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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1007/2/3/02

New Court
Carey Street
London WC2A 2JT

Wednesday 16 April 2003

Before:

The President
SIR CHRISTOPHER BELLAMY
(Chairman)
PROFESSOR JOHN PICKERING
DR ARTHUR PRYOR CB

B E T W E E N:

FREESERVE.COM PLC

Applicant

v.

DIRECTOR GENERAL OF TELECOMMUNICATIONS Respondent

supported by
BT GROUP PLC

Intervener

Mr James Flynn (instructed by Messrs Baker & McKenzie)
appeared for the applicant.

Mr John Turner (instructed by The Director of Legal
Services
(Competition) Office of Telecommunications) appeared
for the respondent.

Ms Kelyn Bacon (instructed by the Head of Competition and
Public Law, BT Retail) appeared for the Intervener.

Discussion following handed down Judgment

Transcribed from the shorthand notes of
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1 THE CHAIRMAN: This is the first sitting of the new
2 Competition Appeal Tribunal.

3 The Tribunal is today handing down judgment in the
4 case of Freeserve.Com plc v. Director General of
5 Telecommunications supported by BT Group plc. For the
6 reasons given in the judgment which has already been
7 circulated, the Tribunal holds that paragraphs 15 to 17
8 of the Director's Decision of 21 May 2002 rejecting
9 Freeserve's complaint of 26 March 2002 be set aside.
10 Secondly, the remainder of the appeal is dismissed.
11 The Tribunal will hear argument on any consequential
12 orders or applications there may be.

13 Yes, Mr Flynn?

14 MR FLYNN: Mr President, Dr Pryor and Professor Pickering,
15 good morning. If I may, congratulations to the
16 Competition Appeals Tribunal, which we will look
17 forward to hearing for many years.

18 Two matters, I think, Sir, are live. One is
19 consequential orders. The other would be applications
20 for costs. There is certainly no application on this
21 side in relation to matters in which you have not found
22 in our favour.

23 In respect of remitting the matter, we of course
24 note what the Tribunal has said towards the end of the
25 judgment and it is not Freeserve's contention that
26 there is any point in the Director undertaking a
27 sterile or historical exercise. However, Sir, as you
28 will appreciate, firstly, Freeserve itself has not been
29 able to read the judgment until just now, but there is
30 an uneasiness, if you like, at the matter being left
31 simply at large when it is a matter of such importance
32 to Freeserve and to the industry generally. I think Mr
33 Turner has a proposal to make. Perhaps you should hear
34 from him and I might react to it. But Freeserve is
35 obviously concerned that any further consideration that
36 the Director should give to the matter should be in the
37 light of all the relevant factors, including all the
38 movements in the market that the Tribunal has referred

1 to. It may well be that Freeserve will wish to update
2 and refresh those parts of its complaint to assist the
3 Director in his determinations. Perhaps I can leave it
4 there, Sir, and respond to anything that Mr Turner
5 says.

6 THE CHAIRMAN: Yes. Just as a matter of comment, Mr Flynn,
7 we have been wondering to ourselves what exactly is
8 "the matter" for the purposes of Schedule 8, paragraph
9 329.

10 MR FLYNN: Indeed sir. Certainly, as I have said, we do
11 not see a great deal of point in simply going back to
12 the drawing board as it was at the time the complaint
13 was made and objecting to it.

14 THE CHAIRMAN: Well let us see. We will hear from the
15 Director in a moment on that point.

16 MR FLYNN: That is part of what the matter must be.

17 In relation to costs, Sir, if it is convenient
18 that I might address you on that now, there are two
19 applications. One would be Freeserve's application for
20 costs against the Director and I believe that there is
21 also an application by BT for costs against Freeserve.
22 If I might say a few words in respect of Freeserve's
23 application.

24 Sir, in **Bettercare** a differently constituted
25 Tribunal awarded costs to the applicant to the date of
26 the handing down of the admissibility judgment but not
27 thereafter. In this case I would seek to persuade the
28 Tribunal that we should do slightly better than that in
29 that the section 47 request from Freeserve expressly
30 indicated to the Director that Freeserve would wish to
31 place further material before him and that course was
32 closed off, we say, by the complaint closure letter of
33 8 July, thus necessitating Freeserve to bring these
34 proceedings. The argument in **Bettercare** that the costs
35 would have been incurred anyway as a matter of the
36 administrative procedure before the Director, in our
37 submission, fall to be distinguished and this is in any
38 event, unlike **Bettercare**, a case in which the Director

1 did actually go to the merits of the complaint and
2 reached his conclusions on the four heads of complaint
3 rather than saying 'I can't look at it for this legal
4 reason'. On that basis, Sir, we suggest that we should
5 do somewhat better than **Bettercare**. I recognise, of
6 course, that Freeserve has not been wholly successful
7 in its application, but would suggest that perhaps 50
8 per cent of the costs down to judgment would be an
9 appropriate division.

