Neutral citation [2005] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1018/3/3/03

Victoria House
Bloomsbury Place
London WC1A 2EB

18 May 2005

Before:

Sir Christopher Bellamy (President)
Michael Blair QC
Dr Arthur Pryor CB

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

(FORMERLY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS)

Respondent

supported by

VODAFONE LIMITED

and

O2 (UK) LIMITED

Interveners

Gerald Barling QC, Alan MacLean and Sarah Stevens (instructed by BT Legal) appeared for the appellant.

Richard Fowler QC and Kassie Smith (instructed by the Treasury Solicitor) appeared for the respondent.

Elizabeth McKnight (of Herbert Smith) appeared for Vodafone Limited

Stephen Kon and Niamh Grogan (of SJ Berwin) appeared for O2 (UK) Limited

JUDGMENT: COSTS

I INTRODUCTION

1. On 12 May 2004 the Tribunal allowed an appeal lodged on 21 August 2003 under section 192 of the Communications Act 2003 (the "2003 Act") by British Telecommunications PLC ("BT") in respect of a direction under Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997, SI 1997 No. 2931 (the "1997 Regulations"), relating to a dispute between BT and Vodafone Limited regarding wholesale connections between BT's and Vodafone's networks (radio base station ("RBS") backhaul circuits) (the "Direction") made on 23 June 2003 by the Director General of Telecommunications (the "Director") and continued by a notice (the "Continuation Notice") issued by the Director on 21 July 2003 to take effect under paragraph 22 of Schedule 18 to the 2003 Act on 25 July 2003: see [2004] CAT 8 (the "Tribunal's judgment").

2. On 12 May 2004, on handing down the Tribunal's judgment the President of the Tribunal observed that the Tribunal wished to consider:

> "what is the right approach to costs in a regulatory field like this where there is a real likelihood of litigation of one sort or another between these two particular parties. This is, in a sense, part of the regulatory system and in this particular case the Director was, at least formally speaking, adjudicating on a dispute that had been brought to him by Vodafone to resolve."

3. By a letter dated 21 June 2004 the Tribunal set a timetable for any written submissions the parties might be advised to make on the question of costs.

4. On 5 July 2004 the Registry received BT's written application that its costs of the appeal, in the sum of £630,421.59[1], should be paid by OFCOM or, in the alternative, by OFCOM and Vodafone Limited and O_2 (UK) Limited, in their capacity as Interveners, in such proportions as the Tribunal considers just, pursuant to rule 55 of the Competition Appeal Tribunal Rules 2003, SI 2003 No 1372 (the "Tribunal's Rules"). Submissions from OFCOM, Vodafone and O_2 resisting BT's application were received on 19 July 2004 and BT's reply to those submissions was received on 26 July 2004.

[1] Comprised of £316,622.26 disbursements (essentially counsels' fees) and £313,799.33 in respect of in-house solicitors' time.

5. Similar issues arise in another case pending before the Tribunal, namely *BT v Office of Communications (CPS Save Activity)* in which the Tribunal gave judgment on 9 December 2004 [2004] CAT 23. The Tribunal deferred dealing with costs in the present case so as to enable it to be aware of the submissions made in the *CPS Save Activity* case, currently pending before a differently constituted Tribunal.

6. The *CPS Save Activity* case presents the opposite situation from that which arises in the present case, in that there BT was unsuccessful and OFCOM was successful. In *CPS Save Activity*, OFCOM has not sought its costs on the grounds that, in general, in these regulatory cases under the 2003 Act costs should lie where they fall unless there is a good reason to make a different order. This judgment, and the judgment in *CPS Save Activity* [2005] CAT 21 are being delivered at the same time.

II THE PARTIES' SUBMISSIONS

BT's submissions

7. BT submits that the fundamental premise on which it was successful in the present appeal to the Tribunal, namely that the provision of RBS backhaul circuits does not constitute "interconnection", is one which BT has consistently advanced throughout the history of the dispute. BT submits that the Director took the contrary view, actively supported by the Interveners.

8. BT submits that its appeal was allowed on the basis of the submission that BT has repeatedly put forward, both in its initial responses to Vodafone's requests for the provision of partial private circuits for use as RBS backhaul circuits in 2002, and following Vodafone's reference of the dispute to the Director for resolution. BT therefore considers that it is entitled to the costs of the proceedings, whether from OFCOM or from the Interveners.

