

CASTLE WATER CODE MODIFICATION APPEAL 2025

Final costs determination

6 August 2025

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The Competition and Markets Authority has excluded from this published version of the determination information which the appeal group considers should be excluded having regard to the considerations set out in regulation 18(7) of The Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017. The omissions are indicated by [✂].

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1. Introduction

- 1.1 This document is the Competition and Markets Authority (the CMA)'s final determination on costs. These costs are those arising from the appeal from Castle Water Limited (**Castle Water**) against the decision of the Water Services Regulation Authority (**Ofwat**) dated 5 February 2025¹ (the **Decision**) to reject Castle Water's Wholesale Retail Code Change Proposal CPW132² (**CPW 132/the Proposal**).

The appeal

- 1.2 The CMA conducted this appeal brought under ss207A-207C of the Water Industry Act 1991 (**WIA** or **the Act**) and Schedule 16 of the WIA in accordance with the procedure set out in the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (the **Regulations**). This includes the Water Codes Appeals: Competition and Markets Authority Rules (CMA67) (the **Rules**) and the Water Codes Appeals guide for participants (CMA68) (the **Guide**).
- 1.3 On 11 January 2022, Castle Water proposed to amend the Wholesale Retail Code (**WRC**) to remove the obligation on Retailers to provide Credit Support to a Wholesaler that does not meet Ofwat's revised cash lock up triggers (i.e. when a Wholesaler's lowest credit rating is BBB/Baa2 with negative outlook or designation, or lower).³
- 1.4 On 5 February 2025, Ofwat published its Decision to reject the Proposal.⁴ As a result of the Decision, there will be no change to the WRC.
- 1.5 Castle Water submitted a Notice of Appeal (**NoA**) seeking permission from the Competition and Markets Authority (**CMA**) to appeal the Decision on 26 February 2025, pursuant to section 207A of the WIA.
- 1.6 The NoA advanced two grounds of appeal:
- (a) Ground 1: Ofwat failed properly to have regard to, and/or failed to give the appropriate weight to, the objective to protect the interests of consumers, wherever appropriate by promoting effective competition.⁵

¹ Ofwat, [Decision on Wholesale Retail Code Change Proposal - Ref CPW123](#), 5 February 2025 (the **Decision**).

² Market Operator Services Limited (**MOSL**), [Credit Support and Wholesaler Credit Ratings](#); Castle Water, Change Proposal Reference: CPW132 (**CPW132/ the Proposal**), 11 January 2022.

³ CPW132, page 3.

⁴ Ofwat, Decision.

⁵ NoA, section 18.

(b) Ground 2: Ofwat was wrong in its findings about the response of financial institutions to Wholesaler distress.⁶

1.7 The CMA granted Castle Water permission to appeal on 12 March 2025. The rationale for this decision is contained in our permission decision.⁷

1.8 On 13 May 2025, the Determination (the **Determination**)⁸ was issued to the Parties in which the CMA dismissed the appeal and accordingly confirmed the decision. Further details of the appeal and its procedural stages are set out in chapter 1 of the Determination.

1.9 Terms and expressions used in this document have the same meaning as they do in the Determination.

Final determination on costs

1.10 A group that determines an appeal is required by Regulation 19(1) of the Regulations⁹ to make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal. The group may also, pursuant to Regulation 19(4) of the Regulation, make such order requiring a party to pay the costs of another party to the appeal incurred in connection with the appeal. These latter costs are known as inter partes costs.

1.11 On 14 May 2025, the CMA invited the Parties to provide statements of costs if they wished to apply for inter partes costs and to set out their reasoning for any costs claimed. Both Castle Water and Ofwat made submissions in relation to costs on 28 May 2025.

1.12 On 4 July 2025, the CMA issued a provisional determination on costs in the Appeal, an accompanying draft costs Order and an invitation to the Parties to make any representations on the provisional determination on costs by 18 July 2025.

1.13 Neither of the Parties made substantive representations in response to the provisional determination on costs. However, Castle Water identified two errors in relation to amounts set out in the provisional determination and draft Order that we have now addressed. Ofwat in its brief email response confirmed that it would not be making any representations in connection with the CMA's provisional

⁶ NoA, section 19. In this Determination, we use this term to refer to when a Wholesaler is in financial distress as proxied by credit ratings dropping to or below BBB/Baa2 with negative outlook or designation (which is the credit rating level which triggers the revised cash lock-up provisions in Wholesaler licences) and/or where there is a market perception that Wholesalers are at an increased risk of financial distress (for whatever reason).

⁷ CMA, [Decision on permission to appeal](#), 12 March 2025.

⁸ CMA, [Determination](#), 13 May 2025.

⁹ Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017.

determination on costs and that it agreed to the amendments suggested by Castle Water to correct the errors identified.

- 1.14 Having considered these submissions, we therefore issue this final determination on costs and accompanying cost Order.