10 THE CHAIRMAN: So you are asking for the costs up to the
11 date of the interim judgment and 50 per cent
12 thereafter.

13 MR FLYNN: Yes.

14 In relation to BT's application, Sir, I do not
15 know if you wish to hear that application so that I can
16 respond to it?

17 THE CHAIRMAN: Yes.

18 MR FLYNN: Thank you, Sir. In that case I have nothing
19 further to add.

20 THE CHAIRMAN: Well while you are on your feet, Mr Flynn --

21 MR FLYNN: I am sorry, I misunderstood, Sir. I was asking
22 whether I should respond when it had been made.

23 THE CHAIRMAN: I think I misunderstood. I think it has
24 been made in writing. You might as well, while you are
25 on your feet.

26 MR FLYNN: It relates very substantially to the disclosure
27 application, in respect of which we say - and the
28 Tribunal may remember this from the Case Management
29 Conference, that there was a misunderstanding of a
30 reference in a letter of 9 December from Baker &
31 McKenzie, Freeserve's solicitors, saying that it was an
32 issue which should be raised at the hearing.

33 THE CHAIRMAN: There were two letters. There was the 9
34 December and then there was a rather clearer letter of
35 11, I think it was, from Freeserve saying that this
36 document is really disclosable, if I remember rightly.

37 MR FLYNN: That is right, Sir. I have got the 9th and the
38 11th here, the 9th saying logistically that it seems

1 unlikely that disclosure and review of the business
2 case could be dealt with adequately in time for the
3 hearing and the 11th saying that they would be happy to
4 discuss it at the case management conference.

5 I have it to hand. I can read it in full, if that
6 would assist the Tribunal.

7 THE CHAIRMAN: Yes.

8 MR FLYNN: It says:

9 "Further to your letter of 10 December [it is a
10 letter to Mr Gordon of Oftel] Freeserve's position is
11 that it will be happy to discuss the disclosure of BT
12 Openworld's business case at the case management
13 conference scheduled to be held next Tuesday, 17
14 December 2002. In relation to certain points raised in
15 your letter, Freeserve notes that BT Openworld's
16 business case is a document which was referred to and
17 relied upon by the Director in the case note summary of
18 21 May 2002. There is no reason why that has not been
19 disclosed to date. Further, Freeserve appreciates the
20 confidential nature of the document and has indicated
21 to the Tribunal that it would put in place or agree to
22 any suitable confidentiality regime to cater for such
23 issues. As previously indicated, Freeserve therefore
24 intends to raise the issue of disclosure with the
25 Tribunal."

26 The "as previously indicated" was, of course, a
27 reference back to the 9 December letter, because it was
28 being said that logistically it was not something that
29 Freeserve would feel able to comment on in time for the
30 hearing. That was Freeserve's position. We recognised
31 in December that that was open to Mr Tate, but
32 nevertheless we think that BT perhaps over-reacted in
33 the sense of preparing for a heavy disclosure
34 application, which it was not Freeserve's intention to
35 make. That was a matter which could have been sorted
36 out before the hearing.

37 In respect of the remainder, we submit that the
38 Tribunal's ordinary practice is that interveners should

1 bear their own costs, unless there is some special
2 reason why not. In this case we have succeeded on the
3 admissibility and we have succeeded on what was plainly
4 the main thrust of the case, to which practically all
5 the hearing was devoted. The emphasis was plainly on
6 the reasoning and in relation to precisely the section
7 of the Decision in which we were held to be unsupported
8 by reason, so on that footing we submit there is no
9 basis for Freeserve to pay any further costs. The
10 worst possible scenario, from our point of view, should
11 be the reasonable costs of preparing for the disclosure
12 application, but I say that really in a very
13 subsidiary alternative.

14 Thank you, Sir.

15 THE CHAIRMAN: Thank you, Mr Flynn.

16 Yes, Mr Turner?

17 MR TURNER: Sir, with your permission I will deal first
18 with the consequentialia and then turn to costs.

19 In relation to consequentialia, the Tribunal has of
20 course set aside paragraphs 15 to 17 of the contested
21 decision, addressing two topics, predatory pricing, as
22 far as the setting aside is concerned, and the issue of
23 the special offer announced in February 2002.

24 It is important that no issue arises on the
25 correctness, or the merits of the Director's Decision
26 and the Tribunal specifically stated that in the
27 Decision at paragraph 224.

28 The Director has carefully considered what should
29 be the consequences of the setting aside. In our
30 submission the matter which may be remitted is the
31 reasoning in the Decision at the relevant parts and
32 although we, for our part, are conscious that the
33 events concerned, and they are water under the bridge,
34 and in particular the special offer, the Director's
35 feeling is that the Tribunal having made those
36 findings, good administration may require us to offer
37 to correct the reasoning and to produce a fuller
38 statement in accordance with the points that were made

1 by the Tribunal in the relevant sections of the
2 judgment.

