



## Press Summary

25 May 2022

**Competition and Markets Authority (Respondent) v Flynn Pharma Ltd and another (Appellants)**

**Competition and Markets Authority (Respondent) v Pfizer Inc and another (Appellants)**

**[2022] UKSC 14**

***On appeal from: [2020] EWCA Civ 617***

**Justices:** Lord Hodge (Deputy President), Lord Sales, Lord Leggatt, Lord Stephens, Lady Rose

### Background to the Appeal

The Respondent (“**the CMA**”) is a public body tasked with investigating companies suspected of breaching competition law and penalising those found to have done so. The Appellants are both pharmaceutical companies fined by the CMA for breaches of the Competition Act 1998 in respect of the supply of prescription epilepsy drugs.

The Appellants both appealed to the Competition Appeal Tribunal (“**the CAT**”) challenging the CMA’s decision. 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 the Appellants a proportion of their costs of the appeal (“**the CAT’s Costs Ruling**”). It did this under the power conferred by Rule 104(2) of the Competition Appeal Tribunal Rules 2015 (“**the 2015 Rules**”), which states that the CAT may “*make any order it thinks fit in relation to the payment of costs*”. The Rule then lists a number of factors that the CAT may take into account when considering costs, but does not set any particular starting point or presumption as to the order the CAT should make.

The Court of Appeal set aside the CAT’s Costs Ruling and ordered that there be no order as to costs of the appeal before the CAT. This was because the Court of Appeal considered that the CAT had disregarded a general legal principle based on a line of cases beginning with *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485 (“**Booth**”) that, where there is no default position expressed in the wording of the power to award costs, the starting point is that no order for costs should be made against a public body such as the CMA when it has been unsuccessful in bringing or defending proceedings in the exercise of its statutory

functions. That starting point may be departed from where there is good reason, such as unreasonable conduct on the part of the public body but there was no such factor present in this case.

The Appellants appealed to the Supreme Court against the Court of Appeal's judgment, on the basis that there is no such legal principle.

## **Judgment**

The Supreme Court unanimously allows the appeals. Lady Rose gives the judgment with which the other members of the Court agree.

## **Reasons for the Judgment**

Since its early caselaw the CAT has in general applied as a starting point in appeals brought under the Competition Act 1998 that an unsuccessful party will pay the successful party's costs (known as "costs follow the event") [39],[42].

In the Supreme Court's judgment, there is no generally applicable principle that all public bodies should enjoy a protected costs position when they lose a case. The principle supported by the *Booth* line of cases is, rather, that an important factor to consider when determining costs awards 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 when it is unsuccessful even where it has acted reasonably. 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 that there is a risk just because the respondent to the appeal is a body acting in the public interest [97]-[98].

Further, the assessment as to whether a chilling effect is sufficiently plausible is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts. In this case, therefore, the CAT was best placed to consider the plausibility of any chilling effect arising from making a costs order against the CMA [98] and against any other public bodies which regularly appear as respondents in the wide variety of appeals over which the CAT has jurisdiction.

On whether the CAT was correct to adopt a "costs follow the event" starting point, the Supreme Court observes that this practice was well-established when the 2015 Rules were introduced preserving the CAT's broad costs discretion conferred by earlier versions of those rules [120]. Further, the way that the CMA's functions are funded by the Government dispels any concern that its conduct will be influenced by the risk of adverse costs orders. This is because, in effect, the CMA can set-off any adverse costs orders against the income it receives from fines imposed on companies for competition law infringements [123]-[126]. There are also good policy reasons to adopt a starting point of costs follow the event. It is right that the CMA is subjected to the discipline associated with having to pay a successful Appellant's costs if ultimately the CAT concludes that the CMA's actions were not well-founded [135].

The Court also notes that the factors considered in *Booth* may legitimately be accommodated by the outcome of a costs award even if costs follow the event is taken as the starting point. A review of the CAT's decisions on costs reveals a range of ways in which the CAT can and does tailor the costs award it makes in any particular case to reflect the many competing factors pulling in different directions [136]-[150]. The CAT has developed a sophisticated approach to costs awards appreciating the need to strike a balance between maintaining

flexibility in dealing with a wide range of different situations, whilst providing predictability and consistency of decision making so that the parties know what to expect if they win or lose the case. The CAT's case law also strikes a balance between ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime and ensuring a just result for both parties [153].

As a result, the Supreme Court concludes that the CAT's Costs Ruling adopting a "costs follow the event" starting point was a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors [154]. The Supreme Court therefore allows both appeals and reinstates the CAT's Costs Ruling [156].

*References in square brackets are to paragraphs in the judgment*

**NOTE:**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)**