[2023 Gib LR 565]

GIBTELECOM LIMITED v. GIBRALTAR REGULATORY AUTHORITY and GIBFIBRE LIMITED

SUPREME COURT (Restano, J.): July 13th, 2023

2023/GSC/028

Telecommunications and Broadcasting—communications providers—competition—costs order made against Gibraltar Regulatory Authority, which unsuccessfully resisted Gibtelecom's appeal against decision—Authority had not adopted non-adversarial, facilitating approach to appeal

Gibtelecom Ltd. sought an order for costs.

Gibfibre Ltd. had sought a leased line to access a data centre operated by Gibtelecom's wholly owned subsidiary, Rockolo Ltd. Gibtelecom refused the request on the basis that it fell outside the scope of the regulatory regime. Gibfibre complained that the arrangements were anti-competitive.

In July 2019, the Guernsey Regulatory Authority ("the GRA") decided that Gibtelecom was required to provide a leased line to Gibfibre. Shortly afterwards, Gibtelecom applied for permission to appeal and for a stay pending appeal. Gibfibre, which was not a party to the proceedings at that point, wished to participate. An order was made in September 2019 allowing Gibfibre to participate and it was later formally added as a respondent. Gibfibre took the lead in resisting the appeal and the GRA took a neutral stance. Due to the Covid pandemic, the appeal was not heard until February 2023. In November 2021, the Privy Council handed down its decision in the separate case regarding Gibfibre's first attempt to access the data centre. It held that the GRA did not have the power to require Gibtelecom to allow Gibfibre access as requested. In December 2022, Gibfibre wrote to the court and the parties stating that it considered that its interests should be adequately protected by the GRA's defence of the appeal and that it would not attend or be represented at the hearing, or submit a skeleton argument.

The Supreme Court allowed Gibtelecom's appeal and quashed the decision (that judgment is reported at 2023 Gib LR 266 Gibtelecom sought its costs against the GRA and Gibfibre on a joint and several basis, alternatively an order that costs be apportioned between the GRA and Gibfibre. Gibtelecom submitted that (a) CPR r.44.2 applied and the starting point was that costs should follow the event; (b) the principle established in *City of Bradford Metropolitan District Council* v. *Booth*, as applied in

other cases, which had been interpreted as giving public bodies almost complete protection from adverse costs orders, did not apply; (c) in any event, the *Booth* principle had been clarified by the Supreme Court in *Competition & Markets Auth*. v. *Flynn Pharma Ltd*., which made it clear that the correct application of that principle was far more contextual and that the potential "chilling effect" that an adverse costs order could have on a regulator or public body was not a given; (d) there was no good reason to depart from the starting point that costs should follow the event in this case; (e) the GRA's conduct in defending the appeal did not justify a departure from the starting point; and (f) an order for costs should also be made against Gibfibre which had not formally conceded the appeal.

The GRA resisted the order for costs submitting that (a) neither CPR r.44.2 nor the decision in *Flynn Pharma Ltd*. prevented the application of the principle established in *Booth*; (b) the court in *Flynn Pharma Ltd*. had preserved categories of cases where there was a general risk of a "chilling effect"; (c) the decision in *Flynn Pharma Ltd*. accepted that appeals arising from adjudications carried out by regulators, such as the present one, represented an exceptional category of case where it was appropriate to make no order as to costs even when the public body lost on appeal; (d) before departing from the starting point that there should be no order as to costs, the GRA would have to be found to have acted unreasonably or in bad faith, whereas it had acted reasonably throughout; (e) the GRA had adopted a neutral approach initially when Gibfibre was participating actively in the proceedings, and when Gibfibre took a step back, the GRA had assisted the court by adopting a non-adversarial, facilitating approach to its participation in the appeal; and (f) there should be no order as to costs.

Gibfibre submitted that (a) the GRA was the principal respondent to the appeal, the GRA had actively defended the appeal to the bitter end, and Gibfibre's position was akin to that of an "intervenor" or "interested party"; (b) previous decisions relying on the *Booth* principle now had to be read in light of the Supreme Court's decision in *Flynn Pharma Ltd*.; and (c) at most, Gibfibre should only be ordered to pay those costs which Gibtelecom would not have incurred had Gibfibre not asked to be added as a party to the proceedings.

In previous proceedings between Gibfibre and the GRA, the Court of Appeal had allowed Gibfibre's appeal against the GRA but refused to award costs against the GRA. It applied the *Booth* principle as it had been developed. The court found that there was no evidence of Gibfibre's financial situation that would justify a conclusion being reached that it would suffer particular financial harm of a significant or unusual nature if no order for costs were made. It was also said that there was no evidence that the GRA had acted unreasonably or in bad faith.

Held, awarding Gibtelecom its costs:

(1) The parties agreed that CPR r.44.2 applied in this case. The starting point was that costs would follow the event although this was subject to the court's discretion. This applied as much to the court's appellate jurisdiction

as it did when the court was exercising its original civil jurisdiction. In relation to costs against public bodies, the *Booth* principle—that where a complainant successfully challenged a public body's decision, the default position was no order for costs, unless the public body had acted unreasonably or there was financial prejudice to the complainant, as there would otherwise be a "chilling effect" on the exercise by the public body of its obligations—had recently been comprehensively considered by the Supreme Court in *Flynn Pharma Ltd*. It was clear from *Flynn Pharma Ltd*. that there was no principle that in every situation and for every public body it must be assumed that there might be a real risk of a "chilling effect" which would undermine the public bodies operating robustly in the public interest. Whether there was a real risk of such a "chilling effect" depended on the facts and circumstances of the public body in question and the nature of the decision that it was defending, but it could not be assumed to exist. Further, the assessment as to whether this "chilling effect" justified a starting point of no order as to costs was an assessment best made by the court or tribunal in question, although there would be some cases in which this would not need to be considered afresh if it had already been made in the same or analogous cases. The burden of proving a real risk of a "chilling effect" fell on the public body in question. The present case was not one where the "chilling effect" of an adverse costs order had already been determined by the Court of Appeal. The Court of Appeal's judgment was based on a pre-*Flynn Pharma Ltd.* understanding of the *Booth* principle. The Court of Appeal did not make any form of assessment about the facts and circumstances of the GRA and the nature of the decision that it was defending. The GRA's reliance on this reasoning therefore represented an attempt to rely on an outdated view of the *Booth* principle through the back door. The court did not consider that the fact that this appeal arose from a statutory adjudication undertaken by the GRA meant that this case fell into a category of exceptional cases where this court should incline against the ordering of costs against the GRA. The correct approach was for the court to carry out an assessment under CPR r.44.2 and for this feature of the case to form part of the context in which that assessment was carried out (paras. 21–54).