2. Legal framework in relation to costs in Appeals brought pursuant to Sections 207A -207C of the WIA 1991

The CMA's duties and powers in relation to costs

2.1 Regulation 19 of the Regulations sets out the CMA's duties and powers in relation to costs in determining an appeal brought under sections 207A-207C of the WIA in the following terms:

- (a) (1) A CMA group that determines an appeal must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.
- (b) (2) Where the appeal is allowed, the order must require those costs to be paid by the Authority.
- (c) (3) Where the appeal is dismissed, the order must require those costs to be paid by the appellant; but if there is more than one appellant the order may specify that one or more of the appellants is to pay those costs, in such proportions as specified in the order.
- (d) (4) The CMA group that determines an appeal may make an order requiring a party to the appeal to pay the costs of another party to the appeal incurred in connection with the appeal.
- (e) (5) A person required by an order under this regulation to pay a sum to another person must comply with the order within the period of 28 days beginning with the day after the day on which the order is made.
- (f) (6) Any unpaid balance remaining after the period mentioned in paragraph 5 expires accrues interest at such rate as may be determined in accordance with provision contained in the order.
- (g) (7) Any costs payable by virtue of an order under this regulation and any interest that has not been paid may be recovered as a civil debt by the person in whose favour that order is made.

2.2 The Rules¹⁰ and Guide¹¹ make further provision in relation to costs.

¹⁰ Rule 21 and 22.

¹¹ Paragraphs 5.1-5.12 of the Guide.

- 2.3 Before making any order for costs, the CMA will provide the Parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.¹²
- 2.4 In the following paragraphs, we address in more detail the considerations that are relevant to determinations of the CMA's costs and inter partes costs.

Payment of the CMA's costs

- 2.5 Regulation 19(1) requires the CMA to recover its costs incurred in the appeal and Rule 22 states that the CMA will make an order for the payment of its own costs incurred in connection with the appeal. Paragraph 5.11 of the Guide provides that an order under Rule 22 must require the CMA's costs to be paid "*...where the appeal is dismissed, by the appellant.*"
- 2.6 In its decision in *British Telecommunications plc v CMA*¹³ (**BT v CMA**), the CAT set out some general observations on the recovery of CMA costs following the CMA's determination of a regulatory appeal. Although these observations were made in the context of an appeal brought under the Communications Act 2003, we consider the principles set out are applicable to the recovery of the CMA's costs in regulatory appeals generally. They include the following:
- (a) the purpose of a costs order is to enable the CMA to recover for the public purse costs incurred by it in connection with the appeal and is significantly different from that of the cost regimes in Civil Procedure Rules 44 or CAT Rule 104;¹⁴
 - (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;¹⁵
 - (c) the CMA must make a broad, soundly based judgement as to its costs and as to the proportion of those costs for which the paying party is to be made liable;¹⁶ and
 - (d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.¹⁷

¹² Paragraph 5.12.

¹³ *British Telecommunications Plc v Competition and Markets Authority (BT v CMA)* [2017] [CAT 11](#).

¹⁴ *BT v CMA* [2017] [CAT 11](#) at [25].

¹⁵ In *BT v CMA* [2017] [CAT 11](#) at [32], the CAT set out the level of detail the CMA should disclose of its costs to the parties at consultation stage, and this makes it clear that it is not just the CMA's direct costs which can be recovered. In addition, the broad language of paragraph 12(1) of the Schedule ('costs incurred by the CMA in connection with the appeal') implies that the CMA must recover not only direct costs such as staff costs, but also its other costs (including any external fees incurred).

¹⁶ *BT v CMA* [2017] [CAT 11](#) at [24].

¹⁷ *BT v CMA* [2017] [CAT 11](#) at [29].

- 2.7 In line with the recommendations of the CAT in *BT v CMA*, our assessment of CMA costs provides details of:
- (a) the names, grades and cost recovery rate for each of the staff and the Group who worked on the appeal, together with the number of hours worked;
 - (b) travel and subsistence costs incurred in the appeal;
 - (c) a breakdown of fees charged by Counsel instructed by the CMA;
 - (d) direct costs, such as transcripts of the hearing; and
 - (e) a description of how the CMA's overhead rate has been calculated.

Discretion to order inter partes costs

- 2.8 Regulation 19(4) provides:

The CMA group that determines an appeal may make an order requiring a party to the appeal to pay the costs of another party to the appeal incurred in connection with the appeal.

- 2.9 Rule 21.1 also provides that:

The CMA will normally order an unsuccessful party to pay the costs of the successful party but may make a different order.

- 2.10 The Rules and Guide set out further considerations the CMA will take into account when deciding whether and what order to make as regards inter partes costs.

- 2.11 Where a CMA group decides that it is appropriate to make an order under Regulation 19 and Rule 21.1, it may have regard to all the circumstances, including:¹⁸

- (a) the conduct of the parties, including:
 - (i) the extent to which each party has assisted the CMA to meet the overriding objective;
 - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;
 - (iii) the manner a party has pursued its case or a particular aspect of its case;

¹⁸ Rule 21.2.

- (b) whether a party has succeeded wholly or in part; and
- (c) the proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.

2.12 In terms of the type of costs covered, paragraph 5.2 of the Guide provides:

Where the CMA makes an order for costs in favour of one or more of the parties, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount in respect of costs incurred before the Authority first published its decision.

2.13 As regards the apportionment of costs, paragraph 5.3 of the Guide provides:

However, the successful party may not be awarded the entirety of their costs. For example, in cases in which a party succeeds on some, but not all grounds of appeal or all aspects within the grounds of appeal, the CMA will make an order in proportion of the appeal which has been successful.

