Neutral citation [2014] CAT 20

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos.: 1205/3/3/13
1206/3/3/13
1207/3/3/13

Victoria House
Bloomsbury Place
London WC1A 2EB

4 December 2014

Before:

THE HONOURABLE MR JUSTICE ROTH

(President)
STEPHEN HARRISON
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant: Case No. 1205/3/3/13
Intervener: Case Nos. 1206-7/3/3/13

(1) CABLE & WIRELESS WORLDWIDE PLC (2) VIRGIN MEDIA LIMITED (3) VERIZON UK LIMITED

Appellants: Case No. 1206/3/3/13
Interveners: Case No. 1205/3/3/13

(1) BRITISH SKY BROADCASTING LIMITED (2) TALKTALK TELECOM GROUP PLC

Appellants: Case No. 1207/3/3/13
Interveners: Case No. 1205/3/3/13

- and -

OFFICE OF COMMUNICATIONS

Respondent

SUPPLEMENTARY JUDGMENT

REPRESENTATION

Mr Rhodri Thompson QC, Mr Graham Read QC, Ms Sarah Lee, Mr Ben Lynch and Ms. Georgina Hirsch (instructed by BT Legal) on behalf of the Appellant in Case No. 1205/3/3/13, British Telecommunications PLC.

Ms Dinah Rose QC and Mr Tristan Jones (instructed by Olswang LLP) on behalf of the Appellants in Case No. 1206/3/3/13, (1) Cable & Wireless Worldwide plc, (2) Virgin Media Limited and (3) Verizon UK Limited.

Mr Meredith Pickford and Mr Julian Gregory (instructed by Herbert Smith Freehills LLP) on behalf of the Appellants in Case No. 1207/3/3/13, (1) British Sky Broadcasting Limited and (2) TalkTalk Telecom Group PLC.

Mr Pushpinder Saini QC, Ms Kate Gallafent QC, Mr Hanif Mussa and Ms Emily Neill (instructed by the Legal Department, Office of Communications) on behalf of the Respondent.

I. INTRODUCTION

1. On 1 August 2014, the Tribunal handed down its judgment on three related appeals ("the Judgment"). This Supplementary Judgment concerns three distinct matters consequential on the Judgment:

    (a) the directions to be made to give effect to the Judgment;

    (b) costs; and

    (c) permission to appeal.

    In this Supplementary Judgment we shall use the same abbreviations as in the Judgment.

2. The Judgment determined appeals against aspects of the Determination by Ofcom of disputes concerning the charges levied by BT for certain Ethernet services and whether those charges were in compliance with Condition HH3.1 imposed by Ofcom pursuant to the 2003 Act in a market review: the 2004 LLMR. By the Determination, Ofcom found that BT had overcharged in breach of Condition HH3.1 and directed that it make repayment in the total sum of £94.8 million but declined to order interest. In summary, the outcome of the appeals was as follows:

    (a) the appeal brought by BT was dismissed save on one point, that Ofcom should have made an adjustment to BT's rental costs in respect of the exclusion of excess construction costs ("ECCs");

    (b) the appeal brought jointly by Sky and TalkTalk was allowed as regards the payment of interest, but otherwise dismissed; and

    (c) the appeal brought by the Altnets concerned only the payment of interest and was allowed.

3. Pursuant to the Tribunal's directions, the applications regarding the three matters set out above were made in writing in September, to which each opposing party responded, and the applicants then served submissions in reply. The Tribunal received very extensive written submissions, in particular as regards costs and permission to appeal: the submissions in total amounted to over 250 pages.

A. DIRECTIONS

4. By their respective appeals, Sky/TalkTalk and the Altnets contended that Ofcom should have awarded them interest on the principal sums to be repaid and set out the way in which that interest should be calculated. By order made on 18 March 2013, the question of what interest rate should apply was adjourned to be considered after the Tribunal had decided whether interest should be paid at all. Since the Tribunal has held that interest should be paid, the question of the rate of interest now falls to be determined. At the conclusion of the Judgment, the Tribunal invited the parties to consider whether that is a matter that should be remitted to Ofcom pursuant to sect 195(4) of the 2003 Act.

5. In addition, the principal amount that BT was directed by Ofcom to pay to each Disputing CP requires to be adjusted to reflect the Tribunal's ruling on BT's appeal as regards ECCs. BT submits that it should recover interest on the amount overpaid.

(1) Interest

6. The successful appellants (Sky/TalkTalk and the Altnets) submit that the Tribunal should determine the rate of interest. As they acknowledge, that will involve the submission of further evidence (including expert evidence) and a second hearing. Ofcom as respondent, supported by BT as intervener, submit that this matter should be remitted to Ofcom.

7. Sky/TalkTalk point out that there is as yet no Tribunal authority on this point so that a judgment will provide "a helpful authoritative statement"; that if the matter were simply remitted to Ofcom it is "virtually inevitable" that Ofcom's findings would be appealed so that it is more efficient if this were determined by the Tribunal without further delay; and that Ofcom has already expressed its views as to the

appropriate rate of interest in the *Gamma* determination that it could supplement by further submissions to the Tribunal. The Altnets make broadly similar submissions.

8. Ofcom considers that it is appropriate for it to decide the question of the rate of interest in the first instance, as the statutory body charged with resolving disputes. BT agrees, adding that it would be unsatisfactory for the appeal process to be used to determine the rate when the regulatory body has not itself reached a decision on it. BT also argues that it is by no means inevitable that a decision by Ofcom will be appealed.

9. We consider that in the circumstances it is appropriate and more satisfactory for the question of determination of the interest rate to be remitted to Ofcom. We think that sect 195(3)-(4) of the 2003 Act clearly enable the Tribunal to take that course, notwithstanding that the appellants sought an order for interest (and thus calculation of a rate) in their Notices of Appeal. This is not a matter that has been considered by Ofcom in the present disputes. In particular:

   (a) The Tribunal is not a regulator but under the 2003 Act operates as an appellate body. This question raises issues of principle and possibly of regulatory policy. It is appropriate that Ofcom should take such a reasoned decision at first instance.

   (b) Although Ofcom issued a reasoned decision as to interest in the *Gamma* dispute, which included general guidance, that was not on the basis of the arguments which the Disputing CPs may seek to advance. Moreover, the approach there outlined by Ofcom incorporated an element of flexibility to reflect the facts of a particular case: para A2.13 of Annex 2 to the *Gamma* decision. The *Gamma* decision therefore does not establish the approach that Ofcom would necessarily adopt in this case.