9. BT refers to *Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2002] CAT 2 ("*GISC: Costs*") in which the Tribunal made general observations about the way in which it would approach the question of costs. In particular, BT refers to paragraph 52 of that judgment, where the Tribunal stated that: "cases involving regulated industries where the costs of statutory regulation are recovered, in one way or

another, from the industry itself may also raise separate issues." BT submits that there should be no general rule that puts regulators in a different position to that of other litigants as regards the question of costs.

10. BT refers to the passage in the judgment of Dyson LJ in *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 at page 356:

> "If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.
>
> The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases. As Mr Sales points out, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of public funds diverted from the funds available to fulfil its primary public functions. I did not understand Mr Drabble to take serious issue with any of the foregoing. It is plainly right that in the normal run of the mill public law case the unsuccessful party should pay the other side's costs…in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it."

11. BT submitted that this appeal was the first appeal brought under the new appellate regime established under the 2003 Act. Formerly the procedure for appealing this type of dispute was a statutory appeal under the Telecommunications Act 1984 to which the costs provisions of the Civil Procedure Rules ("CPR") applied. There is no reason, in BT's submission, to suppose that, in altering the appellate process, Parliament intended parties such as BT to be in a less advantageous position as to costs than under the previous regime.

12. BT also refers to *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] 1 All ER 737 in which Ferris J referred (at 740b, para 7) to the "settled practice" in appeals from tribunals other than the Pensions Ombudsman that if a tribunal takes no part in the appeal

an order for costs will not be made against it, but if it does appear and makes representations in support of its decision, it makes itself at least potentially liable for costs in the event that the decision is reversed. BT further referred to *R (on the application of Touche) v Inner London North Coroner* [2001] 2 All ER 752 in which the Court of Appeal upheld an order for costs against a coroner who had appeared and unsuccessfully resisted an appeal against his refusal to hold an inquest.

13. BT submits that the Director was not a judicial officer in a position akin to magistrates or other inferior judicial officers but an administrative official who could have withdrawn the Direction at any time upon reconsideration. Like the Director in the *GISC: Costs* case, the Director/OFCOM had a "cost free opportunity to change his mind" but chose not to do so.

14. In the circumstances, BT submits that it is very difficult to see any principled reason why OFCOM should not be liable for BT's costs, at least insofar as they were not caused by the interventions of Vodafone and O_2. Just like the appellant in the *GISC: Costs* case, BT has been successful on the basis of a relatively clear cut point of law (albeit, a point of law in this case involving complex and technical evidence to make good BT's submission) on which the Director fell into error. BT has not lost on any subsidiary issues or incurred costs on irrelevant matters or acted in any way unreasonably.

15. BT states that its only interest is in recovering its costs, whether from OFCOM or the Interveners alone, or in some combination. In that regard BT has adopted an "essentially neutral stance" on any arguments between OFCOM and the Interveners. BT recognises, however, that there may be grounds on which OFCOM can respectably argue that it should not shoulder the costs burden alone.

16. In BT's submission there is ample authority for the proposition that where a complainant appears at a hearing and is unsuccessful in defending a decision, in its favour it will be at risk as to costs. BT referred to the following passage in the judgment of Hart J in *University of Nottingham v Eyett* [1999] 1 WLR 594:

> "It is true that a non-appearing respondent complainant, like the non-appearing respondent ombudsman, is not at risk as to costs but the reasons for this are different. In the case of complainants the reason lies in the apprehension that an automatic rule putting

> them at risk as to costs of an appeal would discourage complainants from adopting the summary procedure in the first place. It does not follow that a complainant who, having successfully made a complaint, then seeks actively to uphold the determination on appeal to the court should not be at risk as to costs in the normal way. Indeed, I consider that he is, and have recently so decided in a case where the means of the complainant were not in issue: see *City and County of Swansea v Johnson* [1999] 2 WLR 683."