(2) The general rule was that the unsuccessful party would be ordered to pay the costs of the successful party, but the court could make a different order having regard to all the circumstances. Turning to the "chilling effect" in this case, the GRA did not submit any material to justify a conclusion that there was a risk of a "chilling effect" on it if an adverse costs order was made. The GRA merely asserted that the court could proceed on that basis. In the circumstances, it was not a factor to be accorded any real weight in the court's evaluation on costs and certainly not one which could operate against the general rule on costs applying. The fact that the appeal arose from a statutory adjudication carried out by the GRA did not in itself mean that this appeal should be treated as exceptional. It was however part of the context in which the question of costs fell to be decided as CPR r.44.2(5) required the court to have regard to the parties'

conduct which must be considered by reference to the nature of the proceedings. When looking at the parties' conduct, the sorts of issues the court should have regard to included the parties' conduct before as well as during the proceedings, and the reasonableness of allegations or issues to be raised, pursued and contested. As this appeal concerned an appeal from an adjudication carried out by the GRA, consideration needed to be given to whether the GRA's involvement in the appeal was required as well as that of the disputants, and whether the GRA needed to explain its decision to assist the court, answer any criticisms made of it, or bring to the court's attention wider public issues that might be at stake. The GRA had in fact advised Gibfibre to pursue access to the data centre by means of a leased line. Therefore this was not just a case of a public body adjudicating upon a dispute between commercial parties as a neutral arbiter. Rather than reappraising its decision before the appeal, when Gibtelecom's lawyers wrote to it explaining why it had fallen into error, the GRA persevered in its opposition to the appeal. The court did not accept that the GRA had adopted a non-adversarial, facilitating approach to the appeal. It subjected the expert to extensive cross-examination often based on outdated materials, and wrongly sought to distinguish the Privy Council judgment. It maintained its misunderstanding about interconnection rights, disregarded BEREC guidance and failed to appreciate the significance of the NTP, all central issues. It erroneously argued that Gibtelecom had engaged in anti-competitive "vertical leveraging" and wrongly asserted that Gibtelecom was required to provide access due to co-location obligations. All of this complicated rather than facilitated the appeal. This was not one of those cases where there were finely balanced legal or technical arguments where the court benefited from adversarial arguments. The GRA's approach was at odds with the regulatory scheme and the decision contained material errors of law and of fact that should have been clear, if not before making the decision, then at some point prior to the appeal hearing. There did not appear to be any wider public interests at stake. For all these reasons and taking all the circumstances of the case into account including the parties' conduct, the court did not consider that a departure from the general rule that costs should follow the event was justified in this case. Gibtelecom should have its costs of the appeal (paras. 55–66).

(3) Gibfibre was solely liable to pay Gibtelecom's costs up to December 12th, 2022, as Gibfibre had taken the lead in resisting the appeal up to that point. It was wholly artificial for Gibfibre to suggest that it should be treated as nothing more than an intervenor or interested party. For the period after December 12th, 2022, when Gibfibre ceased to take an active part in the appeal, the GRA was to pay 85% of Gibtelecom's costs, and Gibfibre was to pay 15% of Gibtelecom's costs. After December 12th, 2022, the GRA had effectively taken over as lead respondent. Gibfibre was not relieved entirely from liability to pay costs for this period because, although it did not actively participate in the appeal, it did not concede the appeal either (paras. 68–75).

Cases cited:
(1) *Baxendale-Walker* v. *Law Socy*., [2007] EWCA Civ 233; [2008] 1 W.L.R. 426; [2007] 3 All E.R. 330; [2007] 3 Costs L.R. 475, considered.
(2) *British Telecomms. plc* v. *Officer of Communications*, [2005] CAT 20, considered.
(3) *City of Bradford Metropolitan District Council* v. *Booth*, [2000] EWHC 444 (Admin); (2000), 164 J.P. 485; 3 LGLR 8; [2000] COD 338, considered.
(4) *Competition & Markets Auth.* v. *Flynn Pharma Ltd.*, [2022] UKSC 14; [2022] 1 W.L.R. 2972; [2022] 2 All E.R. (Comm) 937, followed.
(5) *Number (UK) Ltd.* v. *Office of Communications*, [2009] CAT 5, considered.
(6) *R.* (*Perinpanathan)* v. *City of Westminster Mags.' Ct.*, [2010] EWCA Civ 40; [2010] 1 W.L.R. 1508, considered.

R. Palmer, *K.C.* with *M. Levy* and *S. Marrache* (instructed by Hassans) for the appellant;
P. Caruana, *K.C.* with *P. Dumas* (instructed by Peter Caruana & Co.) for the first respondent;
E. Phillips and *P. Grant* (instructed by Signature Litigation) for the second respondent.

1 **RESTANO, J.:**

Introduction

For the reasons set out in my judgment dated April 14th, 2023 (reported at 2023 Gib LR 266) ("the judgment"), Gibtelecom succeeded in an appeal that it brought against a decision made by the GRA dated July 16th, 2019. I adjourned the question of costs at the handing down of the judgment. This allowed the parties to file written submissions, and for Gibfibre, which did not take part in the appeal hearing, to participate in the costs hearing. A further hearing then took place on Monday, May 22nd, 2023. This judgment is on the question of costs following that hearing and should be read together with the judgment. The abbreviations used in the judgment are also used in this judgment.

2 As the successful party, Gibtelecom sought its costs against the GRA and Gibfibre on a joint and several basis. Alternatively, it sought an order that costs be apportioned between the GRA and Gibfibre.

3 Although the GRA was the unsuccessful party in the appeal, it resisted the order for costs sought by Gibtelecom on various grounds. These included the fact that the GRA is a public body, that the appeal arose from a statutory adjudication function that it undertook and that it had acted reasonably throughout.

4 Gibfibre's position was that it was only in the position of an intervener or interested party, that it ceased to actively participate in the proceedings after December 12th, 2022, and that the GRA was the principal respondent to the appeal which it actively defended to the bitter end. Thus, Gibfibre agreed with Gibtelecom that the GRA should be ordered to pay Gibtelecom's costs of the appeal.