   (c) Even if an appeal may be likely (and we doubt it can ever be said that an appeal is inevitable), the conduct of the proceedings before the Tribunal will be much more efficient if they are by way of appeal against a reasoned decision and not seeking what would effectively be a first instance

determination. The Altnets have indicated that if the matter is not remitted but proceeds to be determined by the Tribunal, they would wish to serve a Supplementary Notice of Appeal with supporting expert evidence. Although Sky/TalkTalk served an expert report addressing the interest rate with their Notice of Appeal, they also ask, if the matter is not remitted to Ofcom, for permission to serve a Supplementary Notice of Appeal with further expert evidence. BT would clearly wish to respond with its own expert evidence. There might then be expert reports in reply. Accordingly, for the Tribunal to approach this issue *ab initio* would involve new pleadings, significant further evidence and submissions which otherwise would be addressed in the first instance to Ofcom. Any appeal is therefore likely to involve more focused argument based on Ofcom's decision as to the rate of interest in the particular circumstances of this case.

(2) Excess Construction Costs

10. BT and Ofcom agree that the Tribunal should remit the Determination to Ofcom for it to amend the amount of repayments due to each Disputing CP set out in the individual determinations by adjusting the amount in respect of ECCs. None of the Disputing CPs objects to that course. It is unclear whether the amounts of the adjustment have now been agreed between the parties but it is sufficient to direct that such adjustments should be made in accordance with the Judgment.

11. As regards BT's claim for interest on its overpayment of ECCs, we agree with the proposal of Sky/TalkTalk and the Altnets that this should be considered alongside the question of the appropriate rate of interest in their appeals. Ofcom can then also consider the question of off-setting the overpayment of ECCs as against the interest which BT will be liable to pay to the Disputing CPs. Accordingly, this issue will also be remitted to Ofcom.

B. COSTS

12. Before addressing the costs of the various parties and the different appeals, it is appropriate to set out some general observations regarding the Tribunal's approach to the questions of costs.

13. Rule 55(2) of the Tribunal Rules provides:

> "The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings."

It is clear that this gives the Tribunal a wide and general discretion in relation to costs: see *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [12] and [37].

14. In the context of an appeal under sect 192 of the 2003 Act, when asked to make an award of costs in favour of Ofcom, or against a party other than Ofcom, the Tribunal has previously taken as its starting point the principle that costs should follow the event: see *British Telecommunications plc v Ofcom (Partial Private Circuits)(Costs)* [2011] CAT 35 at [20]-[21]; *Telefonica UK Ltd v Ofcom (Costs)* [2013] CAT 3 at [4].

15. By contrast, as regards costs *against* Ofcom in the case of an appeal against its determination under sect 190 of a dispute resolution, in *The Number (UK) Ltd v. Ofcom* [2009] CAT 5, the Tribunal stated at [5]:

> "It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it."

16. We reject the submission of Sky/TalkTalk that the Tribunal adopted a contrary position in the *Pay TV* case, *British Sky Broadcasting Ltd v Ofcom (Costs)* [2013] CAT 9, and held that the starting point was that costs should follow the event as against Ofcom. That was an appeal from a decision of Ofcom imposing a licensing condition under sect 316 of the 2003 Act and the approach there adopted was specifically in that statutory context. Indeed, the Tribunal in *Pay TV* expressly distinguishes, at [23], the approach to costs in *The Number* as applicable to a dispute resolution case; and the Tribunal added, at [30]:

> "appeals against dispute resolution decisions … have been described by Ofcom itself as involving the performance of a "unique quasi-judicial" function, and one can understand why the special nature of such decisions might be said to affect the appropriate starting point for the award of costs on an appeal therefrom."

17. However, the Tribunal has found it appropriate to depart from the starting point notwithstanding the absence of bad faith or unreasonable conduct by Ofcom, as envisaged by the final sentence of the passage quoted above from *The Number*. Hence in *T-Mobile (UK) Ltd v Ofcom* [2009] CAT 8, involving appeals by four appellants against Ofcom's dispute determinations, in a ruling delivered not long after the Tribunal's ruling on costs in *The Number*, the Tribunal ordered that Ofcom should bear a proportion of the costs of three of the appellants. In coming to that conclusion, the Tribunal found that Ofcom had failed to have proper regard to its regulatory objectives and to information that it should have taken into account. The dispute determination was vitiated by a number of "serious errors" and was found to be "clearly wrong": see at [6]. Moreover, the arguments of at least some of the successful appellants were points that had been raised before Ofcom in the dispute determination process.

18. As regards interveners, the general position adopted by the Tribunal is that the costs of an intervention should not be subject to any specific order: *British Sky Broadcasting Group plc v (1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 20 at [22]. This was explained in *Ryanair Holding plc v. Competition Commission* [2012] CAT 29 at [7] as reflecting a concern "to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties."

19. Furthermore, in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6, the Tribunal observed (at p. 11):

> "In the specific case of a sector such as telecommunications, where there may be interveners who are likely to be regularly appearing before the Tribunal, we think the general practice is likely to be to allow the costs of the intervention to lie where they fall."

In *VIP Communications Ltd v Ofcom* [2010] CAT 3, this was referred to at [7] in setting out the usual practice of the Tribunal that interveners do not recover their costs if they support the winning party and are not liable to pay costs if they support the unsuccessful party.

20. However, in *Freeserve*, the Tribunal emphasised that the observation quoted above was not intended to represent a firm rule and that in some cases it will be proper to make orders either in favour of or against interveners. In every case where such costs have been sought, the Tribunal has considered whether there may be particular circumstances that would justify a departure from the general rule: see, eg, *John Lewis PLC v Office of Fair Trading* [2013] CAT 10, and the *VIP* case, above. And in some cases, the Tribunal concluded that it was appropriate to award costs in favour of an intervener.

21. In *Aberdeen Journals Ltd v Office of Fair Trading* [2003] CAT 21, concerning an abuse of a dominant position contrary to the Chapter II prohibition, a first appeal led to a remittal to the then Director General of Fair Trading ("the Director") of the determination of market definition and then a further appeal against the subsequent decision was dismissed. In its ruling on costs, decided only a few months after *Freeserve*, Aberdeen Independent, which intervened in support of the Director, was awarded 60% of its costs of the first appeal and all of its costs of the second appeal. The Tribunal identified (at [23]) the following as relevant circumstances:

> "First, in our view it was entirely reasonable and proper for Aberdeen Independent, who was the complainant in the administrative procedure, and the target of the abuse of dominant position found to have been committed by Aberdeen Journals, to intervene in both the appeals. Secondly, Aberdeen Independent has ultimately been successful on the substantive case being made to the Tribunal. Thirdly, Aberdeen Independent's submissions were of assistance to the Tribunal, particularly on the issues of market definition and abuse, including the treatment of newspaper production costs. Fourthly, Aberdeen Independent's submissions did not, to any material extent, merely duplicate those of the Director.