17. In respect of Vodafone, BT submits that the Direction challenged on appeal was triggered by Vodafone's complaint to the Director. BT does not submit that the mere making of a complaint of itself should lead to Vodafone being ordered to pay costs. The current proceedings were necessitated by the Director's wrongful assumption of jurisdiction under the Regulations and his resolute refusal to entertain BT's simply stated objections to that assumption of jurisdiction. In the instant case, however, BT submits that Vodafone did not merely complain and then leave the Director to get on with it: Vodafone and O_2 have fully entered the fray in support of OFCOM. BT submits that in taking an active role in the proceedings both Vodafone and O_2 must have appreciated that they assumed a costs risk.

18. BT also refers to paragraph 58 of *GISC: Costs*, where the Tribunal did not consider that it would be proper to fetter its discretion in respect of costs "by adopting a general principle to the effect that, if the Director loses, he should be liable to pay costs to a private party only if he has been guilty of manifest error or unreasonable behaviour", and that: "to introduce such a rule in the context of this Tribunal could, in itself, be a disincentive to exercising the right to appeal, with possible detriment to the competitive process in the market."

19. BT submits that in the event it does not recover its costs having succeeded so comprehensively before the Tribunal there would be a quite unwarranted "chilling effect" deterring the bringing of appeals which would be contrary to the interests of justice. It is in the public interest that regulators such as OFCOM be set right by courts when they fall into error and a jurisdictional error is the paradigm example where it is important that the regulator be corrected by the court.

20. In respect of the proportionality of the costs order sought and the amount of the costs claimed, BT invites the Tribunal to consider that this was a very important case for BT. In the event that the Direction and the Continuation Notice stood, BT submits that potentially BT would have had to supply equipment to many of its competitors over a period of many months at cost-based rather than normal commercial prices. In that regard, BT submits that the impact on its revenues would have been calculated in the tens of millions.

OFCOM's submissions

21. OFCOM submits that the appropriate order for costs by the Tribunal in the present case is that:

    (a) each party bear its own costs of the appeal; alternatively

    (b) OFCOM do pay such proportion of BT's costs of the appeal, following detailed assessment by the Tribunal, as would maintain the balance between the requirements of fairness to the parties and the need to contain the costs of litigation.

22. OFCOM submits that the flexible approach adopted by the Tribunal in respect of costs in cases decided under the Competition Act 1998 and the Enterprise Act 2002 is also appropriate in appeals under the 2003 Act. In particular, OFCOM notes that the Tribunal has made it clear that there is no presumption in proceedings before it that costs will follow the event: see paragraph 37 of the judgment in *IBA Health Limited v Office of Fair Trading: Costs* [2004] CAT 6 and paragraph 22 of the judgment in *Napp v Director General of Fair Trading* [2002] CAT 3 *("Napp: interest and costs"*). OFCOM also refers to paragraph 53 in *GISC: Costs* in which the Tribunal states:

> "it seems to us that any analogy there may be with the rule in civil litigation that the losing party should pay the winning party's costs, should be displaced, in the exercise of our discretion, where we are satisfied that such a rule would frustrate the objects of the Act".

23. OFCOM refers to the general principle that public authorities should be encouraged to make and stand by reasonable decisions and should not be discouraged from doing so by

the risk of substantial costs orders against them. OFCOM refers in particular to paragraphs 40 and 41 of the judgment in *IBA Health,* cited above, which states:

> "The Tribunal also recognises, however, that the system of statutory appeals under the 2002 Act may not function properly if public authorities are not encouraged to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged: see *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), cited in *GISC: Costs* at [43], [44] and [56].
>
> The Tribunal is aware that the costs of litigation in this area are high. Just as it is important that smaller companies are not deterred from bringing well founded applications before the Tribunal, it would be unsatisfactory if the risk of having to pay large orders for costs for having defended reasonably, albeit unsuccessfully, an application under section 120(4) was adversely to affect the performance by the OFT of its statutory functions, which after all exist to benefit the public generally, including other companies as well as individuals."

24. OFCOM submits that cases involving sectoral regulators give rise to special considerations that displace any presumption there might otherwise be that the unsuccessful party should pay the successful party's costs, particularly where the costs of statutory regulation are recovered from the industry itself: see paragraph 52 of *GISC: Costs*. In that regard, OFCOM refers to paragraph 32 of the judgment in *Aquavitae (UK) Limited v Director General of Water Services* [2003] CAT 23 where the Tribunal concluded that, in the particular circumstances of that case, the Director's costs of the appeal should be regarded as part of the general costs of regulation in the sector.