3 We are mindful that there are, particularly in
4 relation to predatory pricing, some points which may be
5 of more general significance and we feel that it would
6 be useful - or could be useful - for the Director to
7 produce a better reasoned document of the kind that the
8 Tribunal had in mind, taking into account the
9 Tribunal's points and then to publish it in the usual
10 way.

11 THE CHAIRMAN: As a decision?

12 MR TURNER: As a decision. We would propose to do that,
13 bearing in mind the constraints of Easter and other
14 work. I will come on to the possibility of appeal
15 within a period of two months.

16 THE CHAIRMAN: In doing that, what would you propose to do
17 about what has happened in the meantime?

18 MR TURNER: We do not feel that there is a basis for
19 reinvestigating the market on the basis of any aspect
20 of the Tribunal's judgment. The Tribunal was very
21 careful to make that point. Therefore, there is no
22 basis for specifically diverting resources from other
23 tasks in order to address that. We feel that that,
24 therefore, is not called for as a result of anything in
25 the judgment.

26 THE CHAIRMAN: I do not know whether you are able to tell
27 us whether you are dealing with any other issues or
28 complaints relating to this market or this issue, or
29 associated with this issue?

30 MR TURNER: Sir, I am instructed that there are complaints
31 of margin squeeze against BT. However, the most
32 significant point that has been drawn to my attention
33 is that, particularly in relation to the broadband
34 market some of the work that is being done is in
35 relation to the mandatory European market review that
36 needs to be carried out under the Directives. It is in
37 relation to that area that resources are currently
38 quite heavily focused.

1 THE CHAIRMAN: Is that something that has to be completed
2 by July?

3 MR TURNER: Yes, it is. It is expected to be notified to
4 the Commission by July of this year.

5 THE CHAIRMAN: What is that all about? Can you fill us in
6 to help with the background.

7 MR TURNER: Under the relevant directives it is necessary
8 for the Director to consider in particular the
9 broadband market and to consider whether BT has
10 significant market power within it. That is the burden
11 of the review which is being undertaken in that area.
12 Mr Gordon adds that a consultation document setting out
13 provisional views for consultation is due shortly to be
14 published.

15 THE CHAIRMAN: But that will be on significant market
16 power. It won't be on conduct?

17 MR TURNER: It won't be on conduct. Nevertheless one of
18 the main points arising from that is that significant
19 work is currently being done by the Office, including
20 in that, that area of the market. Any complaints that
21 do arise which cover the same ground will need to be
22 dealt with. It is felt that the main purpose of
23 expanding the reasoning and clarifying the points that
24 the Tribunal felt were obscure will be to provide
25 guidance for future cases. That could be valuable.

26 THE CHAIRMAN: In the context of that, do you anticipate
27 Freeserve and BT having opportunities to make
28 representations to the Director? I suppose you cannot
29 stop them if they do so.

30 MR TURNER: We cannot stop them if they do so or any
31 action that they may seek to take in consequence, but
32 we, for our part, intended to produce as full a
33 statement of the reasoning and to explain how the issue
34 of predatory pricing was addressed and to publish that.

35 THE CHAIRMAN: I am just thinking it through, Mr Turner.
36 That is a helpful and positive response by the
37 Director. I appreciate that. But what would the final
38 decision be? It would still be a decision that would

1 be an appealable decision?

2 MR TURNER: Yes, it would be relating to the complaint
3 that was originally made, that is true, but it would be
4 explaining how the Director reached his conclusion more
5 fully on the points at issue.

6 THE CHAIRMAN: Yes.

7 MR TURNER: I would apprehend that the question of appeal
8 could be somewhat difficult in the light of the
9 exhaustive review of the facts that was conducted in
10 the context of this appeal, but that is another matter.

11 THE CHAIRMAN: Strictly speaking, if the Director is going
12 to reconsider the matter afresh, it is not possible at
13 this stage to anticipate the conclusion that he is
14 likely to reach, is it?

15 MR TURNER: Well he does not anticipate considering the
16 matter afresh. What he intends to do is to amplify his
17 reasoning in relation to the points that were obscure
18 and were found to be at fault because of an inadequacy
19 of reasoning.

20 THE CHAIRMAN: So what order, if any, are you inviting the
21 Tribunal to make?

22 MR TURNER: We would propose that the Tribunal makes no
23 order, upon our undertaking to carry out an exercise of
24 the kind that I have described and within the period
25 which I have indicated.

26 THE CHAIRMAN: That is within two months?

27 MR TURNER: Within two months.

28 THE CHAIRMAN: We would need some wording, I think, for
29 this undertaking.

30 MR TURNER: Yes.

31 THE CHAIRMAN: Perhaps we can come back to that in a
32 moment.

33 MR TURNER: If I may turn to the issue of costs. It is
34 necessary to begin by recalling, first, that the
35 Tribunal has a very wide discretion in relation to
36 making any order for costs that it thinks fit but that
37 Rule 26(2) does provide some guidance in that it says
38 that "In determining how much a party is required to

1 pay, the Tribunal may take account of the conduct of
2 all parties in relation to the proceedings". So the
3 issue of conduct is a matter that should feature in the
4 weighing up of the considerations.