> Fifthly, and of particular significance in the present case, a large part of Aberdeen Journal's defence consisted of a specific attack on Aberdeen Independent as an "inefficient market entrant" or "fireship". That attack culminated in what became, in effect, an attack on the integrity of Aberdeen Independent's proprietor, Mr Barwell. Aberdeen Independent necessarily had to counter these suggestions, which were entirely rejected by the Tribunal …"

22. Much more recently, in *Independent Media Support Ltd v Ofcom* [2008] CAT 27, a case in the broadcasting sector dismissing appeals against Ofcom's decisions that exclusive contracts entered into by BBCB (in one case with the BBC) did not infringe either UK or EU competition law, both the BBC and BBCB as interveners sought an award of costs against the unsuccessful appellant. The Tribunal declined to award the BBC any costs, noting that the BBC had played a rather limited role in the proceedings and that although it was beneficial to the Tribunal that the BBC had intervened, it was clearly in its interests to do so. However, as regards BBCB, the Tribunal stated:

> "17. The position of BBCB is different from that of the BBC. Not only was BBCB a company which was the subject of OFCOM's investigations in this case, it was the addressee of an appealable decision in which OFCOM decided that its Channel 4 Contract did not infringe the 1998 Act or Articles 81 or 82 of the EC Treaty. BBCB was particularly and directly affected by IMS's challenge to OFCOM's decisions. The relief sought by IMS was not only that these two important contracts should be declared void under Article 81(1) EC and the Chapter I prohibition but that the Tribunal should declare that BBCB occupies a dominant position so that its commercial freedom when taking part in any subsequent re-tender for the contracts would be constrained.
>
> 18. Furthermore, BBCB's submissions did not, to any material extent, duplicate those of the OFCOM. BBCB's submissions assisted the Tribunal, particularly on the issue of dominance, the scope of IMS's pleaded case on that issue, and the terms and effect of the Channel 4 Contract …."

23. The Tribunal held that BBCB should recover 35% of its costs as "a reasonable assessment of the proportion of the overall work [for] which BBCB as an intervener should be entitled to be reimbursed."

24. Moreover, although Ofcom is the respondent in an appeal against its determination on a dispute resolution under sect 190, in *British Telecommunications plc v Ofcom* [2011] EWCA Civ 245, the Court of Appeal observed, at [87]:

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

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

25. If and to the extent that Ofcom does not seek to resist an appeal but leaves the issue to be contested between the parties to the underlying dispute, we consider that the party in whose favour Ofcom determined the dispute and then intervenes in support of Ofcom's decision will in practice perform the role of respondent in the appeal. In those circumstances, it may well be just for that intervener to be treated as regards costs in the same way as a private party to an appeal.

The applications for costs here

(1) BT's Appeal

26. BT's appeal was framed in terms of six independent grounds, although two of them were closely connected and some involved several sub-grounds. BT failed on all points save as to one of the three matters raised in its Ground 4 concerning ECCs.

(a) *Ofcom*

27. Ofcom seeks all of its costs of BT's appeal save in relation to the issue of ECCs. BT accepts that it should pay part of Ofcom's costs of resisting its appeal. However, it submits that there should be a deduction from those costs not only as regards ECCs but also on the basis that Ofcom's stance on the other two items under Ground 4 was unsatisfactory, referring to the Judgment at [210]. Ofcom accepts the first point but strongly resists the second.

28. The passage in the Judgment relied on by BT concerned the question of whether or not Mr Coulson's evidence should be admitted. It was on that point that we considered that the approach taken by Ofcom was unhelpful. This criticism did not refer to the substance of the argument as regards the two other issues under Ground 4, i.e. Transmission equipment costs and Provisioning costs. BT advanced a case that adjustments should be made as regards those matters and that case was rejected. We do not think that Ofcom's approach to the substance of those matters is open to

criticism. Accordingly, we see no basis for discounting from Ofcom's costs other than as regards the issue of ECCs. We therefore reject the submission that Ofcom's costs on BT's appeal should be reduced by one sixth, which in any event we would regard as too high a figure given the overall result of the appeal.

29. Although BT has suggested that the discount should be referred to detailed assessment if not agreed, we consider that as the Tribunal that heard the case we are in a better position than a tax judge to assess the proportionate contribution to the overall costs attributable to the issue of the ECCs. Having regard to the extent to which this featured in the written submissions and evidence, and the time devoted to it in the hearing, we determine that the appropriate discount from Ofcom's costs of BT's appeal that it can recover from BT is 3%.

(b) *Interveners*

30. The Altnets intervened in BT's appeal and seek the costs of that intervention. They point out that they had a direct stake in that appeal as it was against a decision involving a dispute to which they were parties, and that given the amounts involved their interest was substantial. Further, they adduced limited factual evidence which could not have been adduced by Ofcom that was accepted by the Tribunal: see the Judgment at [114]-[116].

31. We readily accept that the Altnets had a very significant and direct interest in the outcome of BT's appeal, since it related to Ofcom's determination of a dispute with them under which BT was directed to pay them a substantial sum of money. However, we do not think that this in itself will necessarily justify departure from the general approach. Ofcom robustly defended its decision, and a party that chooses to intervene in Ofcom's support should not thereby be entitled to burden the appealing party with a second set of costs. The three companies comprising the Altnets are all substantial telecommunications operators, to whom the observations of the Tribunal in *Freeserve,* quoted at para 19 above, apply. Nonetheless, in the present case, the Altnets led evidence from a number of factual witnesses that materially assisted the Tribunal and which, as the Altnets point out, would not otherwise have been available. Having regard to all these circumstances, we think

it is appropriate in this case for the Altnets to recover a part of their costs of intervening in BT's appeal. Having regard to the fact that the Altnets also served expert evidence directed at Grounds 2 and 4 of BT's appeal and that some of their factual evidence directed at Ground 4 was not relied on by the Tribunal, we determine that the fair proportion of their costs of intervention that the Altnets can recover from BT is 40%.

32. As we understand it, Sky/TalkTalk do not seek the costs of their intervention in BT's appeal on the basis that BT does not recover any costs of its intervention in Sky/TalkTalk's appeal. BT makes no such application. Accordingly, there will be no order for costs as regards Sky/TalkTalk's intervention.

(2) Sky/TalkTalk's Appeal

33. Sky/TalkTalk appealed jointly on four grounds, but their Ground 3 (Holding Gains) was not pursued following service of Ofcom's Defence. The appeal failed on Grounds 1 and 2 but succeeded on Ground 4. Ground 4 concerned Ofcom's decision not to award interest. Ofcom did not resist that ground in its Defence, but it was resisted by BT as intervener. Further, by its intervention, BT sought to uphold Ofcom's decision on interest on an entirely new basis, not relied on by Ofcom in the Determination, i.e. that Ofcom did not have jurisdiction to award interest. While remaining neutral in the appeal as to whether interest should have been awarded in this case, Ofcom actively opposed BT's contention that it lacked the jurisdiction to make such an award.

