[2019 Gib LR 197]

GIBFIBRE LIMITED (trading as GIBFIBRESPEED) v. GIBRALTAR REGULATORY AUTHORITY

COURT OF APPEAL (Smith and Elias, JJ.A.): November 15th, 2019

Civil Procedure—costs—costs against public authority—where unsuccessful defendant is public body exercising public functions reasonably and in good faith, default position that there should be no order as to costs

The appellant sought access to a data centre owned or controlled by Gibtelecom Ltd.

Gibtelecom Ltd. ("Gibtel") was a telecommunications company owned by the Government of Gibraltar. It played a dominant role in the telecoms industry in Gibraltar. It owned or controlled a data centre where it hosted third party computer servers. Gibtel had been designated as having significant market power ("SMP") and the Gibraltar Regulatory Authority ("the GRA") had imposed certain obligations on Gibtel including that it should meet reasonable requests for access to, and use of, specific network elements and associated facilities.

The appellant had built a fibre optic system in Gibraltar. The appellant asked Gibtel to enter into an agreement to give it access to the data centre and thereby be able to connect with servers of potential customers. Gibtel already had such an agreement with another company. Gibtel refused to negotiate with the appellant for commercial reasons.

The appellant sought the assistance of the GRA, which was initially sympathetic to the application and initiated regulatory enforcement proceedings against Gibtel. Subsequently, the GRA concluded that there was no lawful basis on which it could compel access of the kind sought by the appellant. The appellant's appeal was dismissed by Butler, J. On further appeal to the Court of Appeal, the appellant submitted that (a) the GRA had power to take action to compel access under both art. 5 of the Access Directive (2002/19/EC) and the obligation imposed by the GRA under art. 12; and (b) the GRA was wrong that it could not lawfully consider the request.

The Court of Appeal held that the GRA did in principle have an art. 5 power to grant access to the appellant in order to enable it to place its server on the data centre and communicate with other servers, provided it thought it a proper exercise of its power (that decision is reported at 2019 Gib LR 92).

The GRA applied for permission to appeal to the Judicial Committee of the Privy Council in respect of the court's ruling on art. 5.

The appellant sought an order that the GRA should the pay the costs of the appeal and the hearing below on the basis that the principle was that costs followed the event and it was the successful party.

The GRA opposed the costs application, submitting that (a) although the principle that costs followed the event was normally the appropriate starting point, that was not so where the unsuccessful party was a public authority which had made a decision in the exercise of its public functions reasonably and in good faith; (b) the appropriate order was that there should be no order as to costs; (c) the appropriate principle was to be found in a line of jurisprudence which provided that in cases of this nature, where the unsuccessful party was a public authority which had made a decision in the exercise of its public functions reasonably and in good faith, the default position in English law was that there should be no order as to costs; and (d) this was the default position in England and there was no justification for departing from that principle here.

The appellant submitted that (a) the default English position that where the unsuccessful party was a public authority which had made a decision in the exercise of its public functions reasonably and in good faith there should be no order as to costs was inapplicable where the court exercising its costs jurisdiction was obliged to take as its starting point that costs should follow the event; and (b) the effect of the Gibraltar Court of Appeal Rules, in particular r.46, was that, in relation to costs, the court was obliged to follow the English CPR, which adopted the default position that costs applied that general rule, not simply because it was a desirable practice but because the court was applying the CPR.

Held, ordering as follows:

(1) The GRA would be granted leave to appeal to the Judicial Committee of the Privy Council (conditional on its paying the requisite security for costs). In order to grant such leave, the court had to be satisfied that the appeal raised arguable grounds and was one which "by reason of its great general importance or otherwise" ought to be submitted to Her Majesty in Council (Gibraltar Constitution Order 2006, s.66(2)). The court accepted that the GRA's submissions were arguable points. So far as the court was aware, the proper construction of art. 5 and its relationship with art. 12 had not been authoritatively determined. The appeal raised points of general importance relating to EU law which warranted consideration by the Judicial Committee. It was doubtful whether, in the context of Gibraltar itself, they could be said to constitute a reason of "great general importance" but the issues were sufficiently important to fall within the phrase "or otherwise." The GRA had to act in accordance with EU law and it understandably wished to have a definitive view of the scope of its powers. The Court of Appeal's order would be stayed pending the determination of the appeal (paras. 5–8).

(2) The appropriate order as to costs would be that there should be no order as to costs. Rule 68 of the Court of Appeal Rules 2004 provided that "the court may make such order as to the whole or any part of the costs of

appeal or in the court below as may be just . . .” It conferred a broad discretion which was potentially at odds with the default position that costs should follow the event in all cases unless other considerations applied. There was no reason in principle why the court should not adopt a different starting point from the general rule where that reflected the practice of the English Court of Appeal. The rules in Gibraltar did not provide that the CPR was to apply where a case was not provided for by the rules; they provided that the practice and procedure adopted by the Civil Division of the English Court of Appeal should be adopted. Although that would usually mean the CPR, the practice which the English Court of Appeal adopted in cases such as the present, where the unsuccessful defendant was a public body exercising public functions, was that no order for costs should be made, at least where there was no default position to the contrary. Special considerations of public policy had led to the adoption of a different starting point where a public body was exercising public functions. There was no reason why that should not be the starting point in the present case. There was no evidence that there would be financial harm to the appellant of a significant or unusual nature if the order made was that there should be no order as to costs, and there were no other material factors which would justify not making that order given that it had not been suggested that the GRA acted unreasonably or in bad faith (paras. 32–42).

