

Costs in the CAT: an Update

By Philip Woolfe¹
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The Competition Appeal Tribunal ("CAT") is a specialist tribunal and is developing specialist costs principles to match. The CAT's costs decisions reflect both public interest considerations particular to the statutory schemes it oversees, and its own special procedures. In Hutchison, the appellant was only partly successful and accordingly the CAT emphasised the importance of the public interest element in awarding costs in the CAT. In Claymore, the CAT dealt with the issue of costs arising when the Tribunal deals with conduct which is "not, objectively speaking, proper". In the Mastercard case, the CAT will have to deal in depth with the situation where the OFT withdraws its decision but intends to continue the administrative procedure against the appellants.

The CAT has held that the Tribunal Rules "give the Tribunal an unfettered discretion as to costs, leaving it to the Tribunal to develop the relevant principles in the light of circumstances and experience".² Recently in *Hutchison*, the CAT similarly stressed its wide discretion as to costs under rule 55 of the Tribunal Rules.³ It also gave some indication of how it will continue to develop its costs principles: costs issues will not be decided by analogy with previous cases, but rather will be determined on a case by case basis, only "relying on authorities for principles where appropriate".⁴

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² *The Institute of Independent Insurance Brokers v DGFT, Judgment (Costs)*, paragraph 39

³ *Hutchison 3G (UK) Limited v OFCOM: Judgment (Costs)* [2006] CAT 8 ("*Hutchison*") at paragraph 40. It referred in particular to *British Telecommunications v Director General of Telecommunications (RBS Backhaul)* [2005] CAT 20 and *British Telecommunications v Office of Communications (CPS save activity)* [2005] CAT 21

⁴ *Hutchison*, paragraph 42

The CAT and the public interest

The CAT has emphasised that it is part of a system of competition law enforcement and sectoral regulation, rather than a forum for private litigation.

In *Hutchison* it noted that “the public interest has a larger part to play in litigation in this Tribunal than in most civil litigation governed by the CPR”,⁵ and that “so far as OFCOM is concerned this is not commercial litigation”.⁶ The CAT has acknowledged that its costs orders may have important implications in encouraging the OFT or sectoral regulators to perform their tasks properly⁷ and in encouraging smaller litigants to bring cases to the CAT in cases where they believe the public authority has got it wrong.⁸ The CAT’s concern is not however with protecting public bodies or the public purse,⁹ but rather with the wider public interest in the proper enforcement of competition law and utilities regulation.¹⁰

In practice, the CAT has considered a broadly similar range of factors as the ordinary civil courts in deciding whether to award costs. However, the public interest considerations set out above mean that the standard costs factors are sometimes treated rather differently.

Costs do not simply follow the event

Since being established, the CAT has consistently made it clear that there is no prima facie rule that the unsuccessful party pays, although “an obvious factor is the financial prejudice, by way of costs, that the successful appellant has suffered as a result of having brought the case”.¹¹ Further, in a complex case before the CAT it is not always clear who the “winner” is.¹² The case arises out of an administrative procedure and the appellant may not succeed on all the points taken to tribunal. Even if the appellant is successful on all the points taken to tribunal, that may not mean that the administrative procedure against it was entirely flawed.

In *Hutchison*, the CAT’s starting point was that Hutchison only succeeded in part in its appeal. The extent of its success was to be judged by both the order of the Tribunal, which sent only a limited point back to OFCOM, and by the CAT’s judgment itself.¹³ The CAT accordingly decided that, as between OFCOM and Hutchison, each party should bear its own costs, though it went on to make some further observations as to other relevant factors.¹⁴ The CAT’s reasoning indicates that one important factor is that the public body’s decision to commence an administrative procedure may have been reasonable, even if it subsequently turned out to be wrong, especially where it has a duty to investigate. The CAT drew attention to the European regulatory context of the case, noting that it arose from a market review that OFCOM “was obliged to carry out in the public interest”. It stated that although “this context of itself might not mean that OFCOM should not pay costs if it gets something wrong and loses an appeal, it must be borne in mind that so far as OFCOM is concerned this is not commercial litigation”.¹⁵ The CAT also emphasised the importance of the proceedings for competitors, customers and consumers on the market and stated that the “public interest element means that costs might not follow the event to the same extent as in other litigation”.¹⁶