34. On that basis, Ofcom seeks its costs of Grounds 1-3 from Sky/TalkTalk; and its costs of resisting the argument of jurisdiction under Ground 4 from BT. Sky/TalkTalk's primary contention is that there should be no order for costs as between it and Ofcom; but in the alternative it submits that Sky/TalkTalk should pay only a part of Ofcom's costs of Grounds 1-3 and that Ofcom should pay part of Sky/TalkTalk's costs of Ground 4, with the balance paid by BT. BT resists any order for costs against it on Sky/TalkTalk's appeal on the basis that it was an intervener; moreover, in this case its intervention assisted Ofcom as the successful

party on Grounds 1-3 albeit that BT was unsuccessful in its submissions on Ground 4.

35. We reject Sky/TalkTalk's primary submission relying on the *Pay TV (Costs)* judgment that there should be no order for costs as between them and Ofcom, on the basis that they won on their Ground 4 although they lost on Ground 1 and the "very minor" Ground 2. That submission rests on the mistaken premise that costs as against Ofcom follow the event; see para 16 above. But in any event, the costs referable to Grounds 1-2 were, in our view, significantly greater than the costs referable to Ground 4.

36. Accordingly, as regards Grounds 1-3, the starting point is that Sky/TalkTalk should pay Ofcom's costs. We of course appreciate the potential complexity of assessment on an issues basis, but where appeals raise wholly discrete grounds, some of which involve much more work than others, we think it would be unjust to avoid that process purely in the interests of simplicity, and that the process is no more complex than that commonly involved in detailed assessment of costs following large-scale litigation. We proceed to address the particular reasons put forward by Sky/TalkTalk as to why there should be a discount from Ofcom's costs.

37. Ground 1 was unquestionably the ground that gave rise to most of Ofcom's costs of this appeal. Sky/TalkTalk submit that they should not pay all the costs because (a) they were justified in bringing this issue before the Tribunal in view of the uncertainty surrounding the appropriate approach to cost orientation, and (b) what they describe as Ofcom's "principal defence" to this ground was not the basis on which the ground was rejected. However, any uncertainty that may have existed was resolved by the Determination. Sky/TalkTalk had put forward their arguments on the approach to cost orientation in the dispute resolution process and Ofcom rejected them. It was Sky/TalkTalk who chose to pursue an appeal, supported by extensive expert evidence, on this ground and that appeal failed. Further, we do not accept that Ofcom's unsuccessful argument that the application of an FAC test would have been equivalent to a charge control was its "principal" defence to this ground. It was one of a range of arguments by which Ofcom comprehensively resisted Sky/TalkTalk's Ground 1. As is not unusual in appeals, some of those

arguments were accepted by the Tribunal and some were not. But this is not a case where it can be said that the particular argument referred to by Sky/TalkTalk, which was not accepted by the Tribunal, involved additional significant evidence or otherwise gave rise to a discrete and identifiable set of costs. This was a hard fought case, and in our view it would be wrong to deprive Ofcom of part of its costs just because some of its submissions were not accepted in support of a ground of appeal on which it was clearly the winner.

38. As regards Ground 2, Sky/TalkTalk simply state that this took up very little of the appeal. That is correct, but cannot provide a reason for reducing such of Ofcom's costs as are attributable to this ground.

39. As regards Ground 3, Sky/TalkTalk assert that this was abandoned because Ofcom produced additional reasoning in its Defence that had not been included in the Determination; and that if such an explanation had been in the Determination this ground would not have been pursued at all. Ofcom strongly disputes that contention. The written submissions of Ofcom and Sky/TalkTalk go into considerable detail regarding what was involved in Ground 3 and the respective failures that each allege was attributable to the other. We have also had regard to the relevant sections of the Notice of Appeal, Defence and Reply. This issue was dealt with in detail in the Determination, and part of Ofcom's Defence recapitulates the approach adopted by reference to the Determination. However, since this ground was abandoned after Ofcom's Defence, and therefore it was not addressed in either the skeleton arguments or during the hearing, there is obvious difficulty for us now to assess these submissions. We note that although 40 paragraphs of Ofcom's Defence are devoted to Ground 3, that compares to 127 paragraphs devoted to Grounds 1-2; Ground 3 is also not covered in Dr Myers' long witness statement. Obviously, Ofcom will have done no further work on Ground 3 after receipt of Sky/TalkTalk's Reply. The share of Ofcom's costs referable to this ground is therefore likely to be small. It would be wholly disproportionate to have a further hearing, purely for the purpose of deciding on costs, to explore the argument about the "holding gain" and the extent to which the pleaded defence of Ofcom went beyond the position it had adopted in the Determination, and neither side invited us to take such a course. In the circumstances, we take a broad brush

approach to the points now advanced and consider that the fairest and proportionate decision is to order that Ofcom should recover 50% of its costs of Ground 3.

40. As regards Ground 4 and the issue of interest, we recognise that in the light of the Determination it was necessary for Sky/TalkTalk to raise this ground in their Notice of Appeal. The Notice was accompanied by statements by witnesses of fact concerning the background to clause 12.3. That appears to have been a response to the approach adopted by Ofcom in paras 15.139-15.144 of the Determination where it noted that it did not have "sufficient evidence" to decide the interest point, and in particular to understand why the Disputing CPs agreed to the inclusion of this clause and thus whether it was "fair and reasonable"

41. Once the evidence of the witnesses of Sky/TalkTalk, and also of the Altnets, on this issue had been filed with their respective Notices of Appeal, Ofcom expressed no view as to whether interest should be awarded save to say that it was a matter for the Tribunal to assess whether the facts now identified by the Disputing CPs "provide a sufficient and appropriate basis on which to set aside clause 12.3 and award interest at anything other than the contractual rate, that is 0%": Ofcom's Defence, para 546. This led BT and the Disputing CPs to adduce more evidence as to the contractual negotiations. The Tribunal held that this evidence was not relevant to this issue: Judgment at [315]. In his opening submissions at the hearing, Mr Saini QC for Ofcom said that Ofcom did not seek to support its reasoning on interest in the Determination but instead urged the approach it had subsequently adopted in its *Gamma* determination issued a few days before the start of the hearing of the present appeals.

42. The argument against an award of interest at the hearing (both orally and in the skeleton arguments) was therefore put forward by BT and, as noted above, by its statement of intervention BT introduced a new and fundamental ground of opposition, i.e. that Ofcom did not have jurisdiction to award such interest in any event.