2.14 As regards the proportionality of the costs claimed, the CMA will balance the costs claimed against the significance of the appeal and the overall impact if the appeal were to succeed.¹⁹

¹⁹ [BGT](#), paragraph 9.21(c).

3. CMA costs

- 3.1 The group must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal. Given that the group dismissed Castle Water's appeal on both grounds as pleaded, the CMA costs order must require those costs to be paid by Castle Water. This outcome is prescribed by Regulation 19.3 of the Regulations (also reflected at Rule 22.1 of the Guide) which provide that where an appeal is dismissed, the appellant pays the CMA's costs.

Parties' Submissions

- 3.2 Ofwat noted that the Regulation does not provide any discretion in relation to CMA's costs and referred to Regulation 19 (3) in submitting that where an appeal has been dismissed, the CMA's costs must be paid by the appellant.
- 3.3 Castle Water accepted that in circumstances where its appeal has been dismissed it is liable to pay CMA's costs under Rule 22.1(b) of the Rules.
- 3.4 It is therefore common ground between the parties that the CMA's costs should be borne by Castle Water.

Calculation of CMA costs

- 3.5 A statement of the CMA's costs is set out in Appendix A. Our assessment of the CMA's costs takes account of the following:
- (a) The CMA has a statutory obligation to appoint three group members to determine the appeal.²⁰ In order to meet its statutory obligation to determine the appeal within the applicable statutory period,²¹ the CMA appointed a staff team to assist the group. That team drew on relevant administrative, project management and delivery, economic, business and financial analysis, and legal skills from across the organisation. Both the group and the project team used CMA resources (such as IT systems and support, administrative resources and facilities management) to support the appeals.
 - (b) One external KC and one junior Counsel were retained, providing expert legal advice and attending the hearing.
 - (c) The group and the staff team were required to consider, understand and analyse a large amount of complex material within the relevant time period:

²⁰ Part 3 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013.

²¹ Pursuant to Section 12H of the Water Industry Act 1991.

- (i) Castle Water advanced two grounds of appeal. These each raised a number of complex issues and their association with the legal grounds of review was not straightforward.
 - (ii) The NoA (which ran to 81 pages) was supported by two witness statement of fact (which ran to 58 pages in total); one expert witness report (which ran to 23 pages) with accompanying exhibit bundles and a bundle of supporting documents to the NoA and witness statements (running to more than 3,000 pages).
 - (iii) Ofwat's Response (comprising 31 pages) was accompanied by one witness statement (which ran to 36 pages) with accompanying exhibit bundle (totalling 282 pages) and was supported by one Independent report (totalling 12 pages).
 - (iv) The Parties submitted materials prior to the main hearing to accompany their opening statements; and the Parties also provided clarification points further to the hearing. Castle Water submitted an email containing six attachments, totalling 41 pages. Ofwat submitted an email containing five attachments, totalling 33 pages.
- (d) During the appeal, the CMA had to consider and dispose of a number of procedural issues, including those arising from the following:
- (i) Castle Water's application for permission to appeal (running to more than 200 pages), including consideration of Ofwat's submissions objecting to the grant of permission (totalling 25 pages).
 - (ii) Ofwat's challenge on jurisdiction and extension of time application to file its response to the NoA.
 - (iii) Dealing with requests to extend the statutory deadline, and to change the date of the hearings.
- (e) A hearing at the permission stage was held with both parties on 7 March 2025 to better understand the parties' arguments in relation to the question of whether the CMA had jurisdiction to hear the appeal.
- (f) An administrative meeting was held with both parties over teams on 25 March 2025 to discuss the process for the conduct of the appeal.
- (g) The group and the staff team managed the conduct of the appeal primarily through a series of group meetings whereby agendas would be circulated in advance along with slides on occasion to present the Parties' representations and issues arising, to prompt discussion and consideration of any such

issues at the meetings. In addition, the group and staff team progressed their work through ad hoc meetings, written communications and advice.

- (h) The holding of a teach-in session with the Parties²² on 26 March 2025 which included consideration of the teach-in materials prepared by the Parties in line with the CMA's topic guide, in order to clarify some of the technical matters raised in the Decision and the NoA.
- (i) A main hearing with the Parties, requiring extensive preparation by the group and the staff team, was held on 14 April 2025. The staff team supported the group at the main hearing.
- (j) Following the main hearing, the group and the staff team considered the Parties' written evidence and submissions and the additional clarificatory information that the CMA requested.
- (k) Along with Castle Water's NoA and Ofwat's Response, both parties submitted additional evidence as requested by the Group.
- (l) On 9 May 2025, the CMA provided the Parties with a draft of its determination for comment on any typographical or minor errors and considered the responses.
- (m) Disposing of the appeal, including considering properly all the relevant documents, submissions and other evidence, resulted in the Final Determination of 123 pages.
- (n) The CMA produced this final determination on costs and cost order, as required under Rules 21.3 and 22.2 of the Rules in relation to both the CMA's costs, and in relation to inter partes costs.