Cases cited:

(1) *BT plc* v. *Ofcom*, [2018] EWCA Civ 2542; [2019] Bus. L.R. 592, considered.

(2) *Baxendale-Walker* v. *Law Socy*., [2006] EWHC 643 (Admin); [2006] 3 All E.R. 675; [2006] 5 Costs L.R. 696; (2006), 156 N.L.J. 601; further proceedings, [2007] EWCA Civ 233; [2008] 1 W.L.R. 426; [2007] 3 All E.R. 330; [2007] 3 Costs L.R. 475, considered.

(3) *Bradford Metropolitan D.C.* v. *Booth*, [2000] EWHC 444 (Admin), applied.

(4) *Law Socy.* v. *Adcock*, [2006] EWHC 3212 (Admin); [2007] 1 W.L.R. 1096, considered.

(5) *R. (Perinpanathan)* v. *City of Westminster Mags.' Ct.*, [2010] EWCA Civ 40; [2010] 1 W.L.R. 1508, considered.

Legislation construed:

Court of Appeal Rules 2004, r.45: The relevant terms of this rule are set out at para. 32.

r.46: “In any case not provided for by these rules the practice and procedure for the time being of the Civil Division of the Court of Appeal in England shall be followed as nearly as may be.”

r.68: The relevant terms of this rule are set out at para. 32.

r.76: The relevant terms of this rule are set out at para. 33.

English Law (Application) Act 1962, s.2(1): The relevant terms of this sub-section are set out at para. 10.

Civil Procedure Rules (S.I. 1998/3132), r.44.2: The relevant terms of this provision are set out at para. 35.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.66(2):

"In the following cases, an appeal shall lie from decisions of the Supreme Court to the Court of Appeal with the leave of the Supreme Court or of the Court of Appeal and thence to Her Majesty in Council with the leave of the Court of Appeal, that is to say—

(a) where the decision appealed against is a final decision in civil proceedings and, in the opinion of the court giving leave, the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Court of Appeal or to her Majesty in Council, as the case may be; and

(b) in such other cases as may be prescribed by the Legislature."

Senior Courts Act 1981 (c.54), s.51: The relevant terms of this section are set out at para. 35.

A. Maclean, *Q.C.* and *E. Phillips* for the appellant;
P. Caruana, *Q.C.* and *C. Allan* for the respondent.

1 **SMITH and ELIAS, JJ.A.:**

Introduction

Gibtelecom Ltd. ("Gibtel") is a telecommunications company owned by the Government of Gibraltar. It owns and controls a data centre at Mount Pleasant where it hosts third party computer servers and keeps them in a secure environment. GibFibre Ltd. (which trades as GibFibreSpeed ("GFS")) has built a fibre optic system in Gibraltar. It also provides public communications network services. GFS requested Gibtel to enter into an agreement with it so that GFS could have access to the data centre and thereby be able to connect with servers of potential customers. Gibtel refused to do this for commercial reasons. GFS sought the assistance of the Gibraltar Regulation Authority ("GRA") to help it secure the connection. GRA has certain statutory powers which can compel a telecommunications company to allow access to its network and/or infrastructure in certain circumstances.

2 Initially the GRA was sympathetic to the application and assumed that it did have the statutory power to assist GFS. Indeed, the GRA initiated regulatory enforcement proceedings against Gibtel and directed it to allow GFS access to the data centre. Gibtel declined to comply and argued that the GRA did not have the powers which it claimed. The GRA reconsidered its position and, after taking counsel's advice, concluded that Gibtel was correct. The GRA gave its reasons for reaching that conclusion in a

decision letter dated February 16th, 2017. GFS was unpersuaded by the analysis; it contended that the GRA did have power, in an appropriate case, to direct GibFibre to enter into an agreement with GFS so as to allow access to the data centre, or at least to require Gibtel to negotiate in good faith. GFS appealed against the decision pursuant to s.91(7) of the Communications Act 2006. Initially, it both mounted a statutory appeal and lodged an application for judicial review. It was in fact doubtful whether there was a statutory right of appeal in circumstances where the GRA had simply concluded that it was powerless to act. However, it did not want to rely solely on a judicial review application in case that was subsequently held to be the wrong procedure in circumstances where it might be out of time to pursue the appeal. There was a preliminary hearing before Ramagge Prescott, J. on the question of the appropriate procedure; she held that it was the statutory right of appeal. GFS accepted that ruling and pursued that route.

