Neutral Citation Number: [2023] EWCA Civ 729

Case No: CA-2023-000770

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(SIR MARCUS SMITH, PRESIDENT)
[2023] CAT 14

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2023

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between :

DURHAM COUNTY COUNCIL	**Appellant**
- and -	
THE DURHAM COMPANY LIMITED	**Respondent**

- -
- -

Jamie Carpenter KC and Richard Howell (instructed by **DWF Law LLP**) for the **Appellant**
Michael Bowsher KC and Ligia Osepciu (instructed by **Tilly Bailey & Irvine LLP**) for the **Respondent**

Hearing date: 6 June 2023

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APPROVED JUDGMENT

Sir Julian Flaux C:

Introduction

1. The present claim before the Competition Appeal Tribunal ("the CAT") by the Durham Company Limited (trading as Max Recycle) against the Durham County Council ("the Council") is the first application for statutory judicial review under section 70 of the Subsidy Control Act 2022 ("the 2022 Act"). The Council appeals, with the permission of Sir Marcus Smith the President of the CAT, his decision dated 21 March 2023, following a case management conference ("CMC") on 17 February 2023, imposing a cap on the Council's recoverable costs of the proceedings incurred after the case management conference at £60,000. The Council advances four grounds of appeal (set out below). The judge did not consider that any of them had a real prospect of success but gave permission to advance them on the basis that it was important that the Court of Appeal should determine whether the general guidance as to the appropriateness of cost capping in subsidy control cases which the judge was seeking to give was correct.

Factual and legal background

2. Max Recycle is a family run waste disposal company in County Durham with 39 employees. The Council is the waste collection authority for the county. Pursuant to its statutory obligations, the Council collects household waste from residential premises without a charge (other than through council tax), save in miscellaneous cases. It also collects "trade waste", which is common waste produced by businesses and commercial premises as distinct from specialist waste and which Max Recycle alleges is a subset of commercial waste. The Council's case is that it collects all forms of commercial waste. The Council does charge businesses for its collection of their trade waste, a service which it provides in competition with private sector providers such as Max Recycle.

3. Max Recycle contends that the Council's charging practices for the collection of trade waste are an unlawful cross-subsidy whereby its commercial trade waste operation is subsidised by its non-commercial household waste operation. It contends that the Council charges trade waste customers non-commercial, below market rates which it could not sustain if it operated a standalone business collecting and disposing of only trade waste.

4. Max Recycle initially sought to challenge the Council's operation under the State aid rules in force pre-Brexit. Following ultimately abortive judicial review proceedings begun in 2014 and unsuccessful complaints to the European Commission in 2018, Max Recycle brought a claim against the Council in 2020 alleging a '*Francovich*' breach of EU state aid law. The claim failed in the Chancery Division ([2020] EWHC 3200 (Ch)) and in the Court of Appeal ([2022] EWCA Civ 66), in consequence of which Max Recycle was ordered to pay the Council's substantial costs. Neither the judgment at first instance nor that in the Court of Appeal purported to determine whether the Council's arrangements amount to State aid.

5. Following the end of the Transition Period on 31 December 2020, the EU law of State aid ceased to have effect in the United Kingdom. Under Article 366 of the Trade and Cooperation Agreement ("the TCA") the UK government assumed an international obligation to put in place and maintain a system of subsidy control which ensured that the granting of a subsidy respected certain principles. The provisions have effect in

domestic law by virtue of section 29(1) of the European Union (Future Relationship) Act 2020. Two substantial judicial reviews have taken place in relation to compliance with Article 366. In *R (British Sugar) v Secretary of State for International Trade* [2022] EWHC 393 (Admin), Foxton J heard an unsuccessful challenge over two days of hearing to an autonomous tariff quota for imports of raw cane sugar. In *R (British Gas Trading) v Secretary of State for Energy* [2023] EWHC 737 (Admin), a number of energy suppliers challenged the decision to transfer the business of Bulb Energy to Octopus Energy. The Divisional Court (Singh LJ and Foxton J) heard the claim over three days and dismissed it on grounds of delay. They would have rejected the claim on the merits as well.