Relevant procedural background

5 Shortly after the GRA issued the decision, Gibtelecom made an application for permission to appeal and for a stay pending appeal. Those applications were originally listed for hearing on September 19th, 2019. The hearing date, however, was adjourned to November 12th, 2019, and one of the reasons for this was that it was clear that Gibfibre, that was not a party to the proceedings at that point, wished to participate in the proceedings. An order was therefore made on September 19th, 2019 allowing Gibfibre to participate at that hearing, and it was later formally added as a respondent.

6 Gibtelecom filed evidence in support of those applications, namely the first witness statement of Dwayne Lara dated July 2nd, 2019 and the first witness statement of Daniel Hook dated October 3rd, 2019. Gibfibre then filed evidence in opposition, and Gibtelecom filed further witness statements by Mr. Lara and Mr. Hook in reply to Gibfibre's evidence. Gibfibre opposed the applications and the GRA took a neutral stance. The Chief Justice handed down his judgment on February 14th, 2020. He granted permission to appeal, partially rejected the stay of the decision, and reserved costs.

7 Following that hearing, the parties corresponded on the meaning of the terms of the stay, and this culminated in an application by Gibfibre for clarification or variation of that stay. That application was heard on November 3rd and 4th, 2020. Prior to that hearing, two CMCs took place on June 30th, 2020 and on July 14th, 2020 dealing with directions leading up the appeal, including the admission of further evidence. The application for the admission of further evidence was also heard in November 2020. The costs orders made in the two CMCs referred to above were costs reserved, and costs in the case respectively.

8 On January 27th, 2021, the Chief Justice dismissed Gibfibre's application for clarification or variation of the stay. He also granted the application for admission of evidence in respect of two of the three grounds of appeal. This was on the basis that the Chief Justice ordered that the first two grounds of appeal should be dealt with first, and ground three would only proceed if necessary. Thus, the application for the admission of evidence insofar as it related to the third ground was adjourned. The Chief Justice also ordered that the costs of these applications, insofar as not

adjourned, be paid by Gibfibre to Gibtelecom. This order for costs was compromised in the sum of £80,000.

9 Due to the Covid pandemic, the appeal hearing in this matter only went ahead on February 28th, 2023. In the meantime, however, Gibtelecom and Gibfibre exchanged expert reports and the experts met and produced a joint statement. This delay also allowed Gibfibre's separate case regarding the first attempt it had made to access the data centre to reach the Privy Council, which handed down its judgment on November 29th, 2021 (reported at 2021 Gib LR 682). The Privy Council held that the GRA did not have the power to require Gibtelecom to allow Gibfibre access in the way it had originally requested to the data centre.

10 On December 12th, 2022, Signature Litigation wrote to the court with the parties in copy stating that although Gibfibre had been added as a respondent:

> "On reflection, however, Gibfibre considers that its interests should be adequately protected by the GRA's defence of the appeal. Therefore, and with a view to avoiding unnecessary costs, Gibfibre does not intend to attend or be represented at the Forthcoming Hearing, or to submit any skeleton argument in advance thereof. Nor does Gibfibre intend to call Mr Edward Mercer (from whom Gibfibre previously served an expert report) to give oral evidence. The purpose of this letter is to notify the Court and the parties accordingly . . ."

11 In the light of this development, Gibtelecom's lawyers wrote to the GRA's lawyers on January 4th, 2023 asking whether, given its neutral position up to that point, it intended to defend the proceedings. This letter further stated that Gibtelecom's case was primarily a legal one in that it was simply not within the scope of the regulatory framework for the GRA to have made the decision, and that this position had gained substantial further support following the Privy Council judgment (2021 Gib LR 682, at paras. 50–56). Further, the letter pointed out that:

> "The short point is that neither Article 5 nor Article 12 of the Access Directive could generate an obligation to allow Gibfibre to connect to customers' servers which do not form part of Gibtelecom's network. The point is no different, whether the connection is sought to be achieved by Gibfibre directly using its own fibre (as it was seeking to do in the Privy Council proceedings) or whether it is sought to be achieved by means of a leased line (as it was seeking to do in its complaint to the GRA which is the subject of the present proceedings). That is a complete and sufficient basis upon which to remit the position to the GRA for reconsideration.
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> . . .

> Please confirm your client's position urgently. We are anxious to avoid incurring the costs of preparing for the hearing currently listed for 28 February 2023, as to which you must understand that our client reserves its rights."

12 There was no formal response from the GRA to this letter, and the appeal hearing therefore went ahead.

The parties' submissions in outline

13 Mr. Robert Palmer, K.C. who appeared for Gibtelecom submitted that CPR r.44.2 applied, and that therefore the starting point when considering costs was that costs should follow the event. He submitted that the principle established in *City of Bradford Metropolitan District Council* v. *Booth* (3), as applied in other cases, and which had been interpreted as giving public bodies almost complete protection from adverse costs orders, did not apply in this case. This was because the *Booth* principle was concerned with cases, unlike the present appeal, where there was no starting point on costs under the rules governing those proceedings. In any event, he said that the *Booth* principle had now been clarified by the Supreme Court in *Competition & Markets Auth.* v. *Flynn Pharma Ltd.* (4). This made it clear that the correct application of that principle was far more contextual, and that the potential "chilling effect" that an adverse costs order could have on a regulator or a public body was not a given.

14 Mr. Palmer submitted that there was no good reason to depart from the starting position that costs should follow the event in this case, and that a mere assertion by the GRA of a potential "chilling factor" was not sufficient to depart from the starting point. Further, he said that the GRA's conduct in defending the appeal did not in any event justify a departure from the starting point.

15 Finally, Mr. Palmer said that Gibtelecom was not only entitled to a costs order against the GRA, but that an order for costs should also be made against Gibfibre that had not formally conceded the appeal.

16 Sir Peter Caruana, K.C. who appeared for the GRA agreed that CPR r.44.2 applied, but he submitted that neither this nor the decision in *Flynn Pharma* prevented the application of the principle established in *Booth*. Further, he said that the court's judgment in *Flynn Pharma* had preserved categories of cases where there was a general risk of a "chilling effect." In this regard, he relied on the fact that the Court of Appeal had recognized that no order for costs should be made against the GRA in *Gibfibre Ltd.* v. *GRA* (2019 Gib LR 197), even if CPR r.44.2 applied. Sir Peter also said that the decision in *Flynn Pharma* accepted that appeals arising from adjudications carried out by regulators, such as the present one, represented an exceptional category of case where it was appropriate to make no order as to costs even when the public body lost on appeal.