3 The appeal was heard by Butler, J. He dismissed the appeal and held that the GRA had properly construed the scope of its powers; it did not have the power to assist GFS in the particular circumstances of the case. GFS appealed to the Court of Appeal which, in a judgment delivered by Sir Patrick Elias, J.A., with which Sir Maurice Kay, P. and Sir Colin Rimer, J.A. agreed, upheld the appeal in part. GFS had argued that the power to compel access (in an appropriate case) arose both under art. 12 read with art. 8 and, independently, under art. 5 of the Access Directive (Council Directive (2002/19/EC) on access to, and interconnection of, communications networks and associated facilities). Article 12 enables the relevant regulatory authority to impose certain obligations upon a body which exercises significant market power ("SMP") in a particular market, requiring it to allow access to its network and associated facilities. Article 5 allows the regulatory authority to compel access in certain more specific situations and is not in terms limited to cases where the body required to allow access has SMP. The Court of Appeal held that the GRA had been right to conclude that art. 12 was not applicable with respect to the particular form of connection sought but, unlike the judge, it held that art. 5 was in principle capable of providing GRA with the requisite power to do so. The effect of the decision was not to compel the GRA to require Gibtel to allow access to GFS; rather it merely established that the GRA did have the power to do so and should consider whether this was an appropriate case in which to exercise that power.

4 The two applications now before the court arise out of that decision. First, the GRA seeks permission to appeal to the Judicial Committee of the Privy Council on the Court of Appeal's ruling on art. 5. Secondly, GFS has made an application that the GRA should pay the costs of both the appeal and the hearing below on the basis that the appropriate and applicable principle is that costs should follow the event and it was the

successful party. The GRA contests the application; it submits that, whilst this is normally the appropriate starting point in litigation, that is not the case where the unsuccessful party is a public authority which has made a decision in the exercise of its public functions reasonably and in good faith. The GRA contends that the decision under challenge falls into that category and GFS does not seriously contend otherwise. The GRA submits that the appropriate order is that there should be no order as to costs so that each side should bear its own costs. We shall deal with the applications in turn.

Permission to appeal

5 It is common ground that there is no appeal as of right so leave must be sought. In order to grant leave, the court must be satisfied that the appeal raises arguable grounds and is one which "by reason of its great general importance or otherwise" ought to be submitted to Her Majesty in Council: see s.66(2) of the Gibraltar Constitution Order 2006.

6 Sir Peter Caruana, Q.C., counsel for the GRA, submits that the court erred in its construction of art. 5 in two respects in particular. First, art. 5 identifies three specific sets of circumstances where access and interconnection can be required pursuant to that article (when read with the definition of "access" in art. 2) and the court wrongly held that these were not exhaustive of the situations where that power may be relied upon. The significance of the point is that it was common ground that none of the three circumstances applied in this case and therefore, if they are the only circumstances where art. 5 can be invoked, the GRA was right to conclude that the article could not assist GFS here. Secondly, it is alleged that the court misunderstood the relationship between art. 5 and art. 12. In essence the complaint is that art. 5 does not apply to a body which exercises SMP and is therefore subject to art. 12 and the court erred in finding otherwise.

7 We accept that these are arguable points. So far as the court is aware, the proper construction of art. 5 and its relationship with art. 12 has not been authoritatively determined. The appeal raises points of general importance relating to EU law which warrant scrutiny by the JCPC. We doubt whether, within the context of Gibraltar itself, they can be said to constitute a reason of "great general importance" but we think that the issues are sufficiently important to fall within the phrase "or otherwise." The GRA needs to act in accordance with EU law and it understandably wishes to have a definitive view about the scope of its powers. We therefore grant leave to appeal on the grounds advanced (conditional of course on paying the requisite security for costs).

8 We also accept that pending the determination of the appeal it would be appropriate to stay the effect of the Court of Appeal's order. That order requires the GRA in the exercise of its powers under art. 5 to reconsider

whether or not to require Gibtel to allow GFS access to the data centre. One possible outcome of that consideration is that Gibtel might have to allow access. This could adversely impact both upon Gibtel and possibly other businesses which use the data centre too, and any losses would be difficult to quantify. That would be undesirable if ultimately the appeal were to be successful.

Costs

9 The dispute on costs raises a question of some significance involving the construction of r.46 of the Gibraltar Court of Appeal Rules 2004 and the relationship between the Court of Appeal's costs rules and the practice and procedure adopted by the Court of Appeal in England and Wales.

10 The basic principle is that English judge-made rules should, subject to occasional necessary modifications, apply in Gibraltar. Section 2(1) of the English Law (Application) Act 1962 provides that:

> "The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require . . ."

11 The dispute in this case is what rule is applicable on the facts of this case. Sir Peter submits that the appropriate principle is found in a line of jurisprudence which provides that in a case of this nature, where a public body is exercising a public function reasonably and in good faith, the default position in English law is that there should be no order as to costs. There is no justification for departing from that principle here, he submits. Mr. Maclean, Q.C., counsel for GFS, disagrees. He argues that the authorities clearly establish that this principle is inapplicable where the court exercising its costs jurisdiction is obliged to take as its starting point that costs should follow the event. He asserts that this is the case here because the effect of the Gibraltar Court of Appeal Rules—and in particular r.46—is that, in relation to costs, it is obliged to follow the English Civil Procedure Rules ("CPR") and they adopt the default position that costs follow the event in civil litigation of this nature.