6. On 4 January 2023, the substantive provisions of the 2022 Act came into force, replacing the transitional provisions under the TCA. Section 12 of the Act imposes a duty on a public authority in these terms:

> "(1) A public authority—
>
> (a) must consider the subsidy control principles before deciding to give a subsidy, and
>
> (b) must not give the subsidy unless it is of the view that the subsidy is consistent with those principles.
>
> (2) In subsection (1) "subsidy" does not include a subsidy given under a subsidy scheme.
>
> (3) A public authority—
>
> (a) must consider the subsidy control principles before making a subsidy scheme, and
>
> (b) must not make the scheme unless it is of the view that the subsidies provided for by the scheme will be consistent with those principles."

7. Part 5 of the Act, headed "Enforcement", provides for appeals to the CAT. Section 70 provides:

> "Review of subsidy decisions
>
> (1) An interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision.
>
> (2) Where an application for a review of a subsidy decision relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to make the subsidy scheme (and may not be made in respect of a decision to give a subsidy under that scheme).
>
> …

> (5) In determining the application, the Tribunal must apply the same principles as would be applied—
>
> (a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review;
>
> …
>
> (7) In this Part—
>
> "interested party" means—
>
> (a) a person whose interests may be affected by the giving of the subsidy or the making of the subsidy scheme in respect of which the application under subsection (1) is made, or
>
> (b) the Secretary of State;
>
> "subsidy decision" means a decision to give a subsidy or make a subsidy scheme;
>
> "the Tribunal" means the Competition Appeal Tribunal;
>
> "Tribunal Procedure Rules" means rules made under section 15 of the Enterprise Act 2002."

Section 75 provides that an appeal lies to this Court on any point of law arising from any decision of the CAT.

8. On 3 February 2023, Max Recycle filed a Notice of Appeal under section 70 of the 2022 Act to the CAT against what it characterises as the Council's decision to grant what is alleged to be an unlawful cross-subsidy to its own trade waste business, by allowing it to use the employees and assets of the Council's publicly funded household waste business for less than a market price.

9. The CAT fixed the CMC for 17 February 2023. Prior to the hearing, the judge circulated a draft directions order which included a provision capping each party's costs at £50,000. At the hearing, the President explained the rationale for the proposed cap: *"The one thing one doesn't want to have is for the financial advantages of subsidies to be subsumed in challenges to their making or not making in terms of legal cost".* The Council opposed the imposition of any cap. The judge requested written submissions from both parties on the issue, which he said were to: *"consider not merely the operation in principle of the regime, but what, if I were to go down this route, the appropriate caps ought to be in each case."*

10. The parties filed written submissions. The Council continued to oppose any cap but said in relation to what an appropriate cap would be no more than: *"it should be based upon a generous estimate of the upper limit"* of a reasonable and proportionate amount, and that: *"as a matter of fairness any cost cap must also be reciprocal"*. However, the Council did not provide any statement of its costs to date or any estimate of its future costs through to the conclusion of a substantive hearing.

The judgment below

11. On 21 March 2023, the judge handed down his judgment on costs capping. Under the heading "General Principles", the judge at [3] made some general observations about the nature of applications under section 70 of the 2022 Act, stating that: (i) the issues are likely to be narrow; (ii) the nature of the issues is unlikely to require extensive disclosure and evidence; (iii) the jurisdiction should be fast, cheap and simple; and (iv) the jurisdiction should generally be seen through the lens of the fast-track procedure in Rule 58 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules").

12. He then summarised the Council's submissions opposing any costs capping before turning to his analysis. He noted at [7] that it was conceded rightly by the Council that there was jurisdiction in the CAT to make a costs capping order, arising out of Rule 19(2)(r) of the CAT Rules which provides that the CAT may give directions: *"for the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit."* He pointed out that in *Belle Lingerie v Wacoal* [2022] CAT 24 (*"Belle Lingerie"*), the CAT had held that a costs capping jurisdiction arose out of the identically worded Rule 53(2)(m).

13. The judge then considered whether the jurisdiction should be exercised in this case and whether a signal should be sent more widely that costs control is of particular importance in subsidy control cases. He considered that the assertion that these are judicial review cases so that the case law of the Administrative Court should be unthinkingly translated to the CAT is misconceived. Section 70(4) of the 2022 Act provides that subsidy control cases are to be determined by the CAT applying the same principles as would be applied by the High Court in determining judicial review proceedings but that did not displace the CAT Rules. That was not to say that the processes of the High Court were not helpful and the CAT would want to adopt, in as much as it properly can, the best practices and processes of other courts and tribunals.