17 Sir Peter also said that before departing from the starting point that there should be no order as to costs, the GRA would have to be found to have acted unreasonably or in bad faith, and that the GRA had acted reasonably throughout. He said that the GRA had adopted a neutral approach initially when Gibfibre was participating actively in the proceedings, and that when Gibfibre took a step back, the GRA had assisted the court by adopting a non-adversarial, facilitating approach to its participation in the appeal.

18 Sir Peter therefore said that there should be no order as to costs, and added that this would ensure coherence between the Supreme Court and the Court of Appeal on this issue.

19 Mr. Phillips who appeared for Gibfibre said that the GRA was the principal respondent to the appeal, that the GRA had actively defended the appeal to the bitter end, and that Gibfibre's position was akin to that of an "intervenor" or "interested party." Mr. Phillips agreed that previous decisions relying on the *Booth* principle now had to be read in the light of the Supreme Court's decision in *Flynn Pharma* (4) and supported Gibtelecom's application for an order for costs to be made against the GRA. At most, Gibfibre said that it should only be ordered to pay those costs which Gibtelecom would not have incurred had Gibfibre not asked to be added as a party to the proceedings.

20 As for the specific procedural applications including the permission and stay applications, Mr. Phillips said that these were costs that had to be incurred by Gibtelecom for the substantive appeal in any event. Further, he said that Gibfibre should not be liable for the costs of the June and July 2020 CMCs.

Discussion

21 Under CPR r.44.2(1), which the parties agreed applied in this case, the court enjoys a wide discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Further, if the court decides to make an order about costs, the general rule under CPR r.44.2(2) is that costs follow the event, but the court can make a different order. In deciding what (if any) order to make about costs, the court must have regard to all the circumstances including those set out at CPR r.44.2(4) and (5). The starting point when it comes to costs, therefore, is that costs will follow the event although this is subject to the court's discretion. This applies as much to the court's appellate jurisdiction as it does when the court is exercising its original civil jurisdiction.

Legal principles relating to costs against a public body

22 Several cases have considered what the correct principles should be when costs are sought against a public body. This line of authorities started

with *City of Bradford Metropolitan District Council* v. *Booth* (3). In that case, justices in the magistrates' court had made an order for costs against a local authority which had made a vehicle licensing decision even though there was no question of unreasonableness or bad faith on the part of the local authority. The position regarding costs in the Magistrates' Court was governed by s.64 of the Magistrates' Court Act 1980 which conferred on the magistrates' court a broad power to make such orders as to costs as it thought was just and reasonable. On appeal, Lord Bingham concluded that the justices had not approached the question of costs correctly when they relied on the principle that costs should follow the event and stated that there were wider considerations which were relevant. He then provided the following guidance for cases of this sort, commencing (164 J.P. 485, at paras. 24–26):

> "(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.
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> (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.
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> (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."

23 The principle established by *Booth* has been applied in several cases in various contexts over the years, although what started as a set of general and nuanced propositions gained a more restrictive and hard-edged character.

24 In *Baxendale-Walker* v. *Law Socy.* (1), the Court of Appeal held that absent impropriety, an order for costs should not be made against the Law Society which was discharging a public interest function in ensuring that cases of possible professional misconduct were properly investigated. The court said that when the Law Society was discharging its responsibilities as a regulator for the profession, an order that costs should follow the event when the Law Society was unsuccessful should not ordinarily follow.

Rather, the "event" was not a starting point but simply one factor for consideration. Sir Igor Judge, P. held ([2008] 1 W.L.R. 426, at para. 39) that, except for cases that had been a "shambles from start to finish," an order for costs should not ordinarily be made against a regulator in the event of a successful challenge by a complainant as this would otherwise lead to a "chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

25 *R.* (*Perinpanathan)* v. *City of Westminster Mags.' Ct.* (6) concerned the dismissal of an application made by the police for the forfeiture of cash. Even though the application made by the police was dismissed, an order for costs against the police was refused. The Court of Appeal held that the presumption that no order for costs should be made applied, and that this presumption was not displaced as the police had acted reasonably and the claimant would suffer no undue financial prejudice because of the order made.

26 This question has also come up in the context of appeals concerning telecommunications disputes such as this one. In the UK, however, these disputes fall to be determined by the Competition Appeal Tribunal ("CAT"), a specialized independent tribunal where the Civil Procedure Rules do not apply, nor does a similar principle apply that the general rule is that costs should follow the event. Rather, the applicable rules on costs confer on the CAT a wide discretion on costs.

27 *British Telecomms. plc* v. *Officer of Communications* (2) ("*RBS Backhaul*"), concerned an interconnection dispute between BT and Vodafone. This was referred to Ofcom for resolution under the relevant legislation at the time, and it resolved the matter against BT. An appeal was successfully brought by BT against Ofcom's decision, but the CAT refused to make an order for costs against Ofcom for the reasons set out in its judgment ([2005] CAT 20, at paras. 57–63). It considered that Ofcom had been bound to defend the decision, that the issue had been technically and legally complex, that Ofcom's submissions had been ably and forcefully presented, and that they were reasonable even though they did not prevail in the end. Further, it stated that making an order for costs against Ofcom might result in it being less resolved to defend its decisions, or more ready to compromise, which would not be in the public interest.

28 In the previous proceedings between Gibfibre and the GRA, which gave rise to the Privy Council judgment, the Court of Appeal, before being overturned by the Privy Council, allowed Gibfibre's appeal against the GRA. The Court of Appeal, however, refused to award costs against the GRA at that point: see *Gibfibre Ltd.* v. *GRA* (2019 Gib LR 197). In reaching this conclusion, the Court of Appeal referred to the broad discretion conferred on it under r.68 of the Court of Appeal Rules 2004 when it came to costs, and which it said was potentially at odds with the default position

that costs should follow the event. Further, it said that the English rules of practice and procedure adopted by the Civil Division of the English Court of Appeal applied. Whilst this would usually mean the CPR, it held that in that case it meant that what applied was the practice that no order for costs would be made against a public body exercising a public function where there was no default position. The Court of Appeal therefore applied the *Booth* principle as it had developed. In doing so, the court found that there was no evidence of Gibfibre's financial situation that would justify a conclusion being reached that it would suffer particular financial harm of a significant or unusual nature if no order for costs were made. Further, it said that there was no evidence that the GRA had acted unreasonably or in bad faith.