12 We will first examine the scope of the principle on which Sir Peter relies and then consider whether the default rule in the English CPR is applicable, and if so, whether it suffices to undermine Sir Peter's argument.

Costs against public or regulatory bodies exercising public functions

13 Sir Peter relies upon a line of authority which establishes that, where a regulatory authority is carrying out its functions responsibly and in good faith, then at least where there is an untrammelled discretion to award

costs, the court should not in the general run of cases make an award of costs against the public body even where it is the unsuccessful party.

14 We were referred to four cases in particular which mark the development of that principle. The starting point is the judgment of Lord Bingham, C.J. sitting in the Divisional Court in *Bradford Metropolitan D.C.* v. *Booth* (3) (although earlier cases had foreshadowed the principle). This was an appeal by way of case stated from a costs order made by the magistrates against a local authority. The magistrates had a discretion under s.64(1) of the Magistrates' Courts Act 1980 to make such costs order as they thought "just and reasonable." The local authority was held to have wrongly refused a vehicle licensing application and the magistrates ordered it to pay the appellant's costs on the principle that costs should follow the event. Lord Bingham held that the magistrates had approached the issue in the wrong way and had failed to recognize that the local authority was a public body exercising public functions reasonably and in good faith ([2000] EWHC 444 (Admin), at paras. 22–26). He set out the general principles applicable in a case of this kind:

> "22. It seems to me that the justices in this case misdirected themselves, first, in relying on a principle that costs should follow the event, that misdirection being compounded by their view that the reference in section 64 to the order being just and reasonable applied to quantum only. On the other hand, in my judgment the submissions made by Mr Blair-Gould on behalf of the local authority go too far the other way since to give effect to the principle for which he contends would deprive the justices of any discretion to view the case in the round which is in my judgment what section 64 intends.
>
> 23. I would accordingly hold that the proper approach to questions of this kind can for convenience be summarised is three propositions:
>
> 24. 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.
>
> 25. 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.
>
> 26. 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."

15 Lord Bingham was not saying that it would necessarily be wrong for the magistrates to order that costs should follow the event, just that this should not be the starting point of their deliberations in certain cases where a public body is the unsuccessful defendant; the court must always have regard to the fact that to award costs as a matter of course in a case of this nature may not be in the public interest. It may have a chilling effect on public authorities if they face the risk of being exposed to undue financial prejudice as a result of taking decisions which they reasonably and in good faith believe should be taken in the public interest. Although this case concerned magistrates, the observation in the third proposition (para. 26) was obviously intended to apply to a wider category of case, as the reference to "regulatory authority" shows.

16 The *dictum* of Lord Bingham was considered by Sir Igor Judge, P. giving the judgment of the Court of Appeal in *Baxendale-Walker* v. *Law Socy.* (2). The Law Society had instigated disciplinary proceedings against a solicitor before the Solicitors Disciplinary Tribunal. The Society relied upon two allegations of conduct unbefitting a solicitor but only one was established to the satisfaction of the tribunal. The tribunal's power to award costs was as follows (s.47(2) of the Solicitors Act 1974):

> ". . . [O]n the hearing of any application or complaint made to the Tribunal under the Act . . . the Tribunal shall have power to make such order as it may think fit, and any such order may in particular include provision for any of the following matters—
>
> . . .
>
> (i) the payment by any party of costs or a contribution towards costs of such amount as the Tribunal may consider reasonable."

17 The tribunal ordered the Law Society to pay 30% of the solicitor's costs on the basis that the solicitor had incurred the greater proportion of his costs in fighting the allegation which failed. That decision was overturned on appeal by way of case stated to the Divisional Court which held that the solicitor should pay 60% of the Law Society's costs. Moses, L.J., giving the lead judgment in the Divisional Court, held that the costs principles applicable to ordinary civil litigation ought not to apply in a case of this kind ([2006] 3 All E.R. 675, at para. 43):

> "Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged."

18 In reaching this conclusion, Moses, L.J. drew upon the guidance given by Lord Bingham in the *Bradford* case (3). The Court of Appeal noted that this approach had not been followed in a later decision of a different Divisional Court in *Law Socy.* v. *Adcock* (4). In that case Waller, L.J. considered that Moses, L.J. had ([2006] EWHC 3212 (Admin), at para. 39):

> ". . . put the matter too highly in favour of a regulator. Lord Bingham does not, as I understand him, suggest that there should be a presumption, one way or another; he simply makes clear that there are particular circumstances to bear in mind where a public body or a regulator is concerned."