43. Notwithstanding the general position regarding an award of costs against Ofcom, we think that this is a case where Ofcom should bear the costs incurred by

Sky/TalkTalk under Ground 4 up to the point where Ofcom abstained from taking an active position in defending its decision on interest in the Determination. The Determination as regards interest focused entirely on clause 12.3 and the circumstances in which that was introduced. By the time of the hearing, Ofcom had entirely abandoned reliance on that approach, and we held that it was correct to do so having regard to its regulatory obligations: Judgment, para [298]. By that stage, Ofcom had put forward a very different approach to this question, in its *Gamma* determination. We consider that the Disputing CPs should be able to recover from Ofcom their costs that were clearly referable to an approach by Ofcom that was misconceived and subsequently abandoned. Although it may difficult to define a precise dividing line, we think the fair course is to order that Ofcom pay's Sky/TalkTalk's costs of their Ground 4 incurred up to 23 May 2013 (i.e. the date of Ofcom's Defence).

44. BT continued to seek to support the position Ofcom had adopted in the Determination and we therefore consider that, although an intervener, BT should in that regard face a liability in costs. BT submits that it would be unfair for it to be liable to Sky/TalkTalk for the costs caused by its intervention in respect of Ground 4, on which Sky/TalkTalk succeeded, when it is not being compensated for the costs of its intervention in respect of Grounds 1-2, on which Sky/TalkTalk failed. However, in our view there is a fundamental difference between the position of an intervener whose effective role is purely supportive of a principal party to an appeal, and an intervener who chooses to take on the burden of contesting a part of the appeal which the principal party does not actively pursue. In any event, the position here as regards BT's costs of intervening in Sky/TalkTalk's appeal (in respect of the grounds on which Sky/TalkTalk failed) is counterbalanced by Sky/TalkTalk's costs of intervening in BT's appeal (on the grounds on which BT failed), as to which no order is being made: see para 32 above.

45. At the same time, we recognise that a part of Sky/TalkTalk's continuing costs under Ground 4 was devoted to production of evidence concerning the negotiation of the terms of the contracts of supply, and in particular clause 12.3. That was provoked not only by the Determination but by the position adopted by Ofcom in

its Defence, referring to the need for the Tribunal to consider further evidence from the parties as to the background to clause 12.3: see paras 542-546.

46. We also note the correspondence between Ofcom and BT on this issue of May-June 2013 (following service of Ofcom's Defence) that is referred to in BT's written submissions on costs of 26 September 2014. Considering the position overall, we therefore consider that there should be some discount from the amount of Sky/TalkTalk's costs of Ground 4 incurred after 23 May 2013 (i.e. the date of Ofcom's Defence), for which BT should be liable. We hold that the fair and proportionate order is that BT should pay 75% of those costs. We have given careful consideration as to whether Ofcom should pay the balance of 25%, but in the end conclude that after Ofcom's Defence the question of interest was effectively contested between Sky/TalkTalk (along with the Altnets) and BT, albeit that Ofcom's prior position influenced part of that contest. Therefore, we do not think that it would be right to make Ofcom liable for any part of those costs.

47. The only costs of Ofcom as regards Sky/TalkTalk's Ground 4 arose as a result of BT raising the jurisdiction issue, which Ofcom rebutted. That was a pure issue of law and we doubt that the costs involved were large. However, such as they were, we accept the submission of Ofcom that it should recover those costs from BT.

(3) <u>The Altnets' Appeal</u>

48. The Altnets appealed only on the question of interest and their appeal was successful.

49. Their position is analogous to that of Sky/TalkTalk in respect of Ground 4 of the Sky/TalkTalk appeal. Accordingly, for the same reasons we hold that the Altnets should recover their costs incurred up to 23 May 2013 from Ofcom and 75% of their costs thereafter from BT; and we do not think that Ofcom should be liable for the balance of the Altnets' costs.

50. Further, the jurisdiction issue raised by BT concerned the Altnets' appeal as much as Ground 4 of Sky/TalkTalk's appeal. Ofcom's costs of that issue, which are

effectively Ofcom's costs of the Altnets' appeal after 27 June 2013 (the date of BT's Statement of Intervention), should therefore be paid by BT: see para 47 above.

Conclusion on Costs

51. In summary, for the reasons set out above:
    (a) BT shall pay 97% of Ofcom's costs of responding to BT's appeal;
    (b) BT shall pay the Altnets 40% of the costs of their intervention in BT's appeal;
    (c) Sky/TalkTalk shall pay Ofcom in respect of its costs of Sky/TalkTalk's appeal:
        (i) its costs of responding to Grounds 1-2; and
        (ii) 50% of its costs of responding to Ground 3.
    (d) Ofcom shall pay Sky/TalkTalk their costs incurred up to 23 May 2013 in respect of Ground 4 of their appeal.
    (e) BT shall pay Sky/TalkTalk 75% of their costs incurred after 23 May 2013 in respect of Ground 4 of their appeal.
    (f) Ofcom shall pay the Altnets their costs incurred up to 23 May 2013.
    (g) BT shall pay the Altnets 75% of their costs incurred after 23 May 2013.
    (h) BT shall pay Ofcom its costs incurred after 27 June 2013 in respect of Ground 4 of Sky/TalkTalk's appeal and the Altnets' appeal.

52. All the costs shall be subject to detailed assessment, if not agreed.

C. PERMISSION TO APPEAL

53. BT and TalkTalk (but not Sky) seek permission to appeal against parts of the Judgment.

54. We refuse both applications since in our view none of the grounds of appeal set out has a real prospect of success, nor do we think that there is any other compelling reason why a second appeal on any of those grounds should be heard. Although

we have received very extensive written submissions on these applications, running to 433 paragraphs, it is not appropriate to produce a long and detailed judgment discussing the reasons for refusing permission, and we shall endeavour to do so as briefly as possible. Before turning to the various grounds advanced, we emphasise two points:

(a) A further appeal to the Court of Appeal lies only on a point of law: sect 196(2)(b) of the 2003 Act;

(b) In his *08x Numbers* judgment in the Supreme Court, Lord Sumption (with whom the other members of the Court agreed) made clear that an economic judgment by an expert tribunal which had received a substantial amount of additional evidence, including economic evidence, does not give rise to a point of law: *British Telecommunication Plc v Telefónica O2 Ltd* [2014] UKSC 42 at [46]. See also the observations of Buxton and Brooke LJJ in *Napp Pharmaceutical v Director General* [2002] EWCA Civ 796, [2002] 4 All ER 376 at [34] and [60].

BT's Application

55. BT seeks permission to appeal:

(a) The ruling in the judgment of 11 March 2014 refusing BT permission to amend its Notice of Appeal ("the Amendment Ruling");

(b) The decision in the (main) Judgment dismissing BT's appeal.

(c) The decision in the Judgment allowing the appeal of the Altnets and of Sky/TalkTalk as regards the payment of interest.

56. However, although expressly seeking permission to appeal all of the Judgment dismissing its appeal (save as regards ECCs on which its appeal was successful), BT's submissions do not seek to challenge the Tribunal's decision on Ground 2 of its appeal ("strong economic and factual considerations that reinforce BT's challenge to the approach adopted by Ofcom"); nor on Ground 4 of its appeal

regarding adjustments to its RFS for Transmission Equipment Costs and Provisioning Costs. We therefore assume that in fact BT seeks to appeal the Judgment as regards Grounds 1, 3, 5 and 6 of its Notice of Appeal.