29 The *Booth* principle was recently comprehensively considered by the Supreme Court of the United Kingdom in *Flynn Pharma* (4), in a judgment handed down on May 25th, 2022. That case concerned an appeal by various pharmaceutical companies to the CAT under the Competition Act 1998 against a decision of the Competition of Markets Authority ("CMA") which had fined them for breaches of competition law. The CAT allowed the appeals in part, set aside part of the CMA's decision, and remitted the case to the CMA for reconsideration. The CAT also made an order that the CMA pay a proportion of the appellants' costs. Under r.104 of the CAT Rules 2015, the CAT has a wide discretion to make any order to costs as it thinks fit, and further lists several factors which it may take account of. The Court of Appeal set aside the order for costs made by the CAT because it considered that the CAT had disregarded the principle that where there is no default position expressed in the wording of the power to award costs, the starting point, which can be departed from, is that no order for costs should be made against a public body which had been unsuccessful in bringing or defending proceedings in the exercise of its statutory functions.

30 On appeal, the Supreme Court held that there was no generally applicable principle that all public bodies should enjoy a protected position when they lose a case. The Supreme Court sided with the pharmaceutical companies and reinstated the original order for costs against the CMA. It stated that an important factor to consider when determining costs awards was the risk of a "chilling effect" on the conduct of a public body if costs orders are routinely made against it when it is unsuccessful, even where it had acted reasonably. It further stated, however, that whether there is a real risk of such a "chilling effect" depends on the facts and circumstances of the public body in question and the nature of the decision it is defending. What this decision makes clear, therefore, is that it cannot be assumed that there is such a risk just because the respondent to the appeal is a body acting in the public interest. Lady Rose, with whom the rest of the court agreed, stated as follows ([2022] UKSC 14, at paras. 97–98):

> "97. In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the *Booth* line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in the kinds of proceedings dealt with directly in *Booth*, *Baxendale-Walker* and *Perinpanathan*, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.
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> 98. Where I depart from the CMA's argument and from the decision of the Court of Appeal in this case is in making the jump from a conclusion that in some circumstances the potential chilling effect on the public body indicates that a no order as to costs starting point is appropriate, to a principle that in every situation and for every public body it must be assumed that there might be such a chilling effect and hence that the body should be shielded from the costs consequences of the decisions it takes. An appeal is not sufficiently analogous to the *Booth* line of cases merely because the respondent is a public body and the power to award costs is expressed in unfettered terms. Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending—it cannot be assumed to exist. Further in my judgment, the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts."

31 The Supreme Court therefore rejected a one-size-fits-all approach to costs orders against public authorities. Further, it made it clear that whether there is a real risk of a "chilling effect" if an adverse costs order is to be made against a public body such as to militate in favour of a different starting point on costs depends on several factors, and that is an assessment that needs to be made by the court or tribunal hearing the case. Lady Rose, however, stated that courts and tribunals may not need to make that

assessment afresh every time if it has already been made in the same or analogous cases. In this regard, she referred specifically to *Booth* (3), *Baxendale-Walker* (1) and *Perinpanathan* (6). Lady Rose also considered how the CAT has responded in its case law to arguments about "chilling effect" by Ofcom later on in her judgment.

32 Lady Rose also made the point (*ibid.*, at para. 133) by reference to the position the context of judicial review proceedings (where the starting point is also that costs follow the event) that adverse costs orders can be beneficial as they encourage better decision-making. She specifically refers to this leading to a more realistic appraisal of defending proceedings, and the efficient and proportionate conduct of proceedings.

33 The first point to make about *Flynn Pharma* (4), and CAT cases generally, is that the rules governing costs in those cases do not provide a starting point. This is like the position in *Booth*, *Perinpanathan* and *Baxendale-Walker* where the governing rules of costs did not provide for a starting point either. Those cases are therefore not directly applicable here where a starting point does apply, and that distinguishing feature has been recognized by the courts. In *Perinpanathan*, Stanley Burnton, L.J.'s judgment sets out seven propositions about the *Booth* principle derived from the authorities which includes ([2010] EWCA Civ 40, at para. 40): "(4) The principle does not apply in proceedings to which the CPR apply." This is then confirmed (*ibid.*, at para. 73) in Lord Neuberger's judgment where he states that:

> "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)."

34 The Gibraltar Court of Appeal also said (2019 Gib LR 197, at para. 37) that the "central question" in that case was whether CPR 44.2 applied in that appeal. The Court of Appeal concluded that the Court of Appeal Rules 2004 did not incorporate CPR r.44.2 and that it enjoyed the broadest discretion in relation to costs orders, which meant that the *Booth* principle applied.

35 Despite this point of distinction, it is nevertheless important to understand the rationale behind the *Booth* principle, and when it is proper for weight to be given to this factor, whether under one costs regime or another.

36 Several courts and tribunals, including the Court of Appeal in *Gibfibre*, interpreted the *Booth* principle as effectively conferring a protected status on public bodies exercising a public function in the absence of unreasonableness or bad faith on their part. This was based on the public interest that public bodies are not discouraged from exercising

their functions robustly in the public interest. The approach taken in these cases was that in the absence of financial prejudice to the winning party or unreasonable conduct on the part of the public body, the starting point was that there should be no order as to costs. This approach was therefore largely unconstrained by the facts and circumstances of the public body or the decision it was defending.

37 It is now clear from the Supreme Court's decision in *Flynn Pharma* (4) that there is no principle that in every situation and for every public body it must be assumed that there might be a real risk of a "chilling effect" which would undermine the public bodies operating robustly in the public interest. Whether there is a real risk of such a "chilling effect" depends on the facts and circumstances of the public body in question and the nature of the decision that it is defending, but it cannot be assumed to exist. Further, the assessment as to whether this "chilling effect" is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, although as stated above there are cases where this will not need to be considered afresh. This means that the burden of proving a real risk of a "chilling effect" falls on the shoulders of the public body in question.

38 The GRA's case, however, was that it was not necessary for it to show a risk of a "chilling factor" in this case. It argued that this was one of those cases where the "chilling effect" of an adverse costs order had already been determined by the Court of Appeal decision in *Gibfibre*, and did not need to be considered afresh, as referred to by Lady Rose ([2022] UKSC 14, at para. 97) in her judgment in *Flynn Pharma*. Further, it said that the Court of Appeal in that case had even gone as far as to say that the real risk of a "chilling effect" would even exist if CPR r.44.2 applied.