5 The result of these proceedings is that the
6 Director was unsuccessful at the initial admissibility
7 stage. However, in our submission, we have been
8 substantially successful in the main hearing and
9 looking at the case in the round, as the Tribunal must
10 now do, including the conduct of all the parties, the
11 right solution which does justice is to leave costs
12 where they fall. I would mention six considerations in
13 that regard.

14 First is the point that until a very late stage
15 indeed the Tribunal will recall that Freeserve's
16 application contained a request that the Tribunal
17 itself should proceed to make original findings and an
18 infringement decision against BT. That was never
19 possible, on the basis of the annexed material.
20 However, it was persisted in.

21 Secondly, Freeserve's application contained from
22 the start and until the eleventh hour the application
23 for the Tribunal to order disclosure of highly
24 sensitive documents in the hands of the Director. That
25 is not a point which affects only BT. The Director's
26 ability to carry out his public functions, if he is at
27 risk of having to disclose documents of that nature, is
28 a very serious matter and considerable effort was
29 expended by the Director as well in preparing to meet
30 that request, which of course was only abandoned at the
31 hearing just before Christmas last year.

32 Mr Flynn has read out the terms of one of the
33 letters in relation to that, and I am afraid I omitted
34 to bring the relevant correspondence.

35 THE CHAIRMAN: We have it in mind.

36 MR TURNER: But I would make two points.

37 The first is that what he read out was a letter
38 responding to the Director's request asking whether

1 that application was going to be persisted in. In
2 context it did not deny or give any indication that
3 that request was not going to be made.

4 Perhaps of greater significance, and the point
5 which certainly impressed us, was that the Tribunal
6 itself, the Registrar, produced a case management
7 agenda for the hearing in relation to which that issue
8 was tabled. Freeserve had the opportunity to say that
9 the point raised in the agenda was not in fact an issue
10 that was going to be live, but did not. We found out
11 at the hearing.

12 Third, the application itself, in my submission,
13 which extended over 44 closely typed pages, was
14 diffuse, if not strictly prolix, and it took a
15 considerable number of low level and manifestly poor
16 points, all of which require to be addressed. I give
17 as one example, where there was a point at paragraph
18 7.296 of the application, that BTs third quarter
19 results had not trailed any significant wholesale price
20 reductions, as the Director had found, whereas in fact
21 inspection of the Director's Decision revealed
22 immediately that there was no such error.

23 Fourth, a major feature of this case was that in
24 the letter of June last year, the section 47 letter
25 from Baker & MacKenzie, which asked the Director to
26 vary and withdraw the Decision, Freeserve promised
27 repeatedly that further material would be provided and
28 further evidence would be forthcoming on numerous
29 points. None was ever submitted - a point made in the
30 judgment at paragraph 63.

31 Fifth, although Mr Flynn says that he has been
32 substantially successful, the point is that Freeserve
33 lost on four of the points against which it appealed in
34 relation to the contested decision and on every one of
35 those points the Tribunal specifically notes in the
36 judgment that Freeserve failed to support its case with
37 any specific or concrete evidence.

38 THE CHAIRMAN: When you say four points, I have got three

1 in my head?

2 MR TURNER: Cross marketing. The references are
3 paragraphs 144 and 148. The advance notice allegations
4 - 165 and 166. The telephone census issue - 255 and
5 also cross-subsidy at paragraphs 206 - 207. The
6 Tribunal will recall that paragraphs 15 and 16
7 straddled cross subsidy and predatory pricing and it
8 was only in relation to predatory pricing that the
9 Tribunal found the Director's reasoning to be at fault.

10 Even on predatory pricing, the Tribunal pointed
11 out that Freeserve could have been expected even there
12 to have put in a better argued complaint. That is at
13 paragraph 222 of the judgment.

14 Finally, and a point which is of subsidiary
15 weight, the Tribunal ought, in my submission,
16 nevertheless to bear in mind that at the earlier stages
17 of the proceeding, for his part the Director chose to
18 engage in voluntary disclosure and made every effort to
19 ensure that all necessary material was placed before
20 the Tribunal. Secondly, again looking at the
21 Director's conduct, for the purpose of deciding the
22 admissibility issue, the Director's approach was not to
23 insist grimly upon any bad points but properly to make
24 crucial concessions that were found by the Tribunal to
25 be significant.

26 To conclude, although in our submission there may
27 even be grounds for saying that in the round there is a
28 case for the Director to claim a proportion of his
29 costs, we consider that there is little point in
30 skirmishing or taking up disproportionate time and that
31 the right order, if the Tribunal stands back and looks
32 at this entire case in the round, is to make no order
33 as to costs.