3.6 Determining the appeal within the statutory timeframe was a significant exercise. It was necessary for the group and the staff team to devote to it a substantial number of hours of work, and to use the CMA's supporting resources (for which the standard overhead uplift rate of 51.32% is applied for the period up to 31 March 2025 and 50.11% for the period after that).²³

3.7 The total CMA costs to be reclaimed, after applying the overhead uplift, are £387,541 (see Appendix A for a detailed statement of costs). These costs include:

- (a) CMA staff and group (i.e. panel members) costs;

²² Castle Water and Ofwat led the teach-in session.

²³ The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. For more details, see the Appendix A.

- (b) External advisers' costs (i.e. retaining Counsel);
- (c) CMA overhead allowance (defined as a standard percentage uplift of staff and panel member costs); and
- (d) Non-staff costs and disbursements (for example transcription costs).

Allocation of CMA costs

CMA costs associated with the determination of the appeal

- 3.8 We consider that CMA costs associated with the determination of the appeal issued on 15 May 2025 should be borne by Castle Water, as the appeal was dismissed in full.
- 3.9 Our records show that £362,985 of the CMA costs were attributable to the Determination.
- 3.10 Our final determination is that Castle Water should pay 100% of these costs, namely £362,985.

CMA costs incurred in the determination on costs

- 3.11 CMA costs incurred in connection with making this determination on costs are being recorded separately. We consider that costs associated with the determination on costs should be borne by Castle Water, as the appeal was dismissed in full.
- 3.12 Our records show that to date £24,556 of the CMA costs were attributable to making the final determination on costs.
- 3.13 Our final determination is that Castle Water should pay 100% of these costs, namely £24,556.

Final determination on the CMA's costs

- 3.14 In view of the above, our final determination is that, pursuant to paragraph 22.1 of the Rules, the CMA's costs of £387,541 should be paid by Castle Water.

4. Inter partes costs

- 4.1 On 14 May 2025, we invited the Parties to provide statements of costs if they wished to apply for inter partes costs and to set out their reasoning for any costs claimed. Both Castle Water and Ofwat made submissions in relation to costs on 28 May 2025.

Castle Water costs submissions

- 4.2 Castle Water made two primary submissions. The first is that Ofwat should be required to pay Castle Water's costs of the permission stage. The second is that the CMA should take into account that Ofwat was found to have made multiple errors in its decision which formed a substantial part of the costs involved in the appeal.
- 4.3 In relation to its first submission, Castle Water contended that it was the successful party in relation to the jurisdiction issue raised by Ofwat in its Acknowledgement of Service and in its application for an extension of time (which was refused by the CMA). Castle Water submitted therefore that Ofwat should be ordered to pay Castle Water's costs in relation to the permission stage.²⁴ Castle Water submitted that its costs are reasonable and proportionate, noting that its costs will be higher than Ofwat's since it has had to pay commercial rates for external legal representation, and noting the importance of the matter to Castle Water and the competitiveness of the non-household market more widely.
- 4.4 In relation to its second submission, Castle Water recognised that it had lost the appeal and that it would therefore normally be required to pay Ofwat's costs. However, it noted that the CMA may make a different order and submitted that the CMA should order that Ofwat recover 60% of its costs to reflect the fact that Ofwat made errors in its decision which Castle Water argued informed the fundamental premise for bringing the appeal and much of the work required.²⁵ Castle Water acknowledged that the CMA found these errors to be insufficiently material to affect the final decision, however it referred to paragraph 5.3 of the Guide which states that:

²⁴ Castle Water's costs submission dated 28 May 2025, Paragraph 12 "...It follows that, at permission stage, Castle Water was in all regards the successful party. Ofwat chose to bring these two discrete applications, which caused Castle Water to incur costs in responding to them. The starting point is that the CMA will order an unsuccessful party to pay the costs of the successful party. There is no reason to deviate from that starting point in relation to permission, given the unequivocal nature of Castle Water's success..."

²⁵ Castle Water's costs submission dated 28 May 2025, Paragraph 23 "...The fundamental premise for Castle Water bringing the appeal – namely that Ofwat had misunderstood how cost of credit had been impacted – and much of the work required in the appeal, were driven by plain errors of fact in Ofwat's analysis in its Decision. It is of course accepted that the CMA found ultimately that these errors were not sufficiently material to require it to disturb Ofwat's finding of an "insufficiency of evidence" (and therefore not sufficiently material: Determination §5.146, §§5.190-191), but they are fundamental issues on which Castle Water succeeded. It cannot be determinative that the ground of appeal ultimately did not succeed, because otherwise it would make a nonsense of the Guide's reference to success on "aspects within the grounds of appeal..."

“the successful party may not be awarded the entirety of their costs. For example, in cases in which a party succeeds on some, but not all grounds of appeal or all aspects within the grounds of appeal, the CMA will make an order in proportion of the appeal which has been successful”.

- 4.5 Castle Water also contended that, since Ofwat’s final decision was based on errors of fact, it would have carried these errors through to its ongoing wider review into credit security, and that there was no route other than the appeal open to Castle Water to correct these issues. Castle Water submitted that, for the purposes of rule 21.2(a)ii of the Rules, it was reasonable for it to pursue these issues, that the cost of dealing with the points were caused by Ofwat’s errors, and that Ofwat did not succeed on all aspects of Ground 2 despite contesting them.