39 It is clear from the Court of Appeal's judgment in *Gibfibre* that it did not order costs against the GRA based on a pre-*Flynn Pharma* understanding of the *Booth* principle. This was on the basis that the GRA was a public authority, that there was no particular financial harm to Gibfibre of a significant or unusual nature, and because there were no other material factors such as unreasonableness or bad faith justifying another outcome. The Court of Appeal also stated *obiter* (2019 Gib LR 197, at para. 46) that even if CPR r.44.2 was incorporated into the Court of Appeal rules, the *Booth* principle could still result in the court departing from the starting point that costs follow the event. This approach, it stated, followed the logic in *Booth* that there may be an appropriate public interest in doing so, namely ensuring that public bodies are not discouraged from exercising their functions in the public interest robustly where those functions are exercised reasonably and in good faith.

40 The fact that the Court of Appeal stated that it was open to a court where CPR r.44.2 applies, to depart from the starting point is not remarkable.

Whatever the starting point the court always has a discretion when it comes to costs, and a starting point is not a finishing point. If the facts and circumstances of a case point towards a departure from the starting point that is within the court's discretion. However, when exercising that discretion, the court must take account of proper considerations.

41 The reasoning adopted by the Court of Appeal for saying that it would have been open to make no order as to costs, even if CPR r.44.2 had applied, was however rooted in its understanding of the *Booth* principle as it had developed prior to the clarification provided by *Flynn Pharma* (4). It is now clear, however, that this approach is no longer accurate, and that it is wrong to jump to conclusions about the risk of the "chilling effect" of a costs order against of a public body. The true principle of *Booth* (3) is that any potential "chilling effect" should not be assumed and cannot be read across automatically to any regulatory authority body or public body just because it was acting reasonably and in good faith.

42 It might have been different if the Court of Appeal had considered the facts and circumstances of the GRA as a regulator, the nature of the decision that it was defending, and had made a decision on that basis. That, however, was not the case. Although the case before the Court of Appeal also concerned the GRA and its adjudication of a telecoms dispute, the Court of Appeal did not make any form of assessment about the facts and circumstances of the GRA and the nature of the decision that it was defending. The GRA's reliance on this reasoning, therefore, represented an attempt to rely on an outdated view of the *Booth* principle through the back door.

43 The concern on the part of the GRA about a lack of coherence between the Court of Appeal and the Supreme Court is also a hollow one following *Flynn Pharma*. Whether this issue comes up in the Supreme Court or the Court of Appeal, the position now is that this is an important factor if made out, but that it is ultimately a fact-sensitive inquiry.

44 This is not a case either where some other assessment has already been carried out about the "chilling effect" that applies to the GRA or where there have been analogous proceedings. This is clear from the cases Lady Rose specifically referred to in her judgment. These were: *Booth*, that concerned appeals against local authority decisions on licensing application; *Baxendale-Walker*, that concerned solicitors' disciplinary proceedings brought by the SRA before the Solicitors' Disciplinary Tribunal; and *Perinpanathan*, that concerned criminal confiscation proceedings brought by the police to the Magistrates' Court. The position of the GRA in this case is not akin to a case arising from a decision of the SRA, a licensing appeal, nor is it a case about cash forfeiture. Nor can it be said that there are analogous proceedings which apply to the GRA.

45 The GRA also argued that appeals arising from the statutory adjudication by a regulator of a dispute had been afforded special treatment by the CAT. Further, it said that these were exceptional cases where adverse costs orders had not been made against the regulator, as acknowledged by the Supreme Court in *Flynn Pharma*.

46 The *Flynn Pharma* judgment refers to the starting position taken by the CAT in statutory adjudication appeals, and Lady Rose states as follows ([2022] UKSC 14, at para. 42):

> "In the light of these cases, it was common ground in the appeal before this court that the CAT has generally adopted a starting point of costs follow the event in appeals brought under the Competition Act. That has not been the case, however, in other kinds of appeals. In some kinds of appeals the CAT has adopted a starting point of no order as to costs, for example in dispute resolution decisions taken by Ofcom."

47 Moving forward (*ibid.*, at para. 112) in the *Flynn Pharma* judgment, Lady Rose added that:

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

48 *RBS Backhaul* (2) was an early dispute resolution appeal in England where the CAT held that it would not be right to make an order for costs against the Director General of Telecommunications (Ofcom's predecessor) for having defended its decision following an adjudication. This, however, was on the basis that the decision may well have been appealed by either side, that it defended the appeal entirely reasonably, and where wider public interests were involved.

49 *Number (UK) Ltd.* v. *Office of Communications* (5) was a case where the CAT acknowledged the unique role of Ofcom as a regulator dealing with the resolution of appeals. It went on to say in that case that where there is no starting point on costs, the starting point should in effect be that Ofcom would not usually be met with an adverse costs order if it has acted reasonably and in good faith, or if the facts otherwise justified it. It added ([2009] CAT 5, at para. 5) that particular facts may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct, and that room must always be left for the exercise of discretion in this way where the facts justified it.

50 The Supreme Court therefore recognized in *Flynn Pharma* (4) that the CAT's practice has been to adopt a starting point of no order as to costs in dispute resolution appeals where Ofcom has been unsuccessful on appeal. This, however, is nothing more than a starting point in the CAT, and it does not mean that those starting points will necessarily be finishing points, as each case will be determined on its own facts and circumstances. In its analysis of the CAT's position, the Supreme Court referred to the CAT's sophisticated approach to costs awards which accommodates the factors referred to in *Booth* (3), even if costs follow the event is taken as the starting point, and that strikes a balance between the various competing factors pulling in different directions. This includes the CAT's readiness to make detailed decisions on costs, issue-based orders, and reductions in the costs to be paid, to give consideration of a variety of factors when considering costs, and to manage cases to avoid the escalation of costs.

51 Pausing there, there are some general observations to be made about the CAT's approach on costs to these sorts of appeals. For a start, the rules governing costs are different in this court where, unlike the CAT, a general rule that costs follow the event applies. Further, it cannot be assumed, in the absence of any material on this, that the position of Ofcom whether in the way that it is funded, its approach to appeals of this sort or other relevant considerations, is materially the same to that of the GRA in Gibraltar. Some of those authorities refer to the reasonableness of Ofcom's interventions and wider public interests being at stake as reasons for not making an order for costs against Ofcom. Another point to bear in mind about these appeals in the UK is that a regulator must not always feel obliged to appear in an appeal. In *BT* v. *Ofcom* (2) ([2011] EWCA Civ 245, at para. 87), Toulson, L.J. said as follows:

> "Section 192(2) of the CA 2003 gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, but it does not follow that it needs to take an active part in the appeal. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom's approach

> in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal."

