vodafone*")

41. In *Vodafone*, the CAT (Lord Carlile QC and 2 members) referred to *Hutchison 3G* and *Bradford* before determining that Ofcom had acted reasonably and in good faith both in making its regulatory decision and refusing to consent to Vodafone's appeal, notwithstanding that the decision was held to be wrong and the appeal had succeeded. Accordingly, the CAT made no order as to costs.

42. BT sought to distinguish the costs decision in *Vodafone* on a number of grounds: (a) it was an early case denigrated by Ofcom as having applied too loose a standard of review, (b) the CAT had acknowledged that such appeals "often involve complex issues on which reasonable people might reach different conclusions", (c) the CAT had not approached the appeal on the basis that it was necessary to identify a material error in Ofcom's decision of the kind subsequently required, and (d) the CAT explicitly took into account the fact that Vodafone had not opposed in principle the end result sought by Ofcom. Mr Beard submitted that the CAT in *PayTV* had been right to treat *Vodafone* as a decision on its own facts.

The Number (UK) Ltd v. Ofcom [2009] CAT 5

43. *The Number* was another dispute resolution appeal. But the CAT, nonetheless, attempted certain statements of principle at paragraphs 4-6 as follows:-

> "4. … OFCOM are, of course, in a unique position as regulator under the 2003 Act when dealing with the resolution of disputes under section 185. In addition, OFCOM have statutory duties to perform and fulfil a role as guardians of the public interest. They are called upon in the exercise of their functions to exercise judgments and to take positions on factual and legal issues. It is therefore strongly arguable that this puts OFCOM in a different position from other parties when it comes to making costs orders, whether against OFCOM or in their favour, in cases where the manner of the exercise of their functions is in issue. The Tribunal has taken this factor into account in other cases under the 2003 Act. For instance, in [*Vodafone*] the Tribunal appears to have attached considerable weight, in declining to make any costs order adverse to OFCOM, to the fact that OFCOM had acted as a reasonable regulator and in good faith.
>
> 5. It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. …
>
> 6. So far as we are aware, the Tribunal has never awarded costs against OFCOM following an appeal under section 192 of the 2003 Act. We have not been taken in detail to the cases to see what, if any, weight has been attached to OFCOM's role as regulator in the decisions not to award costs against OFCOM in cases where it has lost. We cannot therefore conclude that any practice has been demonstrated to us that OFCOM should not, in an ordinary case, be subject to an adverse costs order. However, in principle we think that that is the correct approach. OFCOM is a body charged with duties in the public interest (see, for example, section 3 of the 2003 Act); they should not be deterred from acting in the way which they consider to be in that interest – provided that they act reasonably and in good faith – by a fear that in doing so they may find themselves liable for cost. In particular, OFCOM should ordinarily be entitled without fear of an adverse costs order, to bring or defend proceedings the purpose of which is to determine the proper meaning and effect of domestic or European legislation. We include the word "ordinarily" because the Appellants submit that the present case is not an ordinary case, for reasons to which we now turn."

44. The parties disagreed as to the significance of the decision in *The Number*, but as we shall see, the relevant *dicta* cited above were said in both *Tesco* and in *PayTV* to be confined to dispute resolution appeals.

T-Mobile (UK) Ltd v. Ofcom [2009] CAT 8 ("*T-Mobile*")

45. *T-Mobile* was a dispute resolution appeal. The CAT (Ms Vivien Rose QC and 2 members) cited paragraph 5 of *The Number* as to the starting point being that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted

reasonably and in good faith. The CAT then, however, held that Ofcom had failed to have proper regard to its regulatory objectives in its approach to resolving the disputes in question so that its determinations were so seriously flawed it was "difficult to see when such a costs order would be made, short of findings of bad faith and unreasonable behaviour". A costs order was accordingly made against Ofcom.

Tesco plc v. The Competition Commission [2009] CAT 26

46. In *Tesco*, the CAT granted an application by Tesco under section 179(1) of the Enterprise Act 2002 for judicial review of the Competition Commission's decision to recommend the introduction of a competition test as part of the planning process for larger grocery stores. The CAT (Barling J and two members) ordered the Commission to pay £312,000 in respect of Tesco's costs.