25. Just as the Tribunal found in *Aquavitae* that costs should lie where they fall when the regulator was the successful party, in OFCOM's submission, costs should likewiselie where they fall when the regulator is the unsuccessful party.

26. In OFCOM's submission, ordering Vodafone to pay BT's costs, on the basis that it had initiated the dispute, would be likely to discourage complainants from intervening even though they might be in a position to contribute to the proceedings before the Tribunal.

27. OFCOM points out that, as a result of its funding arrangements, ordering it to pay all or some of BT's costs would result in those costs falling upon the industry generally.

OFCOM contends that it is not appropriate that the costs involved in resolving a dispute concerning two parties within the industry should be borne by the industry as a whole.

28. OFCOM also submits that under the 2003 Act it is under a statutory duty to accept and resolve disputes relating to the provision of network access and that in many cases the parties will seek to appeal OFCOM's decision to the Tribunal. The risk of having to pay large orders for costs for having defended reasonably, albeit unsuccessfully, such decisions could, in OFCOM's submission, affect the performance by OFCOM of its statutory functions. OFCOM asserts that any principle that costs should follow the event should be displaced where it would frustrate the objects of the relevant legislation.

29. Moreover, OFCOM submits that where it is under a duty to resolve disputes between competing parties each of whom is likely, in the event that the OFCOM's decision went against it, to appeal to the Tribunal, there is little scope for discouraging litigation or promoting discipline. In those circumstances, OFCOM does not consider that a party's success in such an appeal should be determinative of the question of costs.

30. OFCOM argues that any reference to the Director/OFCOM having a "cost free opportunity to change his mind" as in the *GISC: Costs* case is inappropriate. In that instance the appellants were obliged, pursuant to the then section 47 of the Competition Act 1998, to request that the Director withdraw or vary his decision before they could make an appeal to the Tribunal. No such legislative provision applies in the present case.

31. In the event that the Tribunal is minded to make a costs order to reflect the fact that BT succeeded in its appeal, OFCOM invites the Tribunal to exercise its discretion in such a way as to produce an outcome such as would apply in the Court of First Instance in Luxembourg, as described in paragraph 46 of the Tribunal's judgment in *GISC: Costs*. On that basis, OFCOM should pay only a small proportion of BT's costs as determined on a detailed assessment. OFCOM argues that such an approach is necessary in the present case where the level of costs claimed by BT is, in OFCOM's submission, excessive.

Vodafone's submissions

32. Vodafone submits that, as an intervener, it should not be ordered to pay a proportion of BT's costs. Vodafone considers that such an approach is consistent with the general principle that, in the telecommunications sector where interveners are likely to appear regularly before the Tribunal, the costs of intervention should lie where they fall: *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6.

33. Vodafone further submits that making such an order for costs would deter companies from intervening in Tribunal proceedings in circumstances where they may assist the Tribunal and that such an effect is inconsistent to the objectives of the relevant legislation.

34. Insofar as Vodafone only took a subsidiary role in the proceedings before the Tribunal, consistent with the Tribunal's Rules, Vodafone submits that there are no special circumstances that would warrant an order that it should pay a proportion of BT's costs.

35. Vodafone contends that its intervention contributed to the efficient resolution of the proceedings before the Tribunal and that such intervention did not cause BT to incur additional costs.

36. Vodaphone submits that the 2003 Act requires OFCOM to apportion its costs between its various activities including the regulation of telecommunications. The costs of OFCOM's telecommunications regulatory activities are met by charges and fees imposed on telecommunications operators. Any costs order payable by OFCOM will ultimately be met by the telecommunications industry. In a regulated industry such as telecommunications, where the regulator is funded by levies on that industry, it is not appropriate, in Vodafone's submission, at least in cases where the issues at stake involve matters of industry or public significance, for the costs of unsuccessfully defending the appeal to be borne in part by the interveners.

37. Vodafone submits that the amount of the costs claimed by BT is excessive and cannot properly form the basis of any costs order against Vodafone insofar as it includes costs incurred prior to the Direction on 23 June 2003 and prior to the intervention of Vodafone on 12 September 2003.

O_2's submissions

38. O_2 submits that it is clear from the Tribunal's previous case law that, in relation to interventions, costs should generally be neutral and lie where they fall. O_2 further submits that the Tribunal should not make any order for costs against it so as to ensure that Interveners are not deterred from intervening in future proceedings.