Ofwat costs submissions

- 4.6 Ofwat submitted that, since it succeeded wholly in the main appeal, the CMA should order Castle Water to pay its costs in accordance with the principle that costs should follow the event (i.e. that the successful party should recover its costs from the unsuccessful party).
- 4.7 In support of this submission, Ofwat relied on the general rule under the CPR²⁶ and quoted Foxton J in *Serious Fraud Office*:²⁷

First, “*There is no automatic rule that the costs of a successful party will be reduced because it lost on some issues, and it has been noted that in complex litigation, it is a rare party who succeeds on every point it argues*”.

Second, “*..There are various factors which are likely to weigh in the balance when determining whether to make such an order, although these are inevitably matters of weight rather than independently determinative considerations...Failure on an argument which was simply an alternative route to the same substantive relief as that obtained may provide a less compelling case for a downwards adjustment than (for example) a party who seeks to recover some further relief and fails.*”

Third, “*a judge should hesitate before making an order by reference to the costs of the specific issue, as opposed to a proportionate reduction in the successful party’s costs*”

²⁶ Ofwat’s costs submission dated 28 May 2025, paragraph 10, CPR 44.2(2).

²⁷ *Serious Fraud Office v LCL and others* [2021] EWHC 2803 (Comm) at Paragraph 30.

Fourth, “in those cases in which it is appropriate to depart from the general rule, a further issue arises as to whether the court should stop at depriving the successful party of part of its costs or go further and make the successful party pay part of the costs of the other party... This will only be appropriate in a suitably exceptional case and is to be regarded as far from routine...”

4.8 Ofwat submitted that there should be no reduction in the amount of costs awarded to it to reflect the fact that it was unsuccessful at the permission stage (where it unsuccessfully raised an argument concerning the CMA’s jurisdiction to hear the appeal). Ofwat made four points in support of this submission:

- (a) Ofwat contended that the High Court has recognised a general principle that successful parties should be awarded all their costs even if they have not succeeded on every issue.
- (b) Ofwat contended that its conduct in the appeal cannot be criticised and that it was reasonable for it to contest the appeal, as reflected in the final decision in its favour.
- (c) Ofwat contended that it was reasonable for it to contest jurisdiction at the permission stage. It noted that this was the first appeal under the Regulations, that the CMA would have had to consider jurisdiction in any event and that Ofwat acted consistently with the overriding objective by making submissions on the issue to ensure that the CMA did not exceed its powers. Ofwat contends that the issue was not a ‘hopeless one’ citing the CMA’s permission decision which noted that the CMA had found the issue “difficult and finely balanced”.²⁸
- (d) Ofwat contended that in other proceedings with a permission stage, general practice is for the costs of that stage to be costs in the case – meaning that those costs are dealt with as part of the final costs order. It referred to the CMA’s decision in *Utilita*,²⁹ where the CMA awarded GEMA its costs for all stages of the proceeding in circumstances where GEMA lost the permission stage but was successful in the appeal. Ofwat also contended that a similar practice is followed in Judicial Review proceedings in the High Court and in appeals to the Court of Appeal.³⁰

4.9 In the alternative, Ofwat submitted that if the CMA does decide to order that Ofwat’s costs be reduced, this should be by no more than 5% of its total costs.

²⁸ [Permission Decision dated 12 March 2025](#), paragraph 9.

²⁹ Financial resilience appeal 2023 (*Utilita*), [Final determination of costs](#).

³⁰ Relied on; *F&C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 2807.

- 4.10 In support of this submission, Ofwat stated that the jurisdiction issue did not materially increase Parties' costs, with submissions being less than three pages and oral argument being no more than 30 minutes, which is a small proportion of the overall appeal. Ofwat also noted that the permission decision would have had to be made in any event to determine standing and any other grounds for refusing permission. Finally, Ofwat referred to a case in the High Court³¹ where a successful party in a Judicial Review claim had their costs reduced by 15% where they relied upon a ground which was unsuccessful. Ofwat submits that in circumstances where it only lost on one aspect of the appeal at permission stage, any percentage reduction should be lower than this.
- 4.11 Ofwat also submitted that its costs are reasonable and proportionate. It relied on the importance of the proceedings, submitting that if the appeal had been granted there would have been an increased risk of detrimental service for customers, and that it was important for Ofwat to contest the appeal to comply with its statutory duties to protect the interests of consumers. Ofwat also relied on the fact that the proceedings were complex and raised novel factual issues, which necessitated specialist legal advice. They noted that the legal fees claimed are lower than the rates set out in the Solicitors Guideline Hourly Rates and that counsel fees were discounted when compared with the usual commercial rates.
- 4.12 Finally, Ofwat submitted that it conducted itself proportionately throughout the proceedings, noting it filed one witness statement compared to Castle Water's three and an expert report, and noting that Ofwat opposed the filing of skeleton arguments to avoid unnecessary costs.

Inter Partes Costs

- 4.13 On 28 May 2025, Castle Water submitted a statement of its costs for the permission stage alone while Ofwat submitted a statement of costs and representations on costs for both the permission and appeal stages.
- 4.14 Castle Water submitted a statement of costs incurred in the permission stage totalling [£X].
- 4.15 Ofwat submitted a statement of costs incurred in defending the appeal totalling £98,135.30 and permission stage costs of £13,630.80.
- 4.16 As explained above at paragraphs 2.8 to 2.14, the CMA has discretion to make an inter partes costs order in respect of costs incurred in connection with this appeal where these are proportionate in amount.