14. He considered that the decision whether to award a subsidy in any given case was likely to be an important one and decision-makers should not be inhibited by the threat of challenge. Equally the risk of enormous costs bills if a challenge failed should not be an undue deterrent to bringing section 70 reviews. He referred to the Courts being alive to the *"chilling effects"* of costs decisions, specifically by reference to the judgment of Lady Rose JSC in *Competition and Markets Authority v Flynn Pharma* [2022] UKSC 14; [2022] 1 WLR 2972 (*"Flynn Pharma"*) at [136] and following. He said that in subsidy control cases it was best to avoid those chilling effects by it being clear from the outset that there will be rigorous costs control. In ordinary subsidy control cases, a light touch costs budgeting approach of the sort laid down in *Instaplanta (Yorkshire) Limited v Leeds City Council* [2023] CAT 11 at [23] was likely to be appropriate, provided that it was understood that a budget of more than £60,000 was likely to receive very careful scrutiny from the CAT.

15. The judge gave further guidance: (i) the costs of creation of a costs budget should not defeat the object of the exercise; (ii) in many cases it may be difficult to work out what costs are to be attributed to what phase of the litigation. In such cases, of which this case is an example, a costs budget may be more trouble than it is worth: see *Genius Sports Technologies v Soft Construct (Malta)* [2022] EWHC 2308 (Ch) at [23] to [29]; (iii) the practice of the Intellectual Property Enterprise Court ("IPEC") is a valuable example. [4.10] of the IPEC Guide states that costs are subject to the cap provided by

CPR Part 46 rules 46.20 to 22 and with limited exceptions the court will not order a party to pay total costs of more than £60,000.

16. The judge noted that the Council suggested that a number of points militated against a protective costs order: (i) Max Recycle's lawyers were not acting on a *pro bono* or discounted fee basis; (ii) Max Recycle had a distinct private interest in the proceedings; (iii) if the Council succeeded it would not recover any costs above the cap. The judge did not consider these points material. The whole point of the subsidy control regime was to give interested parties the right to challenge subsidy decisions and generally such challenges will be informed by narrow private interests not wider public ones. The critical question is to ensure that the jurisdiction which Parliament has created is effective, in which costs play a critical role. A costs follow the event regime discourages bad points but must not be chilling. Costs that are disproportionate will have such a chilling effect. Parties to subsidy review proceedings need to know *ex ante* what the CAT's approach will be. The approach is not set in stone but responsive to the individual case, but parties need to know the CAT's starting point.

17. The judge pointed out that neither party had provided a costs budget, which was understandable and he made no criticism, and he thought it would be a distraction for them to be required to do so now. Max Recycle did not resist a cap of £50,000. The Council did not identify any figure for a cap but merely said that any cap *"should be based upon a generous estimate of the upper limit of what would be a reasonable and proportionate amount of costs to incur on the application."* The judge thought this was an appropriate case for a cap which he imposed from the date of the CMC at £50,000 for Max Recycle and £60,000 for the Council. Normally the figures would be the same, but because costs budgeting/capping was not considered from the outset and Max Recycle has already made its application for review, a higher cap for the Council is justifiable.

The grounds of appeal and Respondent's Notice

18. The Council pursues four grounds of appeal:

(1) The judge erred in law in adopting a different starting point to costs management in applications for statutory review under section 70 of the 2022 Act from that in (i) proceedings for judicial review in the courts of each part of the UK, and (ii) proceedings for statutory review before those courts and the CAT.

(2) Further or alternatively, to the extent the judge capped the Council's costs incurred after 17 February 2023 at £60,000 on the basis that this was a generous estimate of the upper limit of what would have been a reasonable and proportionate amount for the Council to incur, he erred in law by imposing a cap at an irrationally low level.

(3) Further or alternatively, to the extent the judge capped the Council's costs incurred after 17 February 2023 at £60,000 on any other basis, he erred in law by (a) failing to provide adequate reasons for his decision, and/or (b) precluding the Council, in the event it was the successful party, from recovering its reasonable and proportionate costs in circumstances where the judge did not find that a protective costs order was

justified in accordance with the criteria in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [74].

(4) Further or alternatively, the judge acted unfairly by determining that the costs cap should apply from 17 February 2023 in circumstances where (i) he had not invited submissions from the parties on that issue, and (ii) the effect of his decision is that almost all of the costs the Council has incurred in preparing its Defence and evidence and complying with its duty of candour are subject to an effective cap of £10,000 but Max Recycle's equivalent pleading and evidential costs had already been incurred before that date and hence are uncapped. There was no reasonable basis for a finding that the Council's costs of preparing its Defence and evidence and discharging its duty of candour should effectively be capped at £10,000.