The Court of Appeal said that it had granted leave to resolve the judicial disagreement. It preferred the approach of Moses, L.J. which it considered reflected the Bingham principles. Sir Igor explained why it was inappropriate to apply the principle that costs should follow the event in a case of this kind ([2007] EWCA Civ 233, at para. 35):

> "This statutory 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 it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by s47(2)(i). That said, however, it is self evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in *Bolton* makes clear, by ensuring that high professional standards are maintained, and, when necessary, indicated Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary

> proceedings, if it is to perform these functions and safeguard standards, the Tribunal is dependant on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, 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."

19 Later in the judgment, after citing the principles in *Bradford*, he said this (para. 40):

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

20 If this judgment does not in terms adopt the position that the starting point should be no order as to costs, it comes perilously close to it.

21 These two decisions were considered by the Court of Appeal in *R. (Perinpanathan)* v. *City of Westminster Mags.' Ct.* (5). The appellant had successfully resisted an application by the Metropolitan Police Commissioner before the magistrates to confiscate £150,000 pursuant to s.298 of the Proceeds of Crime Act 2002 on the grounds that the money was to be used to fund terrorism. The magistrates found that there were reasonable grounds for the Commissioner's suspicions and they refused to award costs to the appellant. She took proceedings for judicial review challenging that refusal but failed before the Divisional Court. Her further appeal

to the Court of Appeal was also unsuccessful. The statutory power in issue was s.64 of the Magistrates' Courts Act 1980, as it was in the *Bradford* case (3); the court was required to award such costs as were "just and reasonable." Stanley Burnton, L.J. with whose judgment Lord Neuberger, M.R. and Sir Maurice Kay agreed, commented on the scope of the section as follows ([2010] EWCA Civ 40, at para. 19):

> "The starting point must be a consideration of section 64 and of the statutory provisions applicable in alcohol licensing and other cases. In my judgment, section 64 is concerned with both liability for costs and their amount. The only statutory restriction on the power of the magistrates is that they cannot make an order for costs against a successful party. This restriction explains its wording. It does not provide any 'steer' or indication to the court that costs should follow the event, although in cases between private individuals that is likely to be the order failing good reason to deprive a successful party of some or all of his costs."

22 The case is important because the appellant sought to argue that the approach of Lord Bingham in *Bradford* was wrong and should not be followed. The Court of Appeal rejected the argument, Stanley Burnton, L.J. noting that *Bradford* was in line with earlier authorities and had been followed on numerous occasions in a variety of contexts, which he considered at some length. These authorities included the *Bradford* and *Baxendale-Walker* (2) cases. The judge summarized the principles to be drawn from these authorities in the following terms (paras. 40–41):

> "(1) As a result of the decision of the Court of Appeal in *Baxendale-Walker*, the principle in the *City of Bradford* case is binding on this Court. Quite apart from authority, however, for the reasons given by Lord Bingham LCJ 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: *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 nonetheless 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.

41 Lord Bingham LCJ stated that financial prejudice to the private party may justify an order for costs in his favour. I think it clear that the financial prejudice necessarily involved in litigation would not normally justify an order. If that were not so, an order would be made in every case in which the successful private party incurred legal costs. Lord Bingham LCJ had in mind a case in which the successful private party would suffer substantial hardship if no order for costs was made in his favour. I respectfully agree with what Toulson J (with whom Richards LJ agreed) said in *R (Cambridge City Council) v Alex Nestling Ltd*:

> 12. As to the financial loss suffered by the successful appellant, a successful appellant who has to bear his own costs will necessarily be out of pocket, and that is the reason in ordinary civil litigation for the principle that costs follow the event. But that principle does not apply in this type of case. When Lord Bingham referred to the need to consider the financial prejudice to a particular complainant in the particular circumstances, he was not in implying that an award for costs should routinely follow in favour of a successful appellant; quite to the contrary."

23 It is to be noted that Stanley Burnton, L.J. expressly stated that the principle does not apply where the CPR applies. That point was also emphasized by Lord Neuberger in his judgment. He said this (at para. 73):

> "So far as principle is concerned, the judgement of this court in *Baxendale-Walker's* case [2008] 1 WLR 426 has given strong support to the notion that Lord Bingham'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'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 44.3(2)(a)."

24 Lord Neuberger also considered that the *Bradford* principles should be followed. He summarized their effect as follows (para. 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. It is not as if the other party would have no right to recover costs in such a case: as Lord Bingham made clear, one must take into account 'all the relevant facts and circumstances of the case', and in particular 'the financial prejudice to the particular complainant if the order for costs is not made in his favour'."

25 There is, in our view, a certain tension between the two judgments, notwithstanding that Lord Neuberger had commented (para. 78) that his reasons "largely reflect those of Stanley Burnton LJ." Stanley Burnton, L.J. considered that the effect of the principles, where applicable, is that "the starting point and default position" is that there is no order as to costs and that is so even though the successful party will have necessarily incurred financial prejudice, unless it is substantial and out of the ordinary. Lord Neuberger did not adopt quite so rigorous a line; he accepted that there is no presumption that costs should follow the event in cases of this kind, but he did not go so far as to say that there should be a presumption of no order as to costs; all the circumstances should be considered.