³¹ *R (Viridor Waste Management Ltd) v Commissioners for HM Revenue and Customs* [2016] EWHC 2502 (Admin).

- 4.17 In accordance with Rule 21.2 we have considered all the circumstances and have also taken into consideration the Guide at paragraph 5.3.
- 4.18 We consider that in this case it would be appropriate to make an order for inter partes costs. Our assessment is set out below in respect of each of the factors identified in Rule 21.2 (which we note is not an exhaustive list).

Rule 21.2(a): conduct of the parties

- 4.19 In deciding what order to make under Rule 21.1, the CMA may have regard to the conduct of the parties. Ofwat submitted that it acted reasonably in the appeal, which is reflected in the outcome. Whilst we do not consider the outcome of an appeal is necessarily reflective of the conduct of a party in an appeal, we do not consider there is any reason to make an adjustment to the award of costs as a result of the behaviour of Ofwat.
- 4.20 The CMA considers that both parties assisted the CMA to meet the overriding objective and that the issues raised by the parties, including the issue of jurisdiction raised by Ofwat, were reasonable. Specifically, we note that this is the first appeal brought under this regime and that the CMA's determination on the issue of jurisdiction was finely balanced.³² Therefore, whilst Ofwat was ultimately unsuccessful on that issue, we think it was reasonable for it to be raised at the permission stage.

Rule 21.2(b): whether a party has succeeded in whole or in part

Findings of errors in Ofwat's decision despite Ofwat's overall successful defence of the appeal

- 4.21 In determining what order to make under Rule 21.1, the CMA may consider whether a party has succeeded in whole or in part. In this appeal, Castle Water's appeal was dismissed on both grounds as pleaded. While the CMA has discretion in determining whether to make an award for inter partes costs, it typically exercises that discretion so that costs follow the event. We have therefore determined that in this appeal an appropriate outcome is for Ofwat to be awarded its proportionate costs of the appeal in relation to both grounds.
- 4.22 The CMA notes Castle Water's second submission regarding errors identified in Ofwat's decision, on the basis of which it invites us only to award Ofwat 60% of its costs in relation to the substantive stage of proceedings. On balance we reject it on the basis that the errors identified were not material as noted in our Determination.

³² [Permission Decision dated 12 March 2025](#), paragraph 9.

- 4.23 Whilst the Guide recognises that the CMA will take into account whether a party succeeded on some but not all grounds of appeal or aspects within the grounds of appeal, we do not consider the errors identified in Ofwat's decision to warrant a reduction in the costs awarded. This is on the basis that the grounds of appeal were dismissed entirely and that the errors identified were found to be non-material and therefore the outcome of Ofwat's assessment would have been the same had they not been made, as Ofwat's overall conclusions were not found to be wrong.
- 4.24 We therefore determine that the appropriate order is that Castle Water pays Ofwat's costs of the appeal, reflecting the fact that Castle Water was unsuccessful in its appeal of Ground 1 and Ground 2.

Castle Water's success at the permission stage

- 4.25 In its submissions, Castle Water has sought an order requiring Ofwat to pay its costs of the permission stage of the appeal, and Ofwat has sought an order for payments of its costs from Castle Water.
- 4.26 In relation to the costs of the permission stage generally, the CMA considers that the starting point should be that costs incurred throughout the appeal process should be costs in the case and therefore should be dealt with in the same way as costs for the main appeal. This is however a starting point, and the CMA may make a different order.
- 4.27 In considering what order to make, the CMA has taken into account the fact that Ofwat contested the CMA's jurisdiction to hear the appeal at the permission stage. This was a standalone issue which could be distinguished from other issues raised by Ofwat in the main appeal and could also be distinguished from the typical arguments one might expect to be made in relation to the 'no reasonable prospects for success' test, which is a test that the CMA has to apply in any event in deciding permission.³³ In the circumstances, the CMA felt it necessary to hold a hearing to receive submissions from the parties on the issue of jurisdiction and it is clear that this increased costs for both the CMA and the parties.
- 4.28 However, as noted above, we do not consider that it was unreasonable for Ofwat to raise the issue of jurisdiction at the permission stage. This was the first time the CMA had heard an appeal under the Regulations, and the question of whether the CMA had jurisdiction to hear this particular appeal turned on a narrow issue concerning the meaning of the words "consultation under the Act" in Regulation 2(1). It was not unreasonable in the circumstances for Ofwat to wish to test the meaning of this wording. The CMA noted in its decision on permission that both of

³³ We note that Ofwat did not advance this argument in this appeal.

the interpretations advanced by the two parties were plausible, and that the decision on permission was difficult and finely balanced.