47. The CAT started its reasoning by referring to *Merger Action Group*, which was a merger challenge brought under section 120. It mentioned also regulatory challenges under section 179 of the Enterprise Act 2002 more generally, and the fact that the sections were worded in almost identical terms and in each case the same principles would be applied as a court would apply on an application for judicial review. The CAT referred to Dyson J's judgment in *R v. Lord Chancellor ex parte Child Poverty Action Group* [1999] 1 WLR 347, where he had said at paragraph 36 that the general rule in judicial review proceedings was that costs follow the event. The CAT concluded at paragraph 29 that the rationale for a "costs follow the event" starting point in section 120 cases such as *Merger Action Group*, applied just as much in regulatory challenges under section 179.

48. The CAT continued at paragraphs 30-33 of *Tesco* as follows:-

> "30. Nor are the Tribunal's rulings in *The Number* and [*Vodafone*] in point in the present case. In those matters the Tribunal was considering what the starting point on an application for costs against OFCOM should be where there was a successful appeal under section 192 of the Communications Act 2003. In *The Number*, where the appeal was from OFCOM's resolution of a dispute between different telecommunications operators pursuant to section 185 of that Act, the Tribunal, referring to OFCOM's "unique position as regulator", indicated that in resolving such disputes the starting point should be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. The Tribunal, however, emphasised that where the facts justified it a costs order could be made against OFCOM even where it had acted reasonably and in good faith. (See paragraphs 5 and 6 of the judgment.) Just such a case was [*T-Mobile*], where the Tribunal made a costs order against OFCOM although there was no unreasonable conduct. Cases of that kind, involving as they do an appeal on the merits against an OFCOM decision resolving a dispute between commercial operators, can be distinguished from challenges by way of judicial review alleging unlawful or invalid action on the part of the decision-maker.
>
> 31. Similarly, the case stated appeals cited in *Vodafone* and relied upon by the Commission in its submissions to us are very far from the present case. Each involved an appeal to the magistrates from a licensing decision by the local authority where the justices in effect conducted a re-hearing. They were entitled to reach a different decision without finding that the local authority had erred in any way in the original decision, and had a wide statutory discretion to make "such order as to costs as it thinks fit." In [*Bradford*] the Divisional Court … held that the magistrates had misdirected themselves on costs by applying a principle that costs should follow the event without considering a number of

relevant factors. It is difficult to read much more into the case than that. As the Lord Chief Justice said:

> "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."

32. In the subsequent *R (Cambridge City Council) v Alex Nestling Limited* [2006] EWHC 1374 case the Administrative Court, reiterated the approach in [*Bradford*] … Such licensing cases are different in nature from an application for judicial review, which concerns the lawfulness or validity of the decision being challenged, and which does not constitute a merits appeal by way of re-hearing. It is perhaps worth noting that where there is an application for costs in a judicial review in the Administrative Court the "loser pays" principle enshrined in CPR Rule 44.3(2)(a) applies as a general rule, although it is liable to be displaced in the light of the circumstances of specific cases.

33. We therefore consider that the cases referred to do not provide us with much assistance in identifying an appropriate starting point for dealing with costs of a judicial review under section 179 of the Act, and in the present case the Tribunal approaches the costs issue in the same way as in proceedings under section 120."

49. Each of Ofcom and BT have subjected these passages to minute analysis. It is perhaps best to return to the validity of their arguments after we have dealt with the remaining relevant decisions including particularly *Perinpanathan* and *PayTV*. Suffice it to say at this stage that the CAT in *Tesco* does not appear quite to have done justice to the statements of principle to be found in *Bradford*.