57. We address the points raised in the same order as in BT's application.

(a) *The construction and meaning of Condition HH3.1: section C of BT's application*

58. We accept that, as a point of construction, this is a question of law, and here of interpreting the language against the surrounding circumstances. BT's arguments in section C of its application effectively constitute a repetition of the arguments it advanced unsuccessfully in the appeal and are addressed in the Judgment.

59. Further, we reject the suggestion that Condition HH3.1 should be read as if the only material words were "charge … for Network Access covered by Condition HH1" and that the actual words "each and every charge offered, payable or proposed for Network Access covered by Condition HH1" have no effect on the meaning of the condition other than to make clear that there were to be no exceptions. That would be a strained construction, self-serving to BT's case.

60. The contention that it is impossible to determine whether particular elements (i.e. rental, connection and main link) were individually "reasonably derived from the cost of provision" (BT's application, para 33) is a new argument that was not advanced in the appeal. Moreover, it is not a point of law: it is a point of economic or accounting analysis, and if BT sought to run that argument it should have been advanced in the appeal when it would have been determined. On the contrary, most of the argument that we heard on behalf of BT was to the effect that there were various ways in which costs could be allocated to the individual elements such that considering them separately was unreasonable or arbitrary; it was not suggested that allocation of costs could not be done at all.

61. Further, in rejecting Ground 2 of BT's appeal, the Tribunal held that connections and rentals are distinct services and that in commercial terms the balance between

the charges for each affects decision-making by the Disputing CPs. The Tribunal also found that if the cost-orientation obligation was applied only in aggregate and not individually, that would cause distortions as between CPs: Judgment at [114]-[119]. Those are factual findings, which strongly support the construction of Condition HH3.1 adopted by the Tribunal. As indicated above, BT does not appear to seek to appeal on the basis of its Ground 2.

62. Accordingly, this ground of appeal stands no real prospect of success. Nor is there any other compelling reason for an appeal, as BT suggests (application, para 25) just because there is a lot of money at stake or because this issue somehow interrelates with the issue of legal certainty, considered at paras 71-75 below. If neither point has a real chance of success, linking them together does not convert them into providing a compelling reason for an appeal.

(b) *The temporal scope of the NRA's powers to require undertakings to justify, and where appropriate, adjust their charges: section D of BT's application*

63. BT seeks permission to appeal to the Court of Appeal on a basis that appears to go beyond Ground 5 of its appeal to the Tribunal. Ground 5 as advanced in its Notice of Appeal was to the effect that although the Tribunal had jurisdiction to determine whether there had been *compliance* with a cost orientation obligation, its jurisdiction to order *repayment* was more limited and applied only from the time that a dispute had been raised (a point that itself went through some variation in BT's submissions): see Judgment at [247]-[248]. However, by the repeated reference to a requirement by Ofcom on BT to "justify" its prices and the submission that Ofcom had no power to "impose that obligation", the logic of BT's contention in its current application is that Ofcom had no power to resolve the disputes at all and determine whether BT had overcharged: BT's application, para 70. That was not a case previously advanced in the appeal: see the Judgement at [258], second sentence, which BT does not criticise. The effect of BT's new submission appears to be that if Ofcom considered on the basis of BT's RFS that Condition HH3.1 had not been complied with, Ofcom could not even investigate that with BT since that would require BT restrospectively to justify its prices to Ofcom.

64. As regards the power to order repayment, BT mischaracterises in its application the way the Tribunal interpreted the relevant provisions of the CRF. The Tribunal's interpretation is explained in the Judgment: see in particular at [260]-[262]. In its resolution of the disputes, Ofcom found BT had overcharged the Disputing CPs in breach of an obligation imposed on it under the CRF, and directed repayment of the overcharge. Therefore Art 20(3) of the Framework Directive, not Art 13(3) of the Access Directive, is the governing provision.

65. As regards sect 190, BT seeks to raise a further new argument that sect 190(2)(d) is only an ancillary power to a determination under sect 190(2)(a) or (b), and that the only basis for a "historic finding of overcharging" (i.e. a finding of past overcharging) can be sect 190(2)(b): BT's application at paras 71-72. Not only was this contention not advanced in the appeal but it is manifestly misconceived. All the sub-paragraphs of sect 190(2) are ancillary to a determination resolving a dispute: see sect 190(1). Here, the disputes were as to whether BT had overcharged the Disputing CPs because its charges were not cost-oriented, in breach of Condition HH3.1. Ofcom found that BT had overcharged, a finding which inherently involved establishing the amount involved. That was a determination under sect 188(2) and formed the basis on which sect 190(2)(d) was engaged. This analysis is not affected by the Supreme Court judgment in the *08x Numbers* case, to which BT refers at para 72 of its application.[1]

66. Further, we followed the *PPC (preliminary issues)* judgment[2] of a differently constituted Tribunal and found BT's arguments under this head of its appeal wholly misconceived: Judgment at [269]. BT had previously appealed to the Court of Appeal against that earlier judgment,[3] and it is not appropriate for BT to seek to argue now that the *PPC (preliminary issues)* judgment is wrong on a basis which it had not advanced in its previous appeal.

67. It is unclear to what extent BT seeks to rely on the decision of the French telecommunications regulator of 15 July 2014, referred to "by way of introduction"

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[1] BT refers to para 33 of the Supreme Court judgment, but presumably means to refer to para 32.
[2] [2010] CAT 15.
[3] [2012] EWCA Civ 1051.

in its application: see at paras 23-24. However, as there noted at fn 1, that decision followed two earlier decisions, one of which was given on 20 March 2012, well before the hearing in the present case. That decision was not cited or relied on in argument by BT. Moreover, these decisions are based on the French domestic legislation, which is not relevant.

(c) *The Amendment Ruling, refusing permission to amend*

68. BT seeks to challenge this in a sub-section of section D of its application. However, in reality it involves an entirely different ground. By the application to amend, made after the conclusion of the hearing, BT had sought to advance a distinct ground of challenge that Ofcom had no power to order repayment in respect of an obligation that was no longer in force at the time the dispute was referred to Ofcom. BT recognised that this required permission from the Tribunal to amend its Notice of Appeal. Its application for permission to amend was rejected under rule 11 of the CAT Rules, on the basis that BT could not show exceptional circumstances under rule 11(3)(c), which BT accepted was the only basis on which the amendment could be allowed.