- 4.29 We further note that it was Castle Water's choice to bring the appeal and that it was ultimately unsuccessful on all grounds. We do not consider that it would be fair for Castle Water to be awarded its costs in relation to the permission stage, in circumstances where its appeal ultimately did not succeed.
- 4.30 As to whether or not to reduce the amount of costs that Ofwat should be awarded overall to reflect the fact that it unsuccessfully resisted permission, we make the following observations:
- (a) Whilst Ofwat's resistance of the grant of permission was unsuccessful, it would not have been put to the costs of resisting permission had Castle Water's (ultimately unsuccessful) appeal not been brought,
 - (b) The jurisdiction issue was an important one which was not hopeless or unreasonable for Ofwat to raise.³⁴
- 4.31 We have not been persuaded by the submissions made by Castle Water that we should make a different order from the normal order described at Rule 21.1 – that is to say that the unsuccessful party should pay (the whole of) the costs of the successful party. We consider that we should make no deduction from the amount of costs that Ofwat is awarded to reflect its unsuccessful resistance of permission.
- 4.32 We also note that, while we are not bound by precedents set by cases where the Courts have determined costs issues applying CPR Part 44, we consider that the above approach is also consistent with the approach set out by the Court in the *Serious Fraud Office* case, referred to in Ofwat's submissions.³⁵
- 4.33 We therefore order that Castle Water pay Ofwat's costs in respect of both the permission and the other stages of proceedings.

Rule 21.2(c): proportionality of costs claimed

- 4.34 We consider that Ofwat's costs as set out in its statement of costs are proportionate.
- 4.35 Reviewing Ofwat's Statements of Costs and costs submissions, we have observed the following:

³⁴ Viridor Waste Management [2016] EWHC 2502 (Admin); [2016] 4 W.L.R. 165. See Nugee J in Paragraph 14-15.

³⁵ See paragraph 4.7 above.

- (a) In-house lawyers carried out some of the legal work at hourly rates that were below the applicable Guideline Hourly Rates for solicitors set out in the judicial Guide to Summary Assessment.³⁶
- (b) Provided that in-house lawyers are charged at no more than the Guideline Hourly rates for their location, the indemnity principle is unlikely to be infringed;³⁷
- (c) The rates for Ofwat's external lawyers, DAC Beachcroft, overall were below the Guideline Hourly Rates for London 2 even though they are a centrally based London firm conducting work appropriate for that band. DAC Beachcroft's time recording also showed that most hours were recorded at an associate and counsel level, while hours recorded at partner level were commensurate with supervising that work; and
- (d) Counsel was instructed at a discounted rate – in the case of Ofwat's leading Counsel by 65% below commercial rates, and in the case of Ofwat's junior Counsel, by 60% below commercial rates.

Whether to place any weight on potential chilling effects from a costs order against Ofwat

- 4.36 For completeness, we note that Castle Water in its submissions on inter partes costs makes reference to the appropriate approach to the consideration of a potential chilling effect on public bodies when adverse costs are being considered.³⁸ Castle Water draws our attention to *CMA v Flynn Pharma*,³⁹ in which the Supreme Court rejected the position that there is any presumption against costs orders against public authorities, and there should be no assumption that there would be any 'chilling effect' on the future performance of a public authority's functions from the making of a costs order against it.
- 4.37 Ofwat has not made reference to a risk of chilling effects in its submissions on costs. In any event, we have decided to award Ofwat its costs in respect of the whole of the appeal because we have not been persuaded to depart from the starting point of a successful party being awarded the whole of its costs. We do not therefore consider that we need to address any potential chilling effect of a costs order against Ofwat.

³⁶ [Solicitors' guideline hourly rates - GOV.UK](https://www.gov.uk/guidance/solicitors-guideline-hourly-rates).

³⁷ The indemnity principle prevents a party recovering more by way of costs from an opponent than it is obliged to pay its own lawyers. However, where in-house lawyers' costs are sought at no more than Guideline Hourly rates the indemnity principle is not infringed. *Re Eastwood* [1975] Ch 112, *Ping Europe Limited v CMA* [2019] CAT 7.

³⁸ Castle Water Submissions on Costs, paragraph 7.2.

³⁹ [2022] UKSC 14, [2022] 1 WLR 2972.

Final determination on the inter partes costs

- 4.38 In view of the foregoing, and in all the circumstances, our final determination regarding inter partes costs is that we order that Castle Water pay Ofwat its costs of £111,766.10.

5. Interest

- 5.1 Regulation 19(5) provides that a person who is required by an order to pay a sum to another person must comply with the order before the end of the period of twenty-eight days beginning with the day after the making of the order. Regulation 19(6) provides that if sums required to be paid by an order have not been paid within this period, they shall bear interest at such rate as may be determined in the CMA's order.

6. Final costs determination

- 6.1 Our final determination on costs is therefore as follows:
- (a) In relation to the CMA's costs incurred in connection with the appeal, Castle Water is required to pay a total of £387,541.
 - (b) In relation to inter partes costs, Castle Water is required to pay to Ofwat the sum of £111,766.10 in respect of Ofwat's costs in connection with the appeal.
- 6.2 In addition, our final determination is that the interest rate which shall apply in the event of sums set out in paragraph 6.1 being unpaid (see paragraph 5.1) will be one percentage point above the Bank of England's base rate.
- 6.3 A Costs Order accompanies this final determination.

7. Appendix A: Statement of the CMA's costs

Overview

- 7.1 This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeal have been included in the assessment and, in line with the recommendations of the CAT in *BT v CMA* this appendix provides details of:
- (a) the names, grades and cost recovery rate for each of the staff and the Group who worked on the appeal, together with the number of hours worked;
 - (b) travel and subsistence costs incurred in the appeal;
 - (c) a breakdown of fees charged by Counsel instructed by the CMA;
 - (d) direct costs; and
 - (e) a description of how the CMA's overhead rate has been calculated.