Regina (Perinpanathan) v. City of Westminster Magistrates' Court [2010] EWCA Civ 40

50. In *Perinpanathan*, the police had confiscated £150,000 in cash from the claimant 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. When the police applied for a forfeiture order under section 298 of the 2002 Act, the magistrates dismissed the application accepting the claimant's evidence as to the lawfulness of the purposes for which the money was held. The magistrates nonetheless refused an order for costs in the claimant's favour under section 64 of the Magistrates' Courts Act 1980 on the basis that the police had had reasonable grounds for suspicion when they had confiscated the money and applied for the forfeiture order. Both the Divisional Court (Goldring LJ and Sweeney J) and the Court of Appeal (Lord Neuberger MR and Maurice Kay and Stanley Burnton LJJ) dismissed the claimant's application for judicial review of the magistrates' decision as to costs. The claimant had not challenged the finding that the police had had reasonable grounds for suspicion.

51. In the Court of Appeal, both Stanley Burnton LJ and Lord Neuberger gave substantive reasoned judgments to the same effect. Maurice Kay LJ agreed with both judgments. Lord Neuberger said that his reasons largely reflected those of Stanley Burnton LJ, but Stanley Burnton LJ did not expressly agree with Lord Neuberger. The most far-reaching *dicta* found in Lord Neuberger's judgment carry the weight of the majority of the court.

52. Unlike the situation in *Bradford*, the police are required to make an application to the court if they wish to retain confiscated assets in a case like *Perinpanathan*. In a case

like *Bradford*, the application to the court is made by the party applying for a licence. In both cases, however, the original decision is made by the magistrates. Stanley Burnton LJ set out the competing contentions of the parties: the claimant contended for a "costs follow the event" approach as in ordinary civil proceedings, and the police argued that, since they had acted in accordance with their public duty, the magistrates had been entitled, if not bound, to refuse a costs order against them.

53. Stanley Burnton LJ then said that the only statutory restriction on the magistrates was that they could not make an order for costs against a successful party, but that did not provide any indication that costs should follow the event. He referred at paragraph 28 to the consistent application of the *Bradford* principle in successive licensing cases, and in *Baxendale-Walker*. He cited with approval paragraphs 55-63 of the CAT's decision in *RBS backhaul*, which he acknowledged was a dispute resolution decision. He concluded at paragraph 31 in relation to *RBS backhaul* that "the context of the proceedings before the [CAT] was very different from the present. What is relevant to the present case is the decision that a public authority carrying out a public duty and acting reasonably was not to be required to pay the costs of its successful opponent in litigation."

54. Stanley Burnton LJ derived the following propositions at paragraph 40 of his judgment in *Perinpanathan*:-

> "(1) As a result of the decision of the Court of Appeal in [*Baxendale-Walker*], the principle in [*Bradford*] 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*]. (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."

55. Lord Neuberger said this in *Perinpanathan*:-

> "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…
>
> 64. So far as the principles themselves are concerned, they are, as already mentioned, consistent with the approach adopted in the High Court in a number of previous decisions in the preceding eight years [decisions identified by Stanley Burnton LJ] …

> 65. Lord Bingham CJ said that his three principles applied to "questions of this kind", and it is therefore potentially open to arguments as to how far they were intended to apply outside appeals against vehicle licensing decisions. However, it seems to me that the way he expressed himself suggests that he was intending to refer to any case where the police or a regulatory authority was carrying through what was essentially an "administrative decision", which I understand to mean the performance of one of its regulatory functions, and where the question of costs was governed by section 64. …
>
> 73. So far as principle is concerned, [*Baxendale-Walker*] 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 r 44.3(2)(a). …
>
> 75. As I have indicated, there is a respectable argument for saying that there should be a presumption that a person in the position of the claimant should be able to recover at least some of her costs because she had successfully defeated the claim by the police to confiscate her money. However, there is also a respectable argument for saying that there is no such presumption, and that, absent other factors, she should only be able to recover any costs in so far as they were incurred as a result of the actions of the police in connection with the detention and claim for confiscation of her money which were unreasonable or in some other way open to criticism. In my view, the resolution of the question as to which of these two views should prevail is really determined by the decisions to which I have referred of the High Court and the Court of Appeal over the past 30 years, the effect of which is encapsulated in Lord Bingham CJ's principles.
>
> 76. The principles appear to me to be well founded, as one would expect bearing in mind their source. In a case where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs."