52 It is also clear that whilst the CAT does apply a starting point that there should be no costs against Ofcom in these cases, it retains is discretion to make any order for costs that it thinks fit, and that it has a multi-faceted way of dealing with costs order.

53 Thus, there may be cases where it is understandable in appeals of this sort for the GRA to want to participate in an appeal, such as where there are questions of wider importance, because it is the subject of criticism or because it can assist the court. That does not mean, however, that it should feel under pressure to incur the costs of participating in every single appeal from its decision just because it is a respondent to an appeal from its decision, and that it should almost invariably be shielded from costs orders if it does, and it is unsuccessful.

54 In the circumstances, I do not consider that the fact that this appeal arises from a statutory adjudication undertaken by the GRA means that this case falls into a category of exceptional cases where this court should incline against the ordering of costs against the GRA. Such an approach goes well beyond Lady Rose's observations and would in effect place constraints on the factors set out in CPR r.44.2, which is the guiding principle here. The correct approach is for the court to carry out an assessment under CPR r.44.2, and for this feature of the case to form part of the context in which that assessment is carried out.

CPR r.44.2 assessment

55 The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order having regard to all the circumstances.

56 Turning first to the question of the "chilling effect." As stated above, the GRA did not submit any material to justify a conclusion being reached that there was a real risk of a "chilling effect" on the GRA if an adverse costs order was made against it. To put this into context, it is instructive to look at the material considered in *Flynn Pharma* (4) when looking at this issue, even if that decision concerned another regulator and another costs regime. This included data on the limited number of decisions that the CMA took each year under the Competition Act 1998, details of which were provided. The way that appeal costs were dealt with was also considered by reference to financial statements, as well as the arrangements the CMA had with HM Treasury in this regard (see [2022] UKSC 14, para. 121 and following). It was in the light of that information that the court concluded that there was

no plausible concern that the CMA's conduct would be influenced by the risk of an adverse costs order.

57 The position the Supreme Court took in relation to the CMA contrasted with the view that the court expressed about the SRA in Lady Rose's judgment (*ibid.*, at para. 122), and which referred to the written intervention of the SRA. In that intervention, the SRA had pointed out that it undertook 120 to 130 prosecutions a year, and that it was funded predominantly by practising certificate fees and other fees paid by the solicitors' profession. Further, the SRA sought to recover its fees from the unsuccessful solicitor when successful as otherwise those costs would need to be borne by the legal profession. The court therefore distinguished the position of the SRA from that of the CMA. In the case of the former, the regulator is funded predominantly by the profession that it regulates by means of practising certificate fees where higher fees would result from adverse costs orders. In the case of the latter, the CMA is entitled under the Competition Act 1998 to offset its litigation costs against any penalties that it receives. Against that background, Lady Rose recognized the importance of the *Baxendale-Walker* authority for the continued proper functioning of the SRA and did not cast any doubt on the correctness of that decision.

58 What this analysis of the financing and functioning of the CMA and the SRA and the sectors they regulate illustrates is the sort of material that might sway a court in one direction or another on the question of a "chilling effect." So, the way that the CMA was funded dispelled any notion of a "chilling effect" and pointed in one direction, whilst the proper functioning of the legal profession pointed in another direction. In this case, although the burden of showing a "chilling effect" falls on the GRA, it did not provide any such material to support its claim. Rather, it merely asserted that the court could proceed on the basis that there was a real risk of a "chilling effect." Further, it relied on authorities none of which could be read as showing that a "chilling effect" had been established in this case. In these circumstances, this is not a factor to be accorded any real weight in the court's evaluation on costs, and certainly not one which can operate against the general rule on costs applying.

59 Turning next to the fact that the appeal arose from a statutory adjudication carried out by the GRA. For the reasons set out above, this feature does not in itself mean that this appeal should be treated as exceptional. It is, however, part of the context in which the question of costs falls to be decided as CPR r.44.2(5) requires the court to have regard to the conduct of the parties, which must be considered by reference to the nature of the proceedings.

60 When looking at the parties' conduct, the sorts of issues the court should have regard to include the parties' conduct before, as well as during the proceedings, and the reasonableness of allegations or issues to be

raised, pursued, and contested. As this appeal concerns an appeal from an adjudication carried out by the GRA, consideration needs to be given to whether the GRA's involvement in the appeal was required as well as that of the disputants, and whether the GRA needed to explain its decision to assist the court, answer any criticisms made of it, or bring to the court's attention wider public issues that might be at stake. Before addressing this further, however, it is necessary to say a word about how the adjudication came in this case about because, in my view, that too is relevant context.

61 Email communications between Gibfibre and the GRA show that the GRA advised Gibfibre to pursue access to the data centre by means of a leased line (see for example email from Sean O'Reilly of Gibfibre to the GRA dated September 26th, 2018). Gibfibre followed the GRA's advice and when Gibtelecom refused the request, the matter proceeded to adjudication. This was not therefore just a case of a public body adjudicating upon a dispute between commercial parties as a neutral arbiter such as when a regulator fixes the terms of transactions between regulated entities. Rather, the GRA provided advice to Gibfibre about how it thought it could gain access to the data centre, and things developed from there.

62 Following the adjudication and prior to the GRA finalizing the decision, the GRA circulated the decision in draft form. Gibtelecom provided written submissions in response in a letter dated July 5th, 2019 setting out the reasons why it said the decision was wrong. The GRA did not accept these submissions and proceeded to issue the decision. Gibtelecom then set out the grounds of its challenge in the memorandum of appeal. Things went quiet for a while, and this meant that the Privy Council decision was handed down before the appeal was heard. During this time, Dr. Unger also served his expert report, Gibfibre ceased to participate in the appeal, and its expert dropped out of the picture. Further, prior to the appeal hearing and on January 4th, 2023, Gibtelecom's lawyers wrote to the GRA's lawyers referring to the Privy Council judgment and Dr. Unger's report and explaining why this made it clear that the GRA had fallen into error. The GRA provided no formal written response to this letter. Rather than reappraise its position, the GRA persevered in its opposition to the appeal.

63 The GRA said that as regulator and decision-maker, it had no interest in the outcome of the appeal, except for the proper discharge of its statutory duty, upholding its powers as well as Gibtelecom's obligations as an SMP operator to its competitors. Further, it said that it adopted a non-adversarial, facilitating approach to the appeal, and appeared at the appeal hearing to explain its decision and to assist the court.