26 The most recent case which has considered each of these earlier decisions (and many more besides) is the decision of the Court of Appeal in *BT plc* v. *Ofcom* (1). As Sir Peter observed, that case is analogous to this appeal because it also involved a regulatory body operating in a similar area to the GRA. The case concerned an order for costs made by the Competition Appeal Tribunal ("the CAT"). The power to award costs was cast in very general terms. Rule 104(2) of the Competition Appeal Tribunal Rules 2015 gives the tribunal 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." Rule 104(2) then sets out a number of factors which may be taken into account when exercising the discretion; they in part reflect CPR r.44.4 set out above. But r.104 has no equivalent to CPR

r.44.2; there is no presumption or "general rule" that costs should follow the event.

27 In this case, BT had successfully appealed under s.192 of the Communications Act 2003 against a business market connectivity review carried out by Ofcom. The CAT awarded BT 60% of its costs incurred in the appeal. The CAT started from the principle that the general rule that costs should follow the event was applicable to a case of this kind. Ofcom appealed and the Court of Appeal (Sir Geoffrey Vos, Chancellor, Leggatt and Haddon-Cave, L.JJ.), in a judgment delivered on behalf of the court by the Chancellor, held that this was the wrong approach. In doing so, it analysed a considerable number of cases chronologically, including the three cases we have analysed above, as well as a series of costs cases determined by various constitutions of the CAT in which a variety of different approaches had been adopted by the judges. The court noted that the earlier cases of *Bradford* (3), *Baxendale-Walker* (2) and *Perinpanathan* (5) were not directly concerned with competition cases but it was satisfied that the principles there enunciated were equally applicable in this context. The Chancellor observed ([2018] EWCA Civ 2542, at para. 66) that the principles were:

> ". . . 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."

28 The court did not go so far as to say that there would be a presumption that there should be no order as to costs; rather it held that the authorities had established that there was no presumption that costs should follow the event and that that was enough to invalidate the CAT's costs order. The tribunal had erred in law in adopting the wrong principle as its starting point. However, the court recognized that it must respect the special expertise of the CAT and, in the circumstances, it was content simply to refer the matter of costs back to the tribunal. The CAT itself was best able to assess whether there were particular circumstances in cases of this nature which would justify the CAT departing from the *Bradford* line of authority. At the same time, the court did give a powerful steer in favour of the principle applying in this context too. The court said (at para. 83) that—

> ". . . 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."

29 Sir Peter submits that there is no reason not to apply the principle here. All the necessary conditions are satisfied: the discretion is in broad terms without the default rule that costs should follow the event; the GRA had reached its decision reasonably and in good faith; and there is no special financial hardship to GFS or any other justification for departing from the established principle. Accordingly, the appropriate order for the court to make is no order as to costs.

Is the Court of Appeal of Gibraltar subject to the default position that costs follow the event?

30 Mr. Maclean accepts that the decision of the GRA was taken in good faith and he does not seriously contend that it was not a reasonable decision. However, he argues that the *Bradford* line of authority is inapplicable here for the simple reason that the courts have said in terms that it does not apply where the default position is that costs should follow the event. He submits that a proper examination of the Court of Appeal rules in Gibraltar shows that this is the case here; the Court of Appeal rules on costs incorporate relevant provisions from the CPR and, in particular, the starting point or default position that costs should follow the event.

31 In order to consider this argument, it is necessary to set out certain provisions of the Gibraltar Court of Appeal Rules on practice and procedure, and also potentially relevant provisions of the CPR.

32 In Gibraltar, Part V of the 2004 Rules is headed "First appeals in civil matters." Rule 45 is as follows:

> "45. This Part shall apply only to appeals from the Supreme Court acting in original jurisdiction in civil cases and to matters related thereto."

Rule 46 is central to this appeal:

> "46. In any case not provided for by these rules the practice and procedure for the time being of the Civil Division of the Court of Appeal in England shall be followed as nearly as may be."

Rule 68 sets out the relevant provision on costs in the following terms:

> "68. The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same for direct taxation thereof."

33 Part V is not directly applicable to the court hearing this appeal because this was not a first appeal. It is common ground that the effect of r.75 is that the appeal in this case constitutes a second appeal. Butler, J. was exercising an appellate and not an original jurisdiction when he heard the statutory appeal from the decision of the GRA. The particular rules

directly applicable to second appeals are found in Part VI which is headed "Second Appeals in Civil Matters." However, as r.76 makes clear, the basic rule is that, save where express modifications have been made, the rules applicable to first appeals apply equally to second appeals. There is no material modification as to costs:

> "76. The provisions of Part V shall apply to proceedings governed by this Part so far as applicable, but subject to the following modifications—:
>
> (a) rule 68 shall apply to costs in the trial court and also the first appellate court . . ."

34 It follows that, in a second appeal, r.68 remains the guiding principle on costs with respect to the trial court, the first appellate court and the Court of Appeal itself. The simple rule is that the court must order such costs "as may be just." It is difficult to think of a broader discretion. There is no further guidance in the rules themselves as to how that discretion should be exercised.