56. Mr Beard submitted that the breadth of Lord Neuberger's statement in paragraph 76 had to be interpreted as being limited by what he had said at paragraph 73. Ms Rose submitted that Lord Neuberger's judgment was of general application and binding on the CAT in this case. It meant that Lord Bingham's 3 principles enunciated in *Bradford* had to be applied by the CAT in the circumstances of this case. Again, we will return to evaluate these submissions when we have completed our review of the authorities relied upon.

BT v. Ofcom (Partial Private Circuits) [2011] CAT 35 ("*Private Circuits*")

57. We were referred to *Private Circuits*, which was not a case where the CAT was considering the circumstances in which a costs order adverse to Ofcom should be made.

It considered the reverse position. Accordingly, it did not consider whether, in section 192 cases, Ofcom stands in a special position, and is not of great assistance here.

British Sky Broadcasting Ltd v. Office of Communications [2013] CAT 9 (*PayTV*)

58. In *PayTV*, Ms Rose, acting then as now for Ofcom, made similar submissions to the CAT (Barling J and two members) as she has made to us in this case, and cited a similar line of authority. We do not intend, therefore, to recite every aspect of the CAT's reasoning, but will confine ourselves to those aspects that Ofcom challenged. *PayTV* was a regulatory appeal from a decision under section 316 of the 2003 Act.

59. In dealing with the previous authority, the CAT in *PayTV* referred in detail to *RBS backhaul* and to *Hutchison 3G*. In relation to the latter case, the CAT said at paragraph 18 that "[*Hutchison 3G*] does not in our view provide any support for the wide principle in relation to section 192 appeals for which Ms Rose contends. If anything, it takes as a starting point that costs follow the event". The CAT acknowledged in relation to both *Hutchison 3G* and *Vodafone* that they were not dispute resolution decisions. Ms Rose criticised the CAT's holding at paragraph 20 that there was nothing in *Vodafone* to suggest that the CAT was applying a principle applicable to section 192 appeals generally. Ofcom also complained that the CAT at paragraph 23 in *PayTV* declined to read the decision in *The Number* (though it was a dispute resolution appeal) as applicable to section 192 appeals generally. Ms Rose described this paragraph as "profoundly flawed". At paragraph 28 of the CAT's decision in *PayTV*, Barling J concluded after reviewing the authorities that it had not been the CAT's consistent practice to adopt a starting point that, in the absence of bad faith or unreasonable conduct, Ofcom should not have to pay the costs.

60. The CAT's reasoning as to the correct starting point is at paragraphs 31-52. At paragraph 35, the CAT said there were close parallels between a market investigation under the Enterprise Act 2002 (as in *Tesco*) and the processes and decisions of Ofcom in *PayTV*. The CAT then rejected the submission that there were closer parallels between *Bradford* and *PayTV*, than between *Tesco* and *PayTV*, and adopted the reasoning of the CAT in *Tesco* at paragraphs 31-33 (set out above). The CAT said this at paragraph 38:-

> "The present appeal, and indeed any appeal under section 192, is emphatically not an appeal by way of a re-hearing of the original decision, and the Tribunal does not allow an appeal under section 192 without finding that the decision was unlawful or otherwise in error in a material respect. (See in that connection subsection 192(6). See also the observations of the Tribunal on the nature of a section 192 appeal in *British Telecommunications plc v. Ofcom* [2010] CAT 17 at [75]-[78].) The licensing appeals in the magistrates' court which were the subject of these Divisional Court judgments are therefore wholly different from this case."

61. The CAT in *PayTV* then dealt in detail with *Baxendale-Walker* and *Perinpanathan*, concluding that neither provided close analogies to the *PayTV* case, but that the *Tesco* decision effectively did. The CAT distinguished Lord Neuberger's *dictum* at paragraph 73 of *Perinpanathan*, but did not refer to what he had said at paragraph 76 (see above). The CAT concluded at paragraphs 50 and 52 in *PayTV* as follows:-

> "50. In our judgment the considerations contained in the passage from *Tesco* quoted at paragraph 33 above are also applicable to a case such as the present, and the position and duties of Ofcom as a sectoral regulator, although clearly a relevant factor, do not justify "applying … as a matter of principle (as opposed to on the specific facts of a particular case) a distinct and more