34 There was one point that Mr Flynn made upon which
35 I should add a further comment. He says that the
36 ability to put forward further evidence was closed off
37 by the actions of the Director in closing the case on 8
38 July.

1 In my submission, that cannot seriously be
2 advanced, given that at no stage, and even in the
3 appeal itself, did Freeserve even attempt to put
4 forward the further evidence and further material that
5 was promised.

6 Sir, those are my submissions in relation to
7 costs.

8 On the question of appeal, as I have touched on
9 it, I should just say that the Director formally
10 reserves his position for the moment in relation to the
11 setting aside of those paragraphs of the contested
12 decision, but makes the offer in relation to the
13 amplification of those paragraphs in any event.

14 Sir, those are my submissions.

15 THE CHAIRMAN: Thank you very much.

16 Ms Bacon?

17 MS BACON: If I could consider, first, the issue of
18 consequential orders, as Mr Flynn and Mr Turner have
19 done?

20 THE CHAIRMAN: Yes, of course.

21 MS BACON: BT would be entirely happy with the proposal of
22 Mr Turner that the Director should issue more detailed
23 reasoning on those points. That is obviously the
24 sensible course. I am mindful also of the market
25 review and if I could point out that in that, the
26 definition of SMP has now been equated to the European
27 concept of dominance, so many of the issues of
28 dominance are going to be covered in that market review
29 anyway. If Freeserve wants to submit an extra
30 complaint, it can do so now.

31 THE CHAIRMAN: I am not completely clear in my head. How
32 do you see the relationship between the Directors work
33 under the directive and his amplification of his
34 reasons in the present Decision? Is there a connection
35 between those two or are they parallel activities?

36 MS BACON: They are parallel activities obviously. Under
37 the new directives, the Framework Directive, the Access
38 Directive and so on, the Director is going to have to

1 consider whether there is dominance in a market and
2 will have to impose relevant obligations where
3 appropriate. Obviously that does not cover Freeserve's
4 specific allegations of abuse, but as I have said,
5 Freeserve is free to make a specific complaint if it
6 wants to do so again and BT submits that that would be
7 the appropriate course in the present circumstances
8 when, as the Tribunal has noted, this market has moved
9 on and is developing rapidly.

10 THE CHAIRMAN: So where we are likely to finish up, one way
11 or the other, is a view from the Director on
12 significant market power and a view from the Director
13 on the principles to be applied in allegations of
14 predatory pricing in the broadband sense?

15 MS BACON: Exactly. In the round, Freeserve's main
16 objectives will have been satisfied.

17 THE CHAIRMAN: So we will have a ruling on the way the
18 Director sees it and then if somebody wants to appeal
19 that, they can appeal it.

20 MS BACON: Yes, exactly.

21 If I could then turn to the issue of costs. Mr
22 Flynn, when he observed that the normal rule is that
23 costs should not be awarded in favour of an intervener,
24 may have had in mind the **GISC** case.

25 THE CHAIRMAN: I do not think we have got any normal rules
26 at all at the moment, Ms Bacon, but go ahead. What do
27 we say in **GISC**?

28 MS BACON: I have reproduced copies. I have sent copies
29 of that to the Bench for your assistance.

30 THE CHAIRMAN: If they happen to be handy we will just
31 remind ourselves what we said in **GISC**.

32 MS BACON: The relevant part of the judgment in that is at
33 page 157 of the report. That is paragraph 75 and
34 following. The Tribunal notes at 77:

35 "The practice in the Court of First Instance under
36 Art 87 of the CFI Rules is that a party who
37 intervenes in support of the losing party is
38 ordered to pay the winning party the additional

1 costs occasioned to the latter by reason of the
2 intervention, and vice-versa."

3 So an intervener, if successful, would be awarded
4 costs. The citation is to the **Kish Glass** case.

5 The next point is I think Mr Flynn's point:
6 "We see force in the argument that it would be in
7 accordance with the objectives of the Act if the
8 rule as to interveners were broadly cost-neutral."
9 Then the Tribunal sets out its reasons for that. "...
10 the prospect of having to pay an interveners costs if
11 unsuccessful ... could deter some appellants".

12 But then the next point, which I would wish to
13 rely on, is:
14 "That said, however, we would not wish to fetter
15 our general discretion under Rule 26(2) to the
16 effect that there may never be circumstances where
17 costs orders will be made in favour of, or
18 against, interveners."

19 Then the following paragraphs make clear that in this
20 case the Tribunal did order **GISC** to pay a proportion of
21 the costs of its intervention. I would rely on that,
22 not particularly in support of the fact that in the
23 present case the interveners should get their costs,
24 but in support of the broad proposition that there is
25 no general rule and that in an appropriate case costs
26 may be awarded both against the interveners and in
27 favour of the interveners.