The position in England and Wales

35 Section 51 of the Senior Courts Act 1981 provides that:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in . . . the Civil Division of the Court of Appeal . . . shall be in the discretion of the Court."

That section does not itself provide principles or guidance as to how the discretion should be exercised, but it envisages that there may be particular statutory rules or rules of court which will do so. In some cases there are particular costs rules laid down by statute regulating how costs should be awarded in a particular context; the authorities we have considered above provide examples of this. But, absent such special provisions, the applicable rules in ordinary civil litigation are contained in the Civil Procedure Rules (CPR). They include an extensive body of rules relating to costs and in cases where the CPR applies, these rules must be applied by the Court of Appeal in England and Wales (see CPR r.2.1). The main rule regulating the exercise of discretion on costs is found in r.44.2 which, so far as is material, is as follows:

> "(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings—

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

36 There are, therefore, no binding rules as such about costs in the sense that they mandate a particular outcome to a costs application irrespective of the circumstances; a court will always have to have regard to all relevant factors including, but not limited to, those specifically identified in r.44.4. But the "general rule," to use the language of r.44.2, which is applicable in all cases where the CPR apply (save for those cases identified in r.44(3)) is that costs should follow the event unless there is good reason to depart from it.

Does the "general rule" apply with respect to this appeal?

37 The central question in this costs application is whether the CPR rules on costs, and in particular the general rule identified in r.44.2, apply in the circumstances of this case. Should the court take as its starting point that costs should follow the event? Mr. Maclean submits that it must. He relies upon r.46 of the Gibraltar Rules which in terms provides that "in any case not provided for by these rules" the current practice and procedure adopted by the Civil Division of the Court of Appeal in England must be followed. The issue is whether it can be said that, notwithstanding the specific provision on costs in r.68, there is a gap in the rules, in the sense of something which needs to be provided for but has not been. Mr. Maclean submits that r.68 is, in substance, the equivalent of CPR r.44.1. Both rules in essence state the uncontroversial principle that costs must

ultimately be at the discretion of the court; to say that the discretion must be exercised justly, as r.68 does, is adding nothing material; that must always be the case. A general directive to that effect provides no guidance as to how the discretion needs to be exercised in practice. Since no such guiding principles have been established by rules in Gibraltar, the English practice must be followed and that practice is found in the costs rules in the CPR which include the "general rule" that costs should follow the event. Although there may sometimes be reasons why the general rule should not apply, in this case there are no special features, whether falling within CPR r.44.4 or otherwise, which would justify the court departing from it. The special costs rules applicable to public bodies exercising public functions are inapplicable where the default rule is that costs follow the event.

38 Mr. Maclean notes the Court of Appeal in Gibraltar does as a matter of fact apply that general rule in litigation in the courts. He submits that it does not do so simply because it is a desirable practice but because the court is applying the CPR. It is obliged to apply that default principle as a consequence of the duty to follow, as nearly as may be, the practice and procedure in England.

39 We do not accept that submission. We agree that the purpose of r.46 is to ensure that the Court of Appeal in Gibraltar, where appropriate, marches in step with the Court of Appeal in England and Wales. That is also consistent with the provision of s.2 of the English Law (Application) Act 1962 set out above. The Court of Appeal in Gibraltar, when applying the law on practice and procedure, should not seek to depart from established principles in English law where it is properly open to the court, consistent with Gibraltar rules, to adopt the English practice. So if an issue arises and there is no answer given by the local Gibraltar law, the Court of Appeal should adopt the answer given by English law. This would be "a case not provided for in these rules" within the meaning of r.46. However, the court in Gibraltar cannot adopt a principle of English law if to do so would be inconsistent with an express rule in Gibraltar. In the context of this case, this means that it would be wrong for the court to apply the general rule in circumstances where it would lead to an award of costs which the court would not consider to be just and would therefore be contrary to r.68.

40 We do not accept that r.68 is simply the equivalent of CPR r.44.1. In our view it confers a broad discretion which, unlike r.44.1, is potentially at odds with the default position, applicable in all cases, that costs should follow the event unless other considerations apply. If anything, r.68 is more akin to s.51 of the Senior Courts Act 1981 (see para. 35 above) but, unlike that provision, it does not expressly envisage that further guidance will be provided; the requirement that the order should be "just" is enough. We see no reason in principle why the court should not adopt a

different starting point from the general rule where that reflects the practice in the English Court of Appeal.