> indulgent approach to the award of costs against the decision-maker." In order to provide the balance, referred to by Lord Neuberger, between sufficient flexibility to enable the Tribunal to do what is just in a particular case, and an appropriate degree of predictability, we consider that the starting point in cases such as the present should be that costs follow the event, even where Ofcom is the loser in the appeal. This approach aligns the present case with the starting point adopted by the Tribunal in most categories of case with which it deals, is consistent with the approach generally found in civil litigation, including, in particular, other public law cases, and provides ample flexibility to reach a just conclusion in each case. Using this starting point is justified in such cases as the present given that regulatory decisions of this kind often have very significant effects on the commercial interests of the regulated entity and sometimes also on the vital interests of other parties (as, for example, claimed by FAPL in the present case). The appeal route is the only recourse available to those affected by a decision which they consider to be erroneous or invalid.
>
> …
>
> 52. As we have said 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."

62. Ms Rose submitted that *PayTV*, like the Costs Decision, was legally flawed. Mr Beard submitted that *PayTV* was correct, and that it had been open to the CAT to refuse to proceed by way of analogy with *Perinpanathan* and *Baxendale-Walker*. Even if Barling J had got it right for the wrong reasons, Mr Beard submitted that he was correct about the appropriate starting point in regulatory appeals.

Issues for determination

63. Against the above somewhat lengthy background, the court needs, in our view, to consider three questions:-

    (1) Whether the CAT has in the Costs Decision (and, therefore, in *PayTV*) taken inadequate account of *Perinpanathan* and other cases in that line of authority.

    (2) Whether the CAT has in the Costs Decision (and, therefore, in *PayTV*) taken inadequate account of its own previous authority?

    (3) If either question is answered in the affirmative, what is the consequence of any legal error made by the CAT in this case?

Has the CAT in the Costs Decision (and, therefore, in *PayTV*) taken inadequate account of *Perinpanathan* and other cases in that line of authority?

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 paragraph 357,

Cooke v. Secretary of State for Social Security [2001] EWCA Civ. 734 per Hale LJ at paragraph 16, 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 per Lord Carnwath at paragraph 41).

65. It needs also to be borne in mind that the CAT is a UK tribunal, and that its procedural rules apply as much in other parts of the United Kingdom as they do in England and Wales. In *BPP Holdings Limited v. HMRC* [2017] UKSC 55, at paragraph 23, Lord Neuberger said that: "[i]n these circumstances, all tribunals and appellate courts above the level of the UT should be wary of applying or relying on the procedural jurisprudence of the English and Welsh courts without also taking into account that of the Scottish and Northern Irish courts". He continued by saying that "while it would be both unrealistic and undesirable for the tribunals to develop their procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic, the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue". In this case, it was accepted on all sides that the CAT had been sitting in an English and Welsh case so that the CAT was bound by otherwise applicable decisions of the Court of Appeal of England and Wales. It is, nonetheless, important to bear the UK nature of the CAT in mind.

66. We turn then to consider the import of the Court of Appeal authorities to which we were referred. It should first be noted that none of them was a competition case. That said, it is undoubted that the language used in each of *Bradford, Baxendale-Walker* and *Perinpanathan* is in very general terms that is capable of direct, if analogous, application to the circumstances of the present case. We are not sure that there is much value in the detailed semantic analysis of the judgments in these cases that the parties undertook. It is enough to say that in each of these authorities, the courts contemplated that the principles they were enunciating would be of significance and application in other areas.

67. In *Bradford*, Lord Bingham summarised the proper approach to "questions of this kind", making it clear that he intended what he said to have application beyond licensing appeals and section 64(1) of the Magistrates' Courts Act 1980. Admittedly, Lord Bingham's third proposition is limited to successful challenges of administrative decisions in the Magistrates' Courts. He nonetheless emphasised the relevance of "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." There can be no doubt that that proposition resonates and must be taken to be of some importance in the situation that faces this court.