28 That takes me to the question of why in the
29 present case the interveners should be awarded their
30 costs. The closest I have managed to find of this is a
31 judgment of Mr Justice Munby in the High Court, Queen's
32 Bench Division, in the case of **Smeaton**. This Tribunal
33 may recall that that was a case where the SPUC sought
34 to bring a judicial review in relation to the sales of
35 the morning-after pill. That was defended, both by the
36 Secretary of State obviously, because it was a judicial
37 review application, but also there was an intervention
38 made by Schering, among others. Schering sought to

1 recover its costs of the intervention, because it was
2 ultimately successful. Schering is the manufacturer of
3 the morning-after pill, so its commercial interests
4 were directly affected by the judicial review
5 application.

6 The relevant part of the judgment is at paragraph
7 430. If you will forgive me, I have only reproduced
8 the part of the judgment relating to costs.

9 THE CHAIRMAN: Of course.

10 MS BACON:

11 "Mr Gordon submits that SPUC should not be ordered
12 to pay any part of Schering's costs. I do not
13 agree."

14 Then Mr Justice Munby sets out the **Bolton Metropolitan**
15 **District Council** case and the principles set out by
16 Lord Lloyd in that case.

17 Sir, if I could point you to in particular
18 paragraph 436:

19 "Mr Anderson points in particular to four matters
20 as together justifying the order for costs which
21 he seeks.

22 (i) In the first place he says, Schering's
23 interests were directly affected."

24 That is exactly the case in the present case. BT's
25 interests were directly affected in several ways.

26 First, BT was being asked to --

27 THE CHAIRMAN: Yes. I think we can assume their interests
28 were directly affected.

29 MS BACON: Thank you.

30 "Secondly, [Mr Anderson] submits that Schering
31 required separate representation."

32 That is again the case here. BT is a commercial
33 undertaking and the Director is a regulator. In fact,
34 this is the first time that I have actually appeared on
35 the same side as the Director in many cases acting for
36 BT. I think that goes without saying that that also
37 applies here.

38 Next, Mr Anderson submits that "Schering's

1 evidence was distinctive and useful to the court". I
2 would submit that that is also the case here. This
3 Tribunal asked several questions of BT in the course of
4 the proceedings and referred to BT's answers and the
5 evidence provided by BT on those points. One
6 particular example, although it is not the only one,
7 where BT was able to provide evidence which the
8 Director could not provide was the issue of the advance
9 notification. This Tribunal noted, in its judgment,
10 that BT had assured the Tribunal that its procedures
11 were such that the relevant employees in BT Openworld
12 had not had advance notification. That was one of the
13 issues on which BT was able to supply evidence. It
14 also provided evidence of its own internal procedures
15 and BT's points were not identical to those of the
16 Director. It was making a number of points that the
17 Director was not himself making.

18 That brings me to Mr Anderson's fourth point in
19 **Smeaton** (at (iv)):

20 "Finally he submits that Schering's evidence and
21 submissions were not duplicative."

22 I have just addressed that point. Then Mr Justice
23 Munby goes on to point out (at 437):

24 "These are powerful arguments. But there is, as
25 it seems to me, another and wider point. As I
26 commented in paragraph [70], the 2000 Order was
27 merely a convenient peg upon which SPUC sought to
28 hang a claim which could have been brought at any
29 time ..."

30 Then a few lines down:

31 "The real defendant, surely, was Schering."

32 That really applies in the present case. In this case
33 the real and ultimate defendant was BT. What was in
34 issue was BT's practice and from the start Freeserve
35 were essentially, as Mr Turner has pointed out, seeking
36 a decision on infringement against BT. BT had to
37 participate in these proceedings in order to protect
38 its own interests.

1 In the **Smeaton** case those points led Mr Justice
2 Munby to conclude that in that case Schering was
3 entitled to recover a proportion of its costs and I
4 would submit that exactly the same applies in the
5 present case in relation to BT's intervention.

6 That addresses the point as to whether in
7 principle BT should be entitled to its costs of
8 intervention.

9 The next question is, to what extent should it
10 recover those costs. In my skeleton argument I have
11 identified three areas. The first is the issue of
12 disclosure.

13 Mr Flynn has said that this is all a
14 misunderstanding and BT over-reacted and did not have
15 to put in the submissions that it did.

16 Mr Turner has already made several points in
17 relation to that, which I respectfully adopt. The
18 point was made that on 13 December there was an agenda
19 for the case management conference and that said in
20 item 2, "to consider the applicant's request for
21 disclosure of certain documents by the respondent", so
22 it was clearly a request.

23 On the same day BT sent to the Tribunal a letter
24 in which BT said, "BT vigorously opposes any disclosure
25 of the business case for three main reasons", and then
26 set out over several pages the reasons why it opposed
27 the disclosure of its business case.