41 It is also in our view pertinent to note that the rules in Gibraltar do not say in terms that the CPR is to apply where a case is not provided for by the rules; it says that *the practice and procedure* adopted by the Civil Division of the English Court of Appeal should be adopted. No doubt the effect of that provision will usually be that the CPR rules, as construed by the English courts, are applied because they constitute the body of English rules for the time being which apply to most cases before the English Court of Appeal. But the practice which the English Court of Appeal adopts in a case like this, where a public body is exercising public functions, is that no order for costs should be made at least where there is no default position to the contrary. In our judgment, there is no reason why that should not be our starting point in this case. There is no express requirement that the court should adopt as a general rule the principle that costs should follow the event. That is not to say that this will not be the appropriate starting point in most civil litigation, particularly as between private parties. A successful litigant in private litigation has had to go to court to enforce his rights and will be out of pocket; it will plainly be just in such a case to start from the presumption that he should get his costs, whether or not there is an express provision to that effect. The point was made by Stanley Burnton, L.J. in the *Perinpanathan* case (5): see paras. 26 and 27 above. In our judgment, that explains the adoption of that practice in the overwhelming majority of cases in Gibraltar. But there are special considerations of public policy which have led the Court of Appeal in England to adopt a different starting point where a public body is exercising public functions, and in our view nothing prevents us from applying that starting point here. Rule 68 confers a broad and untrammelled discretion. Indeed, in following the *Bradford* line, we are respecting the duty to align the law of Gibraltar with the law of England.

42 Applying the *Bradford* principles, we think that the appropriate order in this case is that there should be no order as to costs. This is not a case where there would be particular financial harm to GFS of a significant or unusual nature if we make that order; indeed, we have had no evidence about its financial situation at all which would justify our reaching such a conclusion. There are, in our view, no other material factors which would justify not making that order, given that it has not been suggested that the GRA has been acting unreasonably or in bad faith.

Three further issues

43 There are three additional matters which we briefly address because they were raised in the course of argument. First, Mr. Maclean submitted that, although GFS pursued an appeal following the ruling of Ramagge Prescott, J. that was not in fact the proper route. He says that if s.91 of the

Communications Act, which confers the right of appeal, is properly construed, it does not apply to a decision by the GRA that it has no power to act. Accordingly the case ought to have gone by way of judicial review and in such cases the rule is that costs follow the event.

44 We do not accept this submission for two independent reasons. First, whilst it is a nice question whether s.91 applies here, that issue has been determined by Ramagge Prescott, J. and acted upon by GFS without GFS appealing the decision. It cannot now seek to have the court apply costs rules on the basis that we must treat the case as in reality a judicial review case even though it was run as a statutory appeal. As Sir Peter pointed out, if there never was a valid right of appeal, that would raise difficult questions about whether the decisions of Butler, J. and the Court of Appeal have any validity or whether they are nullities.

45 Secondly, we do not in any event accept the premise that a different default rule would apply in a judicial review case. The general rule that costs follow the event will apply in England where a judicial review action is pursued in the ordinary courts because the CPR then applies, but that is not necessarily the position where the judicial review application is to a court with its own costs rules which do not include the default rule that costs follow the event. In *BT plc* v. *Ofcom* (1), the Court of Appeal left open the question whether the *Bradford* (3) line of authority would apply in a judicial review case before the CAT as it does to a statutory appeal, but in principle we see no reason why it should not. That is particularly so in a case such as this where any judicial review application would be on the same grounds as the statutory appeal. In our view, the focus should be on substance and not form; there is no principled reason for a different set of costs principles to apply merely because the form which the action takes is different. It is true that the appeal to the Court of Appeal would in such a case be a first appeal, but that is not a proper basis for adopting a different costs rule, given that r.68 would still be applicable.

46 A second point is this: even if Mr. Maclean were right and it is necessary, pursuant to r.46, to incorporate CPR r.44.2 and thereby adopt the general rule that costs follow the event, we are inclined to think that it would still be open to the Court of Appeal in Gibraltar to conclude that it would not be just to apply that rule in the special circumstances where a public body defendant is successfully challenged in circumstances where it has exercised its public functions reasonably and in good faith. The starting point would have to be the general rule but that must give way to a different costs order where the circumstances justify it. It is true that the *Bradford* principles cannot directly apply because the court cannot ignore the fact that the starting point is the principle that costs should follow the event and substitute some other default principle. But we see no reason why the Court of Appeal in Gibraltar should not follow the logic of the *Bradford* line and hold that, even where the general rule is the default

position, the court is entitled to depart from it and to make no order for costs where there is an appropriate public interest in so doing. The need to ensure that public bodies are not discouraged from exercising their functions robustly in the public interest would provide such a justification. The Court of Appeal in England has not yet taken what would appear to us to be the logical step of exercising its costs discretion in that way even where the CPR applies, but nor has it precluded that development. If necessary, we would have been inclined to take that approach here.

47 Thirdly, Sir Peter submitted that, even if the general rule applied, that would not justify the conclusion that all the costs should be awarded to GFS, given that it failed in its art. 12 argument. We would have been minded to reduce the award to some degree to reflect this fact, given that the principal argument advanced by GFS in the substantive appeal was based on art. 12. It is true that there was an overlap between the art. 12 and art. 5 arguments, as Mr. Maclean submitted, but even so it would not, in our view, have been appropriate to make no reduction at all. In the event it has not been necessary to address that issue in detail.

Conclusion

48 For the reasons given, we would grant conditional leave to appeal; grant a stay of the order until after the appeal has been heard or further order; and make no order as to costs either here or below. We will hear submissions in writing on the question of the appropriate order as to costs in these applications.

Order accordingly.