CMA costs

- 7.2 The CMA is entitled to recover its costs in connection with the appeals, including the costs of making the costs determination and order. Details of these costs have been provided separately below.
- 7.3 The CMA is able to recover all costs incurred, not just its direct costs. It therefore includes an amount for the recovery of overheads in the amounts that it calculates as costs.
- 7.4 The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. The CMA's pre-determined recovery charge percentage is calculated by dividing the combined back-office annual budgets (Corporate Services and Board) and depreciation by the combined front line service annual budgets (including Enforcement, Legal Services, Mergers, Markets, Regulation, Office of Chief Economic Advisor, Policy & International and Panel) for the relevant financial year. The rate applied in this case is 51.32% for hours recorded prior to 31 March 2025 and 50.11% for hours recorded after 31 March 2025.

Staff costs

- 7.5 Tables 1, 2 and 3 below set out the names, job titles, grades and cost recovery rates (£ per hour, based on average cost of employing staff of that grade), by phase of the appeal, for each member of the staff team who worked on the appeal.

It also includes the number of hours worked by each member of the staff team on the appeal, and the consequent direct costs and overhead costs incurred by the staff member.

Table 1: Permission stage – staff

Staff	Role	Total hours	Total direct cost (£)	Overhead (£)	Total (£)
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
Total		[X]	[X]	[X]	[X]

Table 2: Substantive stage – staff

[illegible]

Table 3: Costs stage – staff

Staff	Role	Total hours	Total direct cost (£)	Overhead (£)	Total (£)
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]
Total		[X]	[X]	[X]	[X]

Appeal Group costs

7.6 Tables 4, 5, 6 and 7 set out the names and cost recovery rates (£ per hour) for the appeal group members who worked on the appeal for each stage and the overall total. It also includes the number of hours worked by the each of the group members, and the consequent direct costs and overhead costs incurred by the group member. The standard overhead uplift rate of 51.32% has been applied to the direct cost of all group members for hours recorded prior to 31 March 2025 and 50.11% for hours recorded after 31 March 2025.

Table 4: Permission stage – Group

<i>Name</i>	<i>Hours</i>	<i>Recovery rate £/h</i>	<i>Direct costs £</i>	<i>Overhead uplift @51.32%</i>	<i>Total costs £</i>
Cyrus Mehta	[X]	[X]	[X]	[X]	[X]
Total			[X]	[X]	[X]

Table 5: Substantive stage – Group

<i>Name</i>	<i>Hours</i>	<i>Recovery rate £/h</i>	<i>Direct costs £</i>	<i>Overhead uplift</i>	<i>Total costs £</i>
Richard Feasey	[X]	[X]	[X]	[X]	[X]
Frances McLeman	[X]	[X]	[X]	[X]	[X]
Crispin Wright	[X]	[X]	[X]	[X]	[X]
Total			[X]	[X]	[X]

Table 6: Costs stage – Group

<i>Name</i>	<i>Hours</i>	<i>Recovery rate £/h</i>	<i>Direct costs £</i>	<i>Overhead uplift @50.11%</i>	<i>Total costs £</i>
Richard Feasey	[X]	[X]	[X]	[X]	[X]
Frances McLeman	[X]	[X]	[X]	[X]	[X]
Crispin Wright	[X]	[X]	[X]	[X]	[X]
Total			[X]	[X]	[X]

Table 7: Appeal Group costs

<i>Name</i>	<i>Hours</i>	<i>Recovery rate £/h</i>	<i>Direct costs £</i>	<i>Overhead uplift</i>	<i>Total costs £</i>
Richard Feasey	[X]		[X]	[X]	[X]
Frances McLeman	[X]		[X]	[X]	[X]
Crispin Wright	[X]		[X]	[X]	[X]
Cyrus Mehta	[X]		[X]	[X]	[X]
Total				[X]	[X]

Table 8: Summary of CMA Staff and Appeal Group costs by phase

<i>Phase</i>	<i>Total</i>
Permission	£46,297
Substantive	£279,157
Costs	£24,556
Total	£350,010

Non-staff/panel costs

7.7 The following additional costs were incurred:

Table 9: Non staff costs

<i>Cost type</i>	<i>Costs £</i>
T&S claims	[X]
Transcript	[X]
Counsel	[X]
Total	£37,531

7.8 The following table shows the costs associated with the determination of the appeal (excluding the costs associated with the costs phase):

Table 10: CMA costs associated with the determination of the appeal

	<i>Total</i>
Permission	[X]
Substantive	[X]
Non staff costs (ie transcripts, travel and expenses)	[X]
Counsel	[X]
Total	[X]

Total CMA costs to be reclaimed

7.9 The total costs to be reclaimed, split by type of cost is as follows:

Table 11: Estimated breakdown of CMA costs (including overhead for staff and Group time)

<i>Type of cost</i>	<i>Total</i>
CMA Staff	[X]
Appeal Group	[X]
Counsel	[X]
Other costs (ie contractors, transcripts, travel and expenses)	[X]
Total	£387,541