28 THE CHAIRMAN: That is the letter of what date?

29 MS BACON: That is the letter of 13 December. That was
30 four days before the hearing of 17 December. If
31 Freeserve at that stage had simply indicated to BT or
32 the Tribunal, 'well in fact Freeserve is not pursuing
33 its request for disclosure', much of the work,
34 including production of this extensive bundle, most of
35 which I take no credit for - it is the work of Mr
36 Barling - a note on disclosure annexing a number of
37 documents setting out the European case law and the
38 seriousness of the consequences --

1 THE CHAIRMAN: Just remind me. Did that bundle ever reach
2 the Tribunal?

3 MS BACON: I believe it did. I have made enquiries. I
4 believe it was sent by Brick Court rather than by BT.
5 Certainly Mr Turner received a copy of it. From
6 recollection this went out on 16 December in the
7 evening. Certainly the note for Mr Barling is dated 17
8 December. From recollection this was written the day
9 before the hearing. Much of the work was done in the
10 period between 13 December - that is the letter from BT
11 - and the date of the hearing. So if at some stage
12 after the 13 December Freeserve had simply said 'we are
13 not pursuing this request', much of the cost of BT
14 would have been avoided in that respect. It is simply
15 not correct for Mr Flynn to say this is all a
16 misunderstanding and BT over-reacted. Up until the
17 17th it was basing its submissions on an assumption
18 that we were going to have to meet a disclosure request
19 of our business case.

20 Then there is the issue of the remainder of the
21 appeal. In paragraph 9 of my skeleton argument I have
22 divided this into the infringement application and the
23 case closure decision itself. I think this can be
24 taken in the round.

25 BT has succeeded in respect of the vast majority
26 of Freeserve's appeal. There has been no infringement
27 decision taken against it and in relation to the
28 procedural issue of whether the case closure decision
29 should be set aside, it succeeded in about three
30 quarters, and Mr Turner would put it slightly higher,
31 but even being generous to Freeserve about three
32 quarters of the appeal in that respect. In the round
33 BT submits that specifically in relation to its
34 intervention generally and its submissions at the
35 hearing on the substantive issue, it should be awarded
36 about 75 per cent of its costs. That is a separate
37 issue to the costs of the disclosure application, which
38 BT submits it should be entitled to in any event.

1 THE CHAIRMAN: Thank you very much, Ms Bacon.
2 Yes, Mr Flynn?
3 MR FLYNN: Sir, the consequentialness of Mr Turner's
4 proposal, I think what is of course of greatest concern
5 to Freeserve is that further elaboration might be made
6 of the reasoning for rejecting a complaint which has
7 already been rejected - and I think Mr Turner has
8 indicated that there would be difficulties with
9 appealing that - and therefore that there would not be
10 a substantive reconsideration, as you asked him
11 expressly, of the underlying merits of the complaint.
12 The worst position for Freeserve would be that the
13 result of this proceeding was that whatever the
14 Director did was unappealable to this Tribunal.
15 THE CHAIRMAN: Let us just explore that, Mr Flynn, just for
16 my own understanding. If the Director elaborates his
17 reasons, he will need to take a position on what the
18 relevant legal principles are presumably as applied to
19 the underlying facts of the case.
20 MR FLYNN: As I understand it, the underlying facts of the
21 case are those which were, as it were, current before
22 him at the time he made the decision that he made.
23 THE CHAIRMAN: Yes.
24 MR FLYNN: What is intended is that fuller explanation
25 should be given for the conclusion to which he has
26 already come.
27 THE CHAIRMAN: Well the underlying facts of the case,
28 insofar as we can determine them from the existing
29 decision, is that there is a period in which BTs retail
30 broadband business is apparently making losses but that
31 it will come into profit at some point in what the
32 Director considers to be a reasonable period. The
33 Director will have to apply to that factual substratum
34 presumably his understanding of what the European law
35 is on predatory pricing and reach a view.
36 If he reaches a view, it would be open presumably
37 to an appellant to challenge at least the legality of
38 the view that he has reached by saying 'that is not in

1 conformity with existing case law' or, alternatively
2 'there is no case law on this point' and he should not
3 have been looking at it in that way. For example, he
4 should look at it in terms of the length of the
5 subscriber contract instead of the length of time over
6 which a reasonable investor would recover his money, or
7 whatever. It is not clear to me that it would not be
8 appealable.

9 MR FLYNN: I think what Mr Turner said to the Tribunal was
10 that there would be a difficult argument on the
11 appealability of the outcome. I can see that there
12 could be a difficult argument if simply he is re-
13 stating or amplifying reasons for a conclusion to which
14 he has already come.

15 Mr Turner also said that some things lay in the
16 past, the special offer, and so forth.

17 Our submission on that is that it is not in the
18 past. The starting date remains the same. The concern
19 from the practical point of view should be that any
20 consideration should take into account the developments
21 to which you have drawn attention in the judgment and
22 any further that might be put forward by Freeserve or
23 indeed anyone else to the Director, as I said earlier,
24 to assist him in coming to a new conclusion. I note
25 you said, Sir, that he cannot as it were shut us out,
26 but we would like in some way to be assured that if
27 further material is put before him to update and
28 further substantiate the Freeserve complaint, that
29 should be taken into account in this evaluation.