68. In *Baxendale-Walker*, the Court of Appeal limited what it said to the Solicitors' Disciplinary Tribunal context, but it nonetheless applied the thrust of *Bradford*, and made it clear that in that situation, at least, the notion of costs following the event was not an appropriate starting point, absent unreasonable conduct or bad faith. That was specifically said by Sir Igor Judge to be because what was important was (a) that the Law Society was discharging its responsibilities as a regulator of the profession so that an order for costs should not ordinarily be made against it on the basis that costs follow the event, and (b) that 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.

69. Finally, in *Perinpanathan*, Lord Neuberger expressed himself in terms wide enough to be of relevance to the competition arena. Stanley Burnton LJ's judgment, which Lord Neuberger thought was largely reflected in his own, had referred at length to the dispute resolution appeal in *RBS backhaul*. Moreover, the terms used by Lord Neuberger at

paragraphs 65, 73 and 76 were obviously broad enough to be read across to the CAT. At paragraph 65, he said that the way Lord Bingham had expressed himself in *Bradford* suggested that "he was intending to refer to any case where the police or a regulatory authority was carrying through what was essentially an "administrative decision"". It is true that that statement is incidentally qualified by a later reference to section 64 of the Magistrates' Courts Act 1980, but we do not think that can by itself depreciate the width of the *dictum*. Again, in paragraph 73, Lord Neuberger referred to "principle" and said that *Baxendale-Walker* had "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". He said it was "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 r 44.3(2)(a)". Finally, in paragraph 76, Lord Neuberger said that Lord Bingham's principles appeared to him to be well founded. He then summarised what he determined the position to be: "[i]n a case where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs". We accept Mr Beard's submission that the breadth of the principle must in fact make what Lord Neuberger said an *obiter dictum*, since the Court of Appeal in *Perinpanathan* was not deciding a competition case, let alone an appeal in a specialist tribunal such as the CAT under section 192. However, in the case before us, Ofcom has opposed the grant of relief to BT, so the principle seems to us to be strictly applicable.

70. In our judgment, the CAT fell into error in *PayTV* and in *Tesco* in dismissing the relevance of the principles enunciated in these Court of Appeal cases. It is true that the standard of review in this case (as in *PayTV*) was not that of a judicial review (though that will be the standard in future cases, because of the provisions of section 87 of the Digital Economy Act 2017, which changed the standard of review for appeals from Ofcom's decisions made on or after 1st August 2017 – see section 194A(2) of the 2003 Act). That distinction did not, however, invalidate all comparison with the Court of Appeal's decisions.

71. We have, therefore, concluded that the principles stated in *Perinpanathan*, applying the same approach enunciated in Lord Bingham's three propositions in *Bradford*, and the decision in *Baxendale-Walker*, were relevant, if not directly applicable, to the situation with which the CAT was faced in each of *Tesco*, *PayTV*, and the Costs Decision. Insofar as the CAT decided in those cases that the principles were of no relevance, they were wrong.

72. Finally, we should say in this connection, that we do not find the distinctions drawn as to the precise route of the appeal of any great assistance by themselves. *Baxendale-Walker* was an appeal from a Tribunal set up to decide disciplinary matters between the regulator and the solicitor. *Bradford* was an appeal from magistrates determining a licensing question where their decision had to be made *de novo*, and *Perinpanathan* was an appeal from a decision made by magistrates on the application of the police. But in each case, the police or the regulators were acting solely in pursuit of their public duty and in the public interest in "carrying out regulatory functions". The question, as it seems to us, that the CATs faced with these decisions ought to have been asking, was not whether they were relevant. They plainly were. 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. The CAT did not approach the matter in that way in either *PayTV* or

the Costs Decision, and insofar as they failed to do so, in our judgment they made an error of law.

Has the CAT in the Costs Decision (and, therefore, in *PayTV*) taken inadequate account of its own previous authority?

73. In the light of our decision on the first issue, this issue is of less significance, since the CAT ought in the Costs Decision to have adopted a different legal approach.

74. We should, however, since the matter was fully argued, say briefly how the CAT had approached the matter in its own jurisprudence before *Tesco*. First, we do not think that fine distinctions between dispute resolution appeals, regulatory appeals, and so called "merits appeals" are particularly helpful. Insofar as the regulator is acting in that capacity in bringing or resisting proceedings, that is an important consideration.