69. If BT seeks permission to appeal that ruling, that cannot be on the basis that the substantive argument in the amendment has merit, since the Tribunal never ruled on that ground: see the Amendment Ruling at [46]. Permission to appeal must therefore rest on the basis that BT has a real prospect of success in showing that the Tribunal was wrong in its interpretation of rule 11 and/or that its decision to refuse an amendment was vitiated by an error of law. However, that is not argued by BT at all. This is not an instance of a new legal argument being advanced to support an existing ground of appeal (which may well be permissible) but an attempt to put forward a new ground of appeal. Thus proceeding on this basis requires the Notice of Appeal to be amended: sect 195(2).

70. Further, we note that there is a presumption against granting permission to amend in the Court of Appeal to raise a new point that would seriously alter the case as originally put forward in the court below or advance a fundamentally new case: *Jones v Environcom Ltd* [2011] EWCA Civ 1152, [2012] PNLR 5, at [31] and [33],

citing May LJ in *Jones v MBNA International Bank Ltd* (30 June 2000, unreported). Although such permission may be granted in exceptional circumstances, it was precisely because we found no exceptional circumstances that we refused permission to amend.

(d) *Legal certainty: section E of BT's application*

71. Contrary to the submission in BT's application, the Tribunal did not regard the principle of legal certainty as irrelevant in this case on the ground that there was no reliance by BT on the various statements from Ofcom to which BT referred. However, BT did not argue in its appeal that Condition HH3.1 was so vague and uncertain that it was unenforceable or unlawful. That appears to be the argument which BT now seek to raise on a further appeal: BT's application, para 88.

72. Before the Tribunal, legal certainty was relied on as the basis for asserting that Condition HH3.1 should have been applied in a different way, and in particular that since Ofcom had failed to make clear that disaggregation of connections and rental charges was required, compliance with the condition could be assessed on the basis of an aggregation of those charges: BT's Notice of Appeal, paras 144-145 and 167-168.

73. In deciding this ground, the Tribunal found, first, that Condition HH3.1 was clear as regards a requirement to assess connection and rental charges separately, and so was not in contravention of the principle of legal certainty: Judgment at [125]. That conclusion links to the conclusion on Ground 1 of BT's appeal. Further, we noted that the terms of the condition gave a broad leeway to BT: this was not the imposition of a tax or the fixing of prices according to a precise formula: it was deliberately a *more* generous approach for BT, allowing it to decide how to price for the various elements provided that it could demonstrate to Ofcom that its prices met the broad requirements of that approach. That did not constitute uncertainty but provided a flexibility that was for BT's benefit; it did not require BT to achieve cost orientation by applying any particular standard: Judgment at [126] and [111]. It was only because BT failed to advance any credible case as to how it had sought to secure compliance with the cost orientation obligation and demonstrate that to

Ofcom, that it fell to Ofcom to determine whether the charges were cost oriented. That does not render the condition uncertain.

74. Further, we noted that Ofcom did not mechanistically find overcharging simply because a price was above DSAC in a particular year, but proceeded to consider the particular circumstances of that charge: Judgment at [146], referring to para 9.222 of the Determination, and then the discussion of the five specific instances where BT claimed that Ofcom's findings were mechanistic.

75. Nor is it correct to contend that the Tribunal failed to address BT's argument about averaging: see at [145]-[146], setting out Ofcom's justification for its approach, which we found entirely acceptable. Condition HH3.1 required the cost orientation to be demonstrated "to the satisfaction of Ofcom", thereby importing an element of Ofcom's judgment, which of course had to be exercised reasonably.

(e) *The decision on the appeals of Sky/TalkTalk and the Altnets re interest: section F of BT's application*

76. BT in effect repeats the points raised in argument on the appeal on (a) jurisdiction to award interest; and (b) the exercise of that jurisdiction in this case.

77. As regards jurisdiction, we accept that this raises an important point of principle. However, for the reasons set out in the Judgment we find BT's arguments wholly unconvincing and that this ground therefore has no real prospect of success.

78. As regards the question whether, if it has the jurisdiction, Ofcom should have awarded interest, that depends on the circumstances of the present case and is therefore fact specific. BT relies on the term in its contracts with the Disputing CPs and seeks to suggest that the significance to be afforded in this context to a contractual term is a question of law. However, where, as BT accepts, Ofcom is exercising a purely regulatory power, we regard the fact that BT has SMP as very material in considering the weight to be given to a contractual term. In those circumstances, it is unrealistic to suggest that it is wrong as a matter of law to find that little weight should be given to such a term, without conducting an

examination of the detailed negotiations of what was an elaborate contract, with drafts passing back and forth between the parties, so as to establish whether that particular term "had been imposed by BT in an unfair or unreasonable manner": BT's application at para 109. The contention that this approach constituted an error of law does not have a real prospect of success.

TalkTalk's Application

79. TalkTalk seeks to appeal the Tribunal's rejection of what was Ground 1 of the combined Sky/TalkTalk Notice of Appeal. That was headed "The Cost Test to be Applied" and challenged Ofcom's approach in the Determination for applying only a DSAC test whereas Sky/TalkTalk submitted that a further aggregate FAC test should have been applied.

80. In its application, TalkTalk puts its application under three grounds. However, on analysis, we find that the submissions under each of those grounds either misinterpret the Judgment, or amount to issues of fact or economic assessment that TalkTalk attempts to present as points of law.

(a) *Ground 1: the overall approach to construction*

81. TalkTalk submits that the Judgment does not address "the language and form of [Condition HH3.1]": application para. 14. That is a surprising submission and manifestly incorrect: see Judgment at [170]-[171]. Secondly, it submits that the Tribunal did not address "a significant number of passages in the 2004 LLMR that strongly supports S&TT's proposed approach": ibid. In fact, close attention is paid to the 2004 LLMR as part of the process of construction of the condition: Judgment at [172]-[176]. It is correct that the Judgment does not quote and discuss each of the many passages in the 2004 LLMR to which Sky/TalkTalk (or indeed the other parties) referred to in argument. The 2004 LLMR is a very long document (650 pages including annexes) and the Judgment addresses what in our view are the most material and significant passages for the purpose of interpretation of Condition HH3.1: Judgment at [172]-[176] and [180]-[181]. Thirdly, TalkTalk submits that the Judgment did not address "any of the regulatory documents

published in the period leading-up to the imposition of Condition HH3.1". However, the condition was imposed as a result of the very full market review in the 2004 LLMR and accordingly we considered that it is the explanation in that document, along with the language of the condition itself, that are the fundamental basis for construction of the condition. We also took account of the interpretation of the identically worded condition at issue in the *PPC Judgment* of the Tribunal, on which both Sky/TalkTalk and Ofcom relied for their respective interpretations: Judgment at [160]-[164]. Since we considered the meaning was clear on that basis, and rejected Sky/TalkTalk's attempt to distinguish or criticise the *PPC Judgment*, we did not find it necessary specifically to address various earlier Ofcom and Oftel documents, or the 2000 paper of the European Independent Regulators Group, which were introduced by Sky/TalkTalk only in the course of cross-examination of Dr Myers and which are not referred to in their Notice of Appeal.