39. In the instant case, O_2 was permitted to intervene in the proceedings before the Tribunal on the strict understanding that it did not duplicate or re-run arguments that had already been presented. O_2 respected that obligation scrupulously and its participation was kept to the minimum necessary to protect O_2's legitimate commercial interest.

40. Further O_2 submits that its intervention, together with Vodafone's intervention, has been of assistance to the Tribunal.

41. In conformity with the case law of the Court of First Instance, the Tribunal has generally only been minded to award costs against unsuccessful interveners if and to the extent that the intervener may have added to the costs of the appeal. In those circumstances, O_2 submits that the Tribunal should not make any order for costs against it.

42. Should the Tribunal consider that a certain proportion of BT's costs should properly be payable by the interveners, O_2 submits that under no circumstances should the interveners be jointly and severally liable.

43. O_2 further submits that, in view of its minimal intervention in the proceedings, were the Tribunal to consider that a proportion of BT's costs were properly payable by O_2, any costs order against it should be for no more than a nominal percentage.

44. Finally, O_2 submits that BT's costs application is wholly disproportionate to the duration of the proceedings before the Tribunal.

III THE TRIBUNAL'S ANALYSIS

45. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Tribunal's Rules. Rule 55 replaces rule 26 of the Competition Commission Appeal Tribunal Rules 2000, SI

2000 No. 261. The Tribunal's decisions on costs referred to below were decided under rule 26 which is materially in the same terms as rule 55 of the Tribunal's Rules. The principles stated in those decisions are of equal relevance to the application of rule 55.

46. Rule 55 of the Tribunal's Rules provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales …
>
> (2) The Tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit 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.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

47. It is important to note at the outset that unlike the position in some other Tribunals, for example the Financial Services and Markets Tribunal, Parliament has not provided for any special rule concerning costs of appeals under the 2003 Act and, therefore, the costs of such appeals are subject to the Tribunal's wide discretion under rule 55.

48. In *Napp: interest and costs*, cited above, the Tribunal, at paragraph 22, made the following observations on the old rule 26(2):

> "[Rule 26(2)] gives the Tribunal a wide discretion on the question of costs, to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, but nor is there any rule that costs are payable only when a party has behaved unreasonably. All will depend on the particular circumstances of the case."

49. The Tribunal has now emphasised on a number of occasions in appeals under the Competition Act 1998 that the wide discretion conferred by rule 55 to award costs is designed to enable it to deal with cases justly. In the early stages of the development of

cases under the 1998 Act the Tribunal is proceeding on a case-by-case basis, dealing with different, and not always foreseeable, circumstances as they arise. The Tribunal is also of the view that its decisions as to costs should not be allowed to harden into rigid rules: see generally *GISC: costs*, cited above, at [39] and [48]; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6, ("*Freeserve: Costs*") p.11, lines 13 to 24; *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 ("*Aberdeen Journals: costs*") at [19] and *Aquavitae v Director of Water Services (Costs)* [2003] CAT 23 at [17].

50. Bearing these considerations in mind we turn to consider the application of rule 55 of the circumstances of this particular case.

51. We note that this appeal was the first appeal brought under appellate regime established by the 2003 Act, and that formerly the procedure for appealing this type of dispute was a statutory appeal under the Telecommunications Act 1984 to which the costs provisions of the CPR applied. However, CPR Part 44.3(2), which provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order, is not replicated in the Tribunal's Rules and consequently does not apply to the Tribunal. Parliament has not created any presumption that in proceedings before the Tribunal costs should "follow the event". The Tribunal's jurisdiction as to costs is mentioned in the White Book under the heading "Part 48 – Costs Special Cases" at Part 48.12.10 without any further elaboration.

52. In our view, the flexible approach that the Tribunal has taken to the question of costs in appeals under the 1998 Act is also appropriate in relation to appeals under the 2003 Act. As the Tribunal's judgments in appeals under the 1998 Act make clear, there is no presumption under rule 55 that costs should necessarily be borne by the losing party. In this case we take into account the following factors.