19. By its Respondent's Notice, Max Recycle seeks to uphold the judge's order on the additional ground that the proceedings are of a quasi-private nature, as the Council has granted the alleged subsidy to its own commercial operators. On that basis, the requirements of CPR 3.19 are applicable by analogy and are met in this case.

Summary of the parties' submissions

20. On behalf of the Council, Mr Jamie Carpenter KC submitted that other forms of costs management than costs capping were available. He submitted that there were three kinds of costs cap: (i) in general litigation under CPR 3.19 which the CAT can apply by analogy; (ii) costs capping in judicial review proceedings on *Corner House* principles now codified in sections 88 to 90 of the Criminal Justice and Courts Act 2015 ("the 2015 Act"); and (iii) tariff or scale costs in IPEC.

21. He submitted that there were two distinct categories of cap: (i) the cap under CPR 3.19 intended to apply where all the costs are under one head and the provision is a remedy of last resort with the cap intended to reflect all reasonable and proportionate costs and (ii) a cap which is not intended to reflect all reasonable and proportionate costs but the imposition of a limit on recoverable costs. A cap of the latter kind is imposed by the CAT in its fast track procedure under Rule 58 of the CAT Rules as in *Socrates Training Limited v The Law Society* [2016] CAT 10, where Roth J concluded that on a standard basis of assessment the Law Society's costs would probably be less than £500,000 but then imposed a cap of £350,000. Mr Carpenter KC submitted that where there was costs shifting, a successful litigant was normally entitled to recover its reasonable and proportionate costs in full and limiting caps such as under Rule 58 were a derogation from that. Where a limiting cap arises it is dealt with in the Rules or in legislation.

22. Turning to the judgment, Mr Carpenter KC submitted that the judge had imposed a cap on a basis neither party had asked for. The Council had argued that a cap should only be imposed if the *Corner House* criteria applied, which they did not, and Max Recycle said CPR 3.19 should be applied by analogy which involves a case specific assessment.

23. In relation to the judge's statement at [8(4)] referred to at [14] above, that in the ordinary subsidy control case a "light touch" costs budgeting approach as in *Instaplanta* would be appropriate, Mr Carpenter KC pointed out that in that case the CAT had simply imported at [23] the CPR approach to ordinary costs budgeting and there was no suggestion that this was "light touch". The judge simply did not explain why he said at [8(4)(ii)] that a costs budget would be *"more trouble than it was worth"*. Mr Carpenter

KC submitted that the judge's own judgment in *Genius Sports Technologies*, to which he had then referred, was the only case where a cap had ever been imposed under CPR 3.19. He submitted the cap there was a costs management cap not a limiting cap. The judge had then suddenly referred at [8(4)(iii)] to the IPEC practice which was clearly for a limiting cap.

24. He submitted that the judge clearly thought he was imposing a limiting cap, not a cap by reference to full reasonable and proportionate costs for a number of reasons: (i) he drew on other regimes of limiting caps as his model; (ii) there was nothing in the judgment to suggest the judge was attempting to arrive at an assessment of what the Council's reasonable and proportionate costs should be; and (iii) even though there was no specific evidence, there was certainly evidence that the Council's reasonable and proportionate costs up to the end of the hearing would exceed £60,000. There was evidence that it was awarded £86,000 after the previous summary judgment application and it was apparent that the costs of this case would be substantially greater. The judge himself observed during the hearing that £250,000 might be the figure for reasonable and proportionate costs.

25. Mr Carpenter KC submitted that if it was ever appropriate to impose a costs cap in subsidy control cases such as the present, the CAT should follow the judicial review model and apply the *Corner House* principles. Whilst the CAT was not bound to apply those principles, he submitted that similar cases should be treated similarly. He pointed out that in judicial review cases under sections 120 or 179 of the Enterprise Act 2002, the CAT drew heavily on the approach in the High Court in judicial review. He submitted that the policy considerations in relation to costs capping in High Court judicial review cases were equally applicable here. It was a material consideration that Max Recycle was pursuing a private interest.