⁵ *Hutchison*, paragraph 41

⁶ *Hutchison*, paragraph 45

⁷ *Hutchison*, paragraph 47

⁸ *Aquavitae v Director General of Water Services* [2003] CAT 17 at paragraph 32, see also *The Institute of Independent Insurance Brokers v DGFT, Judgment (Costs)* at paragraph 54

⁹ See *The Institute of Independent Insurance Brokers v DGFT, Judgment (Costs)* at paragraph 57.

¹⁰ See for example *Hutchison* paragraph 46 where the CAT noted that the test for market power itself referred to the interests of competitors, customers and consumers.

¹¹ *The Institute of Independent Insurance Brokers v DGFT, Judgment (Costs)* at paragraph 49.

¹² See the comments of the CCAT (as it then was) in *The Institute of Independent Insurance Brokers v DGFT, Judgment (Costs)* at paragraph 50.

¹³ *Hutchison*, paragraph 44

¹⁴ *Hutchison*, paragraph 43, 44, 48

¹⁵ *Hutchison*, paragraph 45

¹⁶ *Hutchison*, paragraph 46

Similarly, the CAT will, like most courts, have regard to the manner in which a litigant conducts its case. In *Hutchison* the CAT criticised the Appellant's case as being "to some extent a moveable feast" and referred to its "lack of clarity". It reasoned that "[d]ealing with this shifting material will have caused the incurring of unnecessary costs by the other parties".¹⁷

Special Factors

On other occasions, however, the CAT will consider situations and procedures that differ markedly from those faced by the ordinary civil courts.

The CAT recently decided the issue of expenses arising from the particular procedure followed in *Claymore*.¹⁸ In that case, the Tribunal had, of its own initiative, called for representations from the parties in the case as to how it should deal with the conduct of the interveners, Robert Wiseman Dairies, in putting pressure on the appellant which risked "compromising proceedings having an important public interest dimension without the OFT or the Tribunal being put in a position to safeguard the public interest".¹⁹ Although no further action was taken by the Tribunal, it considered, with little reasoning, that a costs order in favour of the OFT was appropriate. It also made a costs order in favour of the appellants, on the grounds that had they "not taken the stance they did, this matter would not have come to light, and the interests of justice would have been potentially prejudiced".²⁰

Further, the appeals to the CAT are often only one stage in an ongoing administrative procedure. This is particularly evident in *Mastercard UK Members Forum Limited V Office of Fair Trading*,²¹ where the OFT has announced that it is withdrawing the decision that is the subject of the appeal, with the intention of taking a fresh decision in respect of the same agreements. The CAT is likely to have to decide on costs where there is no compromise between the parties, and where it is not clear who, if anyone, has won.

The CAT may also consider public interest factors that would not carry much weight in most other civil courts. In *Hutchison* the CAT acknowledged OFCOM's submission that a costs order in favour of Hutchison might have a "chilling effect" on OFCOM's willingness to take action under the Communications Act 2003. It drew a contrast between public and private bodies in this regard, stating that it did "not, however, accept the relevance of that factor as one affecting a commercial body" such as Hutchison.²²

Costs of interveners

Interveners are common in the CAT and their role may vary substantially from making submissions on a few isolated points to being in substantially the same position as an appellant.²³ Most recently,

¹⁷ *Hutchison*, paragraph 44

¹⁸ *Claymore Dairies Limited and Arla Foods UK PLC v OFT: Order On Expenses Arising From The Tribunal's Judgment Of 17 February 2006* [2006] CAT 5 ("Claymore Expenses II").