82. TalkTalk submits that the Tribunal treated the construction of Condition HH3.1 as a question of regulatory discretion and not as a question of the construction of a public law instrument on an objective basis. This criticism runs through TalkTalk's application but is quite contrary to the view expressed in the Judgment. The Tribunal does not treat the interpretation of the condition as a matter of regulatory discretion but makes clear that the essential question was the meaning of "appropriate mark up for recovery of common costs" in the wording of the condition: Judgment at [170]. However, "appropriate" does not have a single, precise meaning, as Sky/TalkTalk previously acknowledged. Their skeleton argument in the appeal stated: "The condition does not mandate the use of any single cost methodology" (at para 63). Indeed, the very fact that Sky/TalkTalk accepted that their aggregate FAC test was not required in application of the identically worded condition to the same services after December 2008, when a charge control had been imposed on the low bandwidth AISBO market, demonstrated that this was not a case where just interpretation of the wording of the condition in itself will establish objectively a specific, "correct" cost test. The regulatory purpose and the particular facts were therefore critical to the interpretation, as the Court of Appeal made clear in the *PPC* case: see Judgment at [171].

83. Here, having regard to the 2004 LLMR, the Tribunal found that the regulatory purpose was to promote competition in the AISBO market. For that purpose, we held that an obligation based on DSAC rather than FAC gave, objectively viewed, an "appropriate mark up for the recovery of common costs": Judgment at [169], [177]-[178], and [182]. We appreciate that Sky/TalkTalk urged a different reading of the 2004 LLMR, but we expressly rejected their interpretation for reasons set out in the Judgment. In its application, TalkTalk seeks to run again the arguments about the proper reading of the 2004 LLMR that were canvassed unsuccessfully in the appeal. Even if that might qualify as a point of law, we do not consider that a further appeal on that point has a real chance of success. As for the question whether an aggregate FAC test is required in addition to DSAC to implement that purpose, in our view that is precisely the kind of economic judgment of the specialist tribunal (here comprising along with the President, an economist and an accountant) to which Lord Sumption referred and which does not give rise to a point of law: para 54 above.

84. The Tribunal also considered whether Ofcom's assessment of the regulatory purpose, as we interpreted it on the basis of the 2004 LLMR, was so wrong that the construction which gave effect to that purpose should be rejected as inappropriate. It was in that context that the Tribunal held that Ofcom was fully entitled to determine, as a matter of regulatory judgment, that it should give preference to the promotion of dynamic competition: Judgment at [183].

(b) *Ground 2: The correct construction of Condition HH3.1:*

85. This ground seeks to expand on the general summary under Ground 1, in support of the concluding allegation that the Tribunal misconstrued the 2004 LLMR. Our reason for refusing permission to appeal on this basis has been summarised above.

86. It is correct, as TalkTalk asserts that the Judgment does not address every argument raised by Sky/TalkTalk, or indeed by the other appellants in their appeals. This was a deliberate decision: see the Judgment at [76]. See also the observations of the Court of Appeal regarding what is required in judgments of this Tribunal in *Argos & Littlewoods* [2006] EWCA Civ 1318 at [5].

87. We would only add that the argument as to whether a risk of multiple recovery of BT's common costs is consistent with the proper interpretation of Condition HH3.1 is recognised and addressed at [165]-[170] of the Judgment. Although, as noted above, the Judgment does not discuss every paragraph of the 2004 LLMR on which Sky/TalkTalk relied in argument, we note that some of the passages in the 2004 LLMR to which TalkTalk alleges in its application the Tribunal failed to have regard are in fact expressly referred to and, in some cases actually quoted in the Judgment: e.g., para 7.10: quoted in Judgment at [172]; para 7.54: quoted in Judgment at [173]; paras B.434, B.432: discussed in Judgment at [180].

88. In Ground 2(e) of its application, TalkTalk contends that the Tribunal at [169] and [177]-[178] of the Judgment made a finding regarding the appropriateness of DSAC as a cost standard on the basis of limited wholesale entry that was never put to Sky/TalkTalk's expert. That is not correct. The basis of this approach was expressly raised at some length with Dr Houpis by Prof Mayer: see transcript, day 9, pp 38-42. Although Dr Houpis largely did not accept the thrust of Prof Mayer's propositions since his view was that such entry would be inefficient and thus would not deliver efficiency benefits, he was clearly given the opportunity to comment. Further, there was evidence from the other two economic experts that Dr Houpis' test would deter entry at the upstream level: see Joint Expert Statement on Sky/TalkTalk Ground 1, re question 9.

89. TalkTalk further contends that the Tribunal was wrong in asserting that pricing at DSAC is necessary to encourage competitive entry into a segment of the AISBO market. TalkTalk submits that if such an entrant priced at DSAC it would not be able to recover its costs: application, para 68. That is obviously a question of economics not law. It would therefore be inappropriate in this Supplementary Judgment to set out an extensive exposition of the DSAC cost test; we would merely reaffirm that we have no doubt that the view expressed in the Judgment is clearly correct.

(c) *Ground 3: The Tribunal's comments relating to practicality*

90. TalkTalk alleges that the Tribunal's consideration of the serious problems of practicability and reliability in the test advocated by Dr Houpis reveal an error of approach to the issue of construction. However, Condition HH3.1 manifestly does not include reference to any specific cost test. Since the condition had to be applied *ex ante* by BT in pricing its products, it is appropriate to ask whether a particular cost test put forward, in its application to BT's AISBO services, would have been practicable and reliable. If it would not, that was a relevant consideration in determining whether the condition should be interpreted as requiring such a test.

91. The assessment of the practical difficulties in the Judgment at [188]-[193] relates to an aggregate FAC test. That is the test that Sky/TalkTalk alleged should be applied, calling in support the expert evidence of two economists, Dr Houpis and Mr Robinson. We acknowledged that Sky/TalkTalk's approach did not necessarily require the distribution of costs, and thus calculation of overcharge, to be done in the particular way put forward by Mr Robinson, and that there were various ways an aggregate FAC test could be applied: Judgment at [193]. Accordingly, the discussion of practical difficulties relates to an aggregate FAC test as a matter of principle, and the problems revealed by Mr Robinson's approach were merely illustrative.

92. In fact, we found that the proper interpretation and application of Condition HH3.1 were satisfied by the application of the DSAC test alone, without having regard to the practical difficulties to which an aggregate FAC test would give rise. Our finding as regards those practical difficulties was therefore a supplementary reason that reinforced our conclusions: Judgment at [194]. We do not see how this approach involves an error of law.

The Honourable Mr Justice Roth | Stephen Harrison | Colin Mayer

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 4 December 2014