26. He submitted that the reasons given by the judge did not justify his approach. Essentially the judge concluded that this was a special category of case requiring aggressive costs management. However the points the judge made at [3] of his judgment (summarised at [11] above) would be true of many applications for judicial review. Mr Carpenter KC submitted that there was no evidence that the risk of having to pay the Council's costs was having a chilling effect on Max Recycle as this was the third set of proceedings against the Council it had embarked upon. There was equally no evidence that the subsidy control jurisdiction would be ineffective unless there were costs capping. The one size fits all approach which the judge adopted was the wrong approach given that the cases are likely to vary in size and complexity.

27. Mr Carpenter KC also made submissions on grounds 2 to 4 but given the conclusion I have reached on ground 1 it is not necessary to set those submissions out here.

28. Mr Bowsher KC on behalf of Max Recycle sought to justify the judge's approach. He submitted that since the threshold under the 2022 Act was an effect on trade within the UK rather than within the European Union as under the pre-Brexit regime, there were likely to be a great deal more SMEs interested in this regime. The costs liabilities likely to be incurred without costs capping would have the chilling effect the judge described. Two of the factors identified by Lady Rose JSC in *Flynn Pharma* at [149] were of equal relevance here (omitting citation of authorities):

> "(d) the importance of not deterring small undertakings from bringing reasonable appeals from infringement decisions of the OFT: (e) the importance also of not deterring competitors from challenging a decision to clear a proposed merger where potential applicants may be very much smaller than the parties to the merger…"

29. He submitted that in addition to the case management provisions identified by the judge and by the CAT in *Belle Lingerie* the CAT had power to impose this sort of costs cap under Rules 104 and 115. Nothing in the Rules prevents or limits the ability of the CAT to make costs capping orders if necessary. He submitted that, if anything, the CAT Rules were broader than CPR 3.19 and there was nothing in the 2022 Act which limited the procedures which could be adopted by the CAT.

Discussion

30. The judge's aim of seeking to ensure that the costs of subsidy control reviews under section 70 of the 2022 Act do not become excessive, thereby discouraging challenges under the section, was an entirely laudable one, but unfortunately the tool which he employed of imposing limiting costs caps of £60,000 and £50,000 on the Council and Max Recycle respectively, irrespective of their actual reasonable and proportionate costs, was one which, in my judgment, he had no jurisdiction to impose. I agree with Mr Carpenter KC that the judge imposed what was a judge-made tariff on costs by way of a limiting cap, which was a derogation from the normal position that a successful party is entitled to recover its reasonable and proportionate costs. Such a derogation can only be imposed by Rules or by legislation. An example of such a limiting cap can be found in the IPEC procedure where "scale costs" of no more than £60,000 will be awarded as expressly provided for in CPR 46.21. Likewise, pursuant to the CAT fast track procedure under Rule 58 of the CAT Rules: *"the amount of recoverable costs is to be capped at a level to be determined by the Tribunal"*.

31. However, there is no equivalent provision either in the CAT Rules or in the 2022 Act which entitles the CAT in subsidy control cases to set a limiting cap of the sort the judge imposed. The case management powers under the identical provisions of Rules 19(2)(r) and 53(2)(m) of the CAT Rules would enable the CAT in an appropriate case to make a costs capping order of the kind permitted by CPR 3.19 by analogy: see *Belle Lingerie* at [24]. However, as 3.19(5) and *Belle Lingerie* at [25] make clear, a costs capping order under that rule will only be made if three cumulative conditions are met: (a) it is in the interests of justice to do so; (b) there is a substantial risk that without such an order costs will be disproportionately incurred and (c) the CAT is not satisfied that the risk can be adequately controlled by (i) case management directions or orders; and (ii) detailed assessment of costs. It is thus clear that, as Mr Carpenter KC submitted, a cap under 3.19 is designed to limit costs to what is reasonable and proportionate.

32. The CAT in *Belle Lingerie* considered various decisions of this Court where applications were made for costs capping orders, specifically *Black v Arriva North East Limited* [2014] EWCA Civ 1115 and *Tidal Energy Ltd v Bank of Scotland Plc* [2014] EWCA Civ 847, in both of which the application was rejected. In *PGI Group Limited v Thomas* [2022] EWCA Civ 233; [2022] Costs LR 307 Coulson LJ noted that both those cases pre-dated costs budgeting. He also said of CCOs (costs capping orders) at [6] of his judgment (quoted by the CAT at [41] of *Belle Lingerie*):