¹⁹ *Claymore Dairies Limited and Arla Foods UK PLC v OFT: Judgment (Guidance On Conduct Concerning Withdrawal)* [2006] CAT 3 at paragraph 88.

²⁰ *Claymore Expenses II*, paragraph 12

²¹ Public documents relating to the appeal so far may be viewed on the CAT's website at <http://www.catribunal.org.uk/archive/casedet.asp?id=106>.

²² *Hutchison*, paragraph 47. The importance of this factor may be judged by the fact that in the GISC case (see above n.2) the CAT of its own motion cited *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), where Lord Bingham CJ referred to "the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest".

²³ See for example the position of Visa in the MasterCard case as discussed in the Case Management Conference on 9 December 2005: <http://www.catribunal.org.uk/documents/Tran1054-55-56Mcard091205.pdf> at pages 15-16. General guidance as to the factors which may influence the CAT to grant costs to an intervener are set out in *Aberdeen Journals Limited v Office of Fair Trading: Judgment (Costs)* [2003] CAT 21 at paragraphs 21-30.

in *Hutchison*, the CAT stated that, especially in the telecommunications sector, the costs of intervention “will often in justice lie where they fall”.²⁴ Its reasoning was not encouraging for interveners hoping to obtain their costs. It stated that “the intervener is usually not a necessary party and will often intervene for its own purposes, or perhaps partly for the purpose of assisting the Tribunal”.²⁵ Those advising interveners may note that the CAT emphasised two factors: first, that BT applied to intervene at an early stage, before it had seen any of the pleadings in the appeal;²⁶ and secondly, that the bulk of the evidence and submission provided by BT did not relate to the core issue in the case.²⁷ On the other hand, interveners are at low risk of having costs orders made against them. The CAT stated that “we can see no reason whatsoever” why BT should bear any of *Hutchison*’s costs.²⁸

Conclusions

It is clear from the CAT’s decisions to date that the CAT is deciding costs issues in a manner which closely reflects the public interest aspects of its jurisdiction. The reasoning of the CAT in *Hutchison* suggests that it will place weight on the fact that the public body is acting reasonably in litigating the case, especially where it has a duty to act, even if it ultimately loses. Further, the CAT will be alert to the possible “chilling effect” that costs orders might have on the conduct of public affairs.

However, private parties concerned about the potential cost of taking a case to the CAT should note that much of the CAT’s reasoning in *Hutchison* was orthodox, referring to the extent to which *Hutchison* was successful and the reasonableness with which it conducted its case. *Hutchison* was a marginal case, in which the appellant was only partly successful and, it is in that context that public interest arguments were taken into account by the CAT. Further, those advising smaller companies or representative bodies should note the fact that the CAT has previously expressed concern that “the burden of costs falling on a small complainant, acting reasonably if unsuccessfully, is likely to be disproportionately heavy”.²⁹

For the future, it appears likely that the CAT will continue to develop its costs principles along the same lines. *MasterCard*, where the administrative procedure is ongoing, will provide another opportunity to see how the CAT deals with costs in its specialist context.

Peter Roth QC and Kassie Smith represented OFCOM in Hutchison. George Peretz and Jon Turner represented the OFT in Claymore. Sir Jeremy Lever QC, Jon Turner, Meredith Pickford and Josh Holmes are representing the OFT in Mastercard. Anneli Howard is representing Visa.

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²⁴ The Tribunal cited its own judgment in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6

²⁵ *Hutchison*, paragraph 49

²⁶ *Hutchison* paragraph 50-51. The CAT concluded that BT did not “necessarily” have to intervene to counter the allegations raised by *Hutchison* even though “resisting them became appropriate at the later stage”.

²⁷ *ibid.* paragraph 52

²⁸ *ibid.* paragraph 53

²⁹ *Aquavitae v Director General of Water Services* [2003] CAT 17 at paragraph 32