53. The present case arose under the 1997 Regulations which implemented in the United Kingdom Directive 97/33/EC, known as the Interconnection Directive. Under Regulation 6(6) of the 1997 Regulations, the Director, OFCOM's predecessor, was required, at the request of either party, to resolve "a dispute concerning interconnection between organisations" within six months of the date of a request to do so. The direction made by the Director to resolve the dispute was required by Regulation 6(6) "to represent a fair

balance between the legitimate interests of both parties". In exercising his duty under Regulation 6(6) the Director was further required to take into account the wide range of considerations set out at Regulation 6(8), including the interests of users, the relative market position of the parties, the public interest, the promotion of competition, and many other matters: see paragraph 35 of the Tribunal's judgment.

54. The "dispute concerning interconnection" which the Director purported to resolve by the contested Direction of 23 June 2003 was prompted by a complaint by Vodafone as to the terms on which partial private circuits (PPC's) should be supplied by BT to Vodafone for use as radio base station (RBS) backhaul circuits connecting Vodafone's RBS to Vodafone's MTX. One main issue in the Direction, and the only issue argued on the appeal, was whether that involved "interconnection" within the meaning of the 1997 Regulations and the Interconnection Directive.

55. The dispute in this case was, therefore, one which the Director resolved pursuant to the then-applicable statutory procedure. Having resolved the matter against BT, in our view OFCOM (which by then had inherited the Director's function) was bound to appear before the Tribunal to defend BT's appeal, against the contested Direction. OFCOM, in our view, would have been in the same position had the Director reached the opposite view and OFCOM had been facing an appeal by Vodafone.

56. Similar situations are likely to arise in the future under Chapter 3 of the 2003 Act where OFCOM is obliged to determine a wide range of disputes about network access referred to it under sections 185 to 191. OFCOM's decisions in that regard are – among many other matters – also appealable to the Tribunal under section 192 of that Act. Indeed, under section 192(7)(b) appeals may be brought against a failure by OFCOM to make a decision when requested to do so.

57. It is unrealistic, in our view, to suggest that OFCOM should have withdrawn the contested Direction following the lodging of BT's appeal. Apart from the fact that that might well have provoked an appeal by Vodafone, the issues in the present case were, in our view, extremely complicated, involving technical issues, and a complex body of European legislation, as the Tribunal's judgment shows. There was, as far as we know, no previous judicial authority on the issue we were asked to decide. OFCOM's

submissions were ably and forcefully presented, and the arguments OFCOM put forward were, in our view, entirely reasonable ones notwithstanding that, in the end, we held that BT's arguments should prevail. However, there is no unreasonable conduct on OFCOM's part or other respect in which OFCOM's position is open to criticism.

58. We also bear in mind that in making the Direction the Director took into account what he believed to be wider benefits to the public interest such as greater network efficiency, facilitating innovation and investment in voice and data services, and ultimately benefits to end-users of mobile telephony services in terms of prices and quality (see e.g. S8 of the Direction). This was a case in which wider public interests, and not just the private interests of BT, were at stake.

59. It is also apparent from the Direction that BT is the major supplier of RBS backhaul circuit links across the industry (paragraph 4.9). Indeed, the Direction is based on the Director's finding that BT has market power in that respect. Although that aspect of the Direction is not necessarily accepted by BT, it was not contested in the present appeal. BT's success in this appeal in defending its market position, on the legitimate but nonetheless narrow legal ground that what was involved was not "interconnection", has brought BT commercial benefits. BT's submissions referred to "many millions of pounds" having been at stake.

60. It is also relevant in our view that in a regulated industry such as this, BT and the other principal parties to these proceedings will be in a constant regulatory dialogue with OFCOM on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which BT and the interveners are, in their own interests, routinely incurring regulatory costs which are not recoverable.

61. Furthermore, none of the parties have submitted that, if the Tribunal does not to make a costs order in their favour, they will have suffered a financial hardship by having brought the matter before the Tribunal.

62. In our view, we have to strike a balance between, on the one hand, the fact that BT has been successful, and on the other hand, the various considerations mentioned above. Rule 55 gives the Tribunal a wide discretion. Our judgment is that where OFCOM has determined a dispute in accordance with the procedure in the 1997 Regulations, and could have been appealed against by either side, it would not be right to order OFCOM to pay BT's costs in circumstances where OFCOM defended the appeal entirely reasonably and wider public interests were involved. BT has benefited commercially from the stance which it legitimately took. We do not consider that BT will suffer material financial hardship if the costs of this case are treated as part of the general regulatory costs which BT incurs by virtue of the fact that it has significant market power.