75. Thus, whilst 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 the two competing parties. Likewise in a case under sections 120 and 179 of the Enterprise Act 2002, Ofcom may have an obligation to reach 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.

76. It is true, however, that in some cases, the regulator will not need to defend the claim before the CAT and can stand by and allow the competing private parties to contest the issue. That is realistic in some, but probably not very many, cases. For example, in a true dispute resolution appeal, Ofcom may not have much good reason for defending its decision, just as magistrates will rarely do so. But in some cases, the regulator will wish to defend the approach it has adopted even on a dispute resolution appeal because of the effect that the decision may have on other market participants.

77. We accept that it is appropriate for the CAT itself to consider the kinds of distinction to which we have been alluding, and also, of course, the applicable standard of review. But it must do so, keeping closely in mind the applicable authorities already referred to.

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.

79. Turning then to the authorities themselves, *RBS backhaul* was indeed an early dispute resolution appeal. Nonetheless, paragraph 62 of the CAT's decision in that case includes some valuable guidance as to the appropriate approach where a regulator has behaved properly. As the CAT said, it would not be right in a dispute resolution case to order Ofcom to pay the successful appellant's costs in circumstances where it defended the appeal entirely reasonably and wider public interests were involved.

80. In *Hutchison 3G*, the CAT referred in a regulatory appeal to the fact that, unlike the position under the CPR, there was no *prima facie* rule that the unsuccessful party pays, and that that reflected the fact that the public interest has a larger part to play in litigation in the CAT than in most civil litigation. But *Hutchison 3G* did not adumbrate a particular starting point, even though it referred importantly to the relevance of the fact that under the EU and domestic legislative framework, the decision was made in the context of a market review which the regulator had been obliged to carry out in the public interest. Moreover, the CAT relied there, correctly we think, on the fact that wider public interests were at stake. The CAT also thought, again correctly, that an order for costs against Ofcom could potentially have a chilling effect on its activities, even though that would not, by itself, have been sufficient to deprive Hutchison 3G of its costs. The case certainly did not justify a "costs follow the event" starting point as BT submitted.

81. *Vodafone* followed the approach in *Bradford* and *Hutchison 3G*. It was indeed a decision on its own facts, but was generally supportive of the argument that Ms Rose advanced. Likewise, the CAT's decision in *The Number* referred to a number of applicable general principles, even though it was itself a dispute resolution appeal. We would particularly endorse its statement, at paragraph 5, that "[i]t would … be unsatisfactory if different Tribunals placed radically different weight … on Ofcom's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that Ofcom should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith".

82. Finally, in our judgement, the CAT's decision in *Tesco* did, as Ofcom submitted, give inadequate weight to the cases already mentioned. Instead, it sought to distinguish them in order to negate the effect of the *Bradford* decision and its relevance to the competition situation. Admittedly, *Tesco* was a case in which the judicial review standard of review applied. It is beyond the scope of this decision to comment on whether that makes a critical difference. That factor may become more relevant in cases coming to the CAT under the new judicial review standard (see paragraph 70 above). That said, we cannot accept that it was justifiable for the CAT to have downplayed both its own previous decisions and those in *Bradford* and the cases that followed it.

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.

<u>What is the consequence of any legal errors made by the CAT in this case?</u>

84. In our judgment, this aspect of our decision is the most straightforward. Since the CAT in this case wrongly followed *PayTV* and did so ignoring the applicable legal principles espoused in *Bradford, Baxendale-Walker* and *Perinpanathan*, its decision cannot stand.

85. That does not mean that it would not have been open to the CAT, to explain why in this case, for good reasons, the principles in the Court of Appeal cases we have mentioned were inapplicable. The CAT is best placed to understand its own specific regulatory context, and will want, as was said in *The Number*, to reach a consistent position.

86. In our judgment, the appropriate course is for this court to remit the Costs Decision to the CAT to decide the matter afresh on the correct legal principles adumbrated in this

judgment. 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.

Conclusion

87. For the reasons we have tried shortly to give, we will allow Ofcom's appeal and send the matter back to the CAT for reconsideration of the applicable starting point, and its consequent decision.