> "CCOs are very rare. CPR PD 3F at 1.1 makes plain that they will only be made "in exceptional circumstances". The costs budgeting regime, introduced after costs capping as part of the Jackson reforms, is widely regarded as a more scientific way of achieving the same goal…"

33. With respect to the judge in the present case, he did not consider whether the three conditions required under CPR 3.19(5) for a costs capping order were met, no doubt because the cap he was intending to impose was a limiting one, not related to the Council's reasonable and proportionate costs. Whilst he referred to costs budgeting and recognised that in a normal subsidy control case, costs budgeting as in *Instaplanta* could adequately control the risk of disproportionate costs being incurred, he thought that costs budgeting in the present case would be more trouble than it was worth (by reference to his own judgment in *Genius Sports Technologies* which, as Mr Carpenter KC pointed out, appears to be the only case where a costs capping order under 3.19 has been made). However, the judge does not explain why he came to that conclusion and it is difficult to see why costs budgeting at the CMC in the present case would not have adequately controlled the risk of disproportionate costs being incurred and protected against any potential chilling effect of costs liabilities on Max Recycle if it were unsuccessful. It is of significance that Max Recycle in its skeleton argument for the CMC did not apply for a costs capping order but for costs budgeting.

34. To the extent that costs budgeting would no longer be of any practical assistance in controlling the risk of disproportionate costs because the hearing is now imminent and therefore the majority of the costs will have already been incurred, then the risk can be controlled by detailed assessment hereafter by the CAT under Rule 104, a point made by the CAT in *Belle Lingerie* at [90] to [92].

35. Even in the rare case where costs budgeting at the CMC or detailed assessment at the end of the case could not adequately control the risk of disproportionate costs being incurred, so that a costs capping order might be required, it is important to have in mind that such an order would be made in order to control that risk. However, the order the judge made here did not consider whether disproportionate costs would otherwise be incurred, but simply imposed an artificial and arbitrary cap on the council's costs of £60,000, irrespective of the fact that there was no evidence that the Council would otherwise incur disproportionate costs and the judge himself recognised at the CMC that its reasonable and proportionate costs might well be in the region of £250,000. In my judgment, the judge could and should have addressed the concerns he had about costs by requiring the parties to produce costs budgets for the CMC and then engaging in costs budgeting and case management, which is what the CAT did in *Belle Lingerie* where, whilst recognising the jurisdiction to make a costs capping order by analogy with CPR 3.19, the CAT did not consider the three conditions were met. Costs budgeting in this case could have controlled the risk of disproportionate costs being incurred.

36. To the extent that so close to the substantive hearing, costs budgeting is no longer practical, detailed assessment of the costs after that hearing can control that risk. Contrary to the Respondent's Notice and Max Recycle's submissions, the three conditions under 3.19 are not met in this case. Even if there were a substantial risk that without an order the Council would incur disproportionate costs (as to which there is simply no evidence) that risk could be adequately controlled by costs budgeting or a

detailed assessment of costs. Also contrary to Mr Bowsher KC's submissions, there is nothing in Rule 104(4) dealing with costs or Rule 115 dealing with the general powers of the CAT which confers on the CAT jurisdiction to make a limiting cap of the kind imposed by the judge.

37. Accordingly, I consider that the judge erred in imposing the limiting cap on costs which he did and that the appeal must be allowed on the first ground. In reaching that conclusion I do not consider that the Council is correct in its submission that, in subsidy control cases, costs capping should only be available if the principles now set out in sections 88 to 90 of the 2015 Act for judicial review cases are satisfied. The judge was right to conclude that whilst the substance of an application challenging a subsidy decision is to be determined under section 70 of the 2022 Act by applying the same principles as in judicial review, that does not restrict the CAT's case management powers under its Rules. Where the judge fell into error was in concluding that those powers entitled him to impose a limiting costs cap of the kind he imposed in this case.

38. Given that I have concluded that the appeal must be allowed on the first ground, so that the costs cap the judge imposed was wrong in principle, it is unnecessary to consider the other three grounds which would only arise if the judge had had jurisdiction to impose a limiting cap. All I would say is that if I had concluded that there was jurisdiction for the judge to make an order for a limiting costs cap, then my strong provisional view is that the level of that cap would be a matter for the costs management discretion of the judge so that I very much doubt that grounds 2 to 4 raise any issue of law at all.

Lord Justice Nugee

39. I agree.

Lord Justice Newey

40. I also agree.