63. We do not accept that, in those circumstances, our view as to costs would have a "chilling effect" on the bringing of appeals by companies in the position of BT. On the contrary, we have some concern at this early stage of the Tribunal's jurisdiction under the 2003 Act that an order against OFCOM would have a "chilling effect" in the opposite direction by making OFCOM less resolved to defend its decisions, or more ready to compromise, when faced with appellants with market power and large financial resources. Any such pressure on OFCOM would not be in the public interest.

64. Our view would be likely to be the same if the positions were reversed, and OFCOM had succeeded against BT, for the reasons given in the Tribunal's decision in *CPS Save Activity* [2005] CAT 21.

65. We do not accept that there is any close analogy between the present case and cases such as *The Child Poverty Action Group* and *University of Nottingham*, cited above, not least because the CPR applied in those cases. We accept however the broad proposition that a possible sanction in costs remains relevant in public law proceedings, as it is in litigation between private parties. Such a sanction may be appropriate in future cases before the Tribunal. The Tribunal is not saying that it will not exercise the discipline of costs orders, against OFCOM or any other party, if the circumstances warrant. We do not, however, consider that such an order is appropriate in the present case.

66. We add for completeness that we have had drawn to our attention the funding arrangements under which OFCOM operates. OFCOM is apparently funded partly by

grant-in-aid from the Department of Trade and Industry, and partly by a levy on the regulated companies concerned. The present matter apparently comes under the budgetary heading "Networks and Services" in respect of which administrative charges are payable to OFCOM by providers of electronic communications services pursuant to section 38 of the 2003 Act. Those charges are levied as a percentage of relevant turnover, in accordance with a tariff.

67. Companies such as BT, Vodafone and O_2 therefore contribute by way of administrative charges to the expenses incurred by OFCOM in regulating the "Networks and Services" sector. The effect of this is, apparently, that if OFCOM is ordered to pay BT's costs, the net benefit to BT is, theoretically at least, somewhat less than might be supposed because BT is already supporting what is presumably a significant proportion of OFCOM's expenses. On the other hand, the remaining proportion would ultimately fall on the rest of the industry. If, by contrast, there is no order for costs, BT will support its own costs, and indirectly a proportion of OFCOM's costs through the administrative charges it pays.

68. However, we are of the view that we should not treat these specific funding arrangements as relevant to our analysis, not least because the connection between the costs of this case and the funding arrangements described above is too indirect. The tariffs for 2004/05 were apparently already set when this case was determined, in accordance with the OFCOM publication "Licence and Administrative Fees – Statement of Principles for Broadcasting Act Licences and Telecommunications Regulation". What impact the costs of appeals to the Tribunal may have on charges in 2005/06 and future years, and how far that is likely to be material to future contributions from the various parties in question, whose relevant turnover will also presumably vary from year to year, are matters which seem to us too distant from the present case to be taken into account. Accordingly, we have not investigated the details of the funding arrangements any further.

69. For all the above reasons we consider that, as between BT and OFCOM, each side should bear their own costs.

70. As regards the Interveners, in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6 the Tribunal held that in the telecommunications

sector where Interveners are likely to appear regularly before the Tribunal, the costs of intervention will often in justice lie where they fall.

71. BT submits that in the current appeal Vodafone and O_2 fully entered the fray in support of OFCOM and, by taking an active role in the proceedings, both Vodafone and O_2 must have appreciated that they assumed a costs risk. However, both Vodafone and O_2 were only permitted to intervene in the proceedings before the Tribunal on the strict understanding that they did not duplicate or re-run arguments that had already been presented and that their participation was kept to the minimum necessary to protect their legitimate commercial interests. Moreover, Vodafone and O_2's intervention was of assistance to the Tribunal in determining the appeal. We could not wish to run the risk of discouraging such interventions before the Tribunal. In those circumstances, the Tribunal does not consider that the any proportion of BT's costs should be borne by the Interveners. The Interveners will, therefore, support their own costs.

72. For these reasons we make no orders for costs in this case.

Christopher Bellamy Michael Blair Arthur Pryor

Charles Dhanowa
Registrar May 2005