64 This is not in my view an accurate reflection of the way that the GRA approached the appeal hearing. It subjected Dr. Unger to an extensive cross-examination at the hearing often based on outdated and

decontextualized selected materials, and wrongly sought to distinguish the Privy Council judgment. Further, the GRA maintained its misunderstanding about interconnection rights, disregarded BEREC guidance, and failed to appreciate the significance of the NTP, all central issues. The GRA also relied on its own decision in relation to the NTP for flat owners that was not only misplaced but had not even featured in the decision. It also erroneously argued that Gibtelecom had engaged in anti-competitive "vertical leveraging," and wrongly asserted that Gibtelecom was required to provide access due to co-location obligations. This all complicated rather than facilitated the appeal.

65 This was not, therefore, one of those cases where there were finely balanced legal or technical arguments where the court benefited from adversarial arguments, as was the case in *BT* v. *Ofcom* (2) (see comments at [2005] CAT 20, para. 57). In that case, the CAT also made the point that if Ofcom had withdrawn it would have provoked an appeal by another of the parties. It also pointed out that Ofcom's submissions were reasonable ones even though they did not prevail in the end. There is therefore a world of difference between what the CAT was dealing with in that case, and the position here. In this case, the whole approach taken by the GRA was at odds with the regulatory scheme and the decision contained material errors of law and of fact that should have been clear, if not before making the decision, then at some point prior to the appeal hearing. It is also worth bearing in mind that there do not appear to be any wider public interests at stake here as was the case in *BT* v. *Ofcom*. Although the GRA referred to Gibtelecom's SMP obligations (which it accepted were out of date) which might suggest on the face of it that that are public interests at stake, there was in fact no question of this being the case. The data centre does not form part of the public communications network, and the GRA was mistaken about this.

66 For all these reasons and taking all the circumstances of this case into account including the parties' conduct, I do not consider that a departure from the general rule that costs should follow the event is justified in this case. I therefore order that Gibtelecom should have its costs of the appeal.

Apportioning of costs

67 The next issue to consider is how, if at all, to apportion costs between the GRA and Gibfibre. In doing so, it is appropriate to consider the position before and after December 12th, 2022, which is the date when Gibfibre ceased to take an active part in the appeal.

Costs before December 12th, 2022

68 As soon as the appeal was filed, Gibfibre indicated that it intended to fully participate in the proceedings. It applied to be joined as a party, and

it took the lead role in opposing the appeal. It is therefore wholly artificial for it to say, as it did, that it should be treated as nothing more than an intervenor or interested party as it suggested. This is clear from the fact that Gibfibre opposed the permission hearing and the stay application heard on November 12th, 2019 when the GRA took a neutral stance in relation to those applications. Although Gibfibre said that the permission hearing was a necessary step in the appeal, that ignores the fact that the costs of that step in the proceedings were increased very considerably by Gibfibre's opposition, as can be seen from the judgment of the Chief Justice dated February 14th, 2020. Gibfibre also instructed an expert to respond to Gibtelecom's expert, which shows that it was also actively involved in opposing the substantive appeal at that time. It is also clear that during that period the GRA took a back seat role in the proceedings. This is reflected in the order for costs that the Chief Justice made against Gibfibre in relation to the hearing that took place in November 2020 concerning the admission of new evidence and a clarification of the stay.

69 In resisting an order for costs being made against it, Gibfibre also made the point that some of the evidence which Gibtelecom filed in these early applications also ended up being used for the appeal hearing. In my view, the fact that this was the case does not relieve Gibfibre of its liability for costs during this period, as that evidence had to be filed by Gibtelecom for the purposes of those early applications.

70 In my view, therefore, Gibfibre should be solely liable for the costs for the appeal up to December 12th, 2022. To the extent that these costs have not already been dealt with, these costs include the following:

(1) The costs of the permission and stay hearing which was heard on November 12th, 2019 which were reserved following the Chief Justice's judgment of February 14th, 2020;

(2) The costs of the CMC of June 30th, 2020 which were reserved; and

(3) The costs of the application to admit evidence in relation to the third ground of appeal which was adjourned.

Costs after December 12th, 2022

71 Once Gibfibre announced that it considered that its interests could be adequately protected by the GRA, the GRA effectively took over as the lead respondent. Although Gibfibre remained as a party to the proceedings and did not concede the appeal, it did not take any further active steps. It ceased to rely on its expert, it did not file skeleton arguments, and it did not attend the appeal hearing.

72 When Gibfibre withdrew its active participation in the appeal, the GRA could have quite properly informed Gibfibre that as the regulator it would only take a limited role in the appeal, assisting the court as required.

Such an approach would have been especially apt in the light of the Privy Council's judgment that was handed down on November 29th, 2021 (2021 Gib LR 682), as this confirmed where the NTP boundary lay in the data centre which was a central issue in this appeal. This reasoning applied just as much to the requested access to the data centre by way of Gibtelecom's leased lines as it did to the original request to access the data centre by means of ducts, a point which was reinforced by Dr. Unger's report. As explained above, this is not what happened, and the GRA in fact fought the appeal tooth and nail.

73 All of this points to the GRA, rather Gibfibre, being primarily liable for the costs to be paid for this period. In my view, however, Gibfibre should not be relieved entirely from liability to pay costs for this period. Gibfibre did not adduce any evidence or file any skeletons for the appeal hearing, it did not rely on its expert evidence, and it did not attend the hearing, but it did not concede the appeal either. If Gibfibre had conceded the appeal, this might have put a different perspective on things. In the circumstances, I consider that the just way to apportion costs for this period is that the GRA should be liable for 85% of Gibtelecom's costs, and that Gibfibre should be liable for the balance of 15%.

Summary of conclusions

74 The starting point under CPR r.44.2 is that costs should follow the event, and there is no good reason to depart from that starting point in the present case.

75 Gibtelecom is entitled to its costs of the appeal which are to be apportioned as follows:

(1) Gibfibre is to pay Gibtelecom's costs up to December 12th, 2022, as it was Gibfibre that took the lead up in resisting the appeal up to this point.

(2) For the period after December 12th, 2022, including this costs hearing, the GRA is to pay 85% of Gibtelecom's costs of the appeal, and Gibfibre is to pay 15% of Gibtelecom's costs of the appeal.

Judgment accordingly.