30 THE CHAIRMAN: I would have thought, at least
31 provisionally, that if the position is that the
32 Director, in the light of the judgment, is
33 reconsidering the reasoning in paragraphs 15 to 17 of
34 the Tribunal's judgment with a view to reaching a
35 further decision on Freeserve's complaint, I would have
36 thought on ordinary principles that he would be obliged
37 to take into account any further observations from both
38 Freeserve and BT on what conclusions he should draw in

1 the light of the judgment, if nothing else, and any
2 other matters which Freeserve and/or BT considers to be
3 relevant. He, the Director, may well decide they are
4 not relevant or for some reason he should not take them
5 into account, but I would have thought it is difficult
6 to say that he was not obliged to take into account, or
7 to at least receive observations from BT and Freeserve
8 following the judgment as to what the contents of any
9 new decision should be.

10 Would that not be right, Mr Turner?

11 MR FLYNN: If I may say so, Sir, from Freeserve's point of
12 view, that is an extremely helpful indication.

13 THE CHAIRMAN: Well let us see what Mr Turner says.

14 MR TURNER: Our feeling on this is that, in the absence of
15 any further facts or further complaint from any party,
16 including Freeserve, then the issue will be the
17 application of legal principles, as you, Sir, have
18 explained, to the facts that were presented at the time
19 and having explained the way in which he approaches the
20 issue there will be a possibility of that going
21 further, being subject to appeal. However, if a
22 further complaint is made about contemporaneous conduct
23 on the part of BT, obviously in relation to that the
24 Director will need to form a view, assuming that he
25 pursues the complaint, about the application of those
26 legal principles to the new facts.

27 I would mention that if one is contemplating the
28 presentation of a further complaint, then the issue of
29 the timescale within which a new decision can be
30 produced becomes more difficult. The indication of two
31 months was produced on the basis that we would be
32 elaborating in accordance with the terms of the
33 Tribunal's judgment the reasoning in the original
34 contested decision.

35 THE CHAIRMAN: What is slightly troubling me, Mr Turner, is
36 that this discussion is proceeding on the underlying
37 assumption that the Director is already minded to come
38 to the same view and it is only a question of

1 elaborating his reasons, whereas the normal
2 administrative law consequence of setting aside a
3 decision is that the authority reconsiders it and when
4 it reconsiders it, it should not reconsider things
5 having already shut out the possibility that it might
6 reach a different view from the view that it originally
7 reached. That is why Mr Flynn is a bit concerned about
8 what appears to be a somewhat mechanical exercise in
9 simply giving better reasons to support the view that
10 has already been arrived at, without taking into
11 account any further arguments of law at least, which
12 might be put forward, or which have surfaced in the
13 course of the proceedings.

14 MR TURNER: My position proceeds on the premise that the
15 Director has a clear view of the way in which he does
16 approach, or has approached this issue in relation to
17 predatory pricing, and needs to explain it and that he
18 did apply it in relation to the complaint. The
19 Tribunal has not found in the judgment that the
20 Director made an error of law in its approach.

21 THE CHAIRMAN: Well we have not found that, because we have
22 not been able to detect the legal basis upon which he
23 did decide it, so we have not reached that stage. We
24 have neither blessed nor condemned the conclusions. We
25 are simply neutral on the point.

26 MR TURNER: I understand that, but the task at this stage,
27 therefore, must be to explain the principles according
28 to which the Director did act.

29 I would add the qualification that that is not to
30 exclude the possibility, and of course I accept this,
31 that when reviewing the matter and considering the
32 terms of the Tribunal's judgment with care and the
33 applicable case law, the Director may feel that the
34 original decision was wrong. However, it is only fair
35 to say that the Director does have a clear view at the
36 moment as to the principles that should apply and
37 considers that in the light of the Tribunal's judgment
38 the right task is to explain that adequately.

1 THE CHAIRMAN: I think the difference in this case, unlike
2 the situation that arises in some other cases where the
3 Director is asked to provide further reasons in the
4 course of proceedings before the Tribunal, is that this
5 part of the decision has been quashed, so he starts
6 again, at least in legal theory he starts again. I
7 think the Tribunal's view would probably be that if he
8 did start again and he wished to reach a view that is
9 going to be of general public importance in this
10 industry, considering the amount of water that, as it
11 were, has flowed under the bridge since the original
12 decision was taken, the arguments on the appeal and the
13 judgment, it would be only right before he reached that
14 view if he gave an opportunity to the complainant and
15 BT to make any representations to him that they thought
16 fit as to the view they thought he ought to reach.

17 MR TURNER: In relation to the original situation or in
18 relation to the current situation?

19 THE CHAIRMAN: Strictly speaking I think it must be in
20 relation to the original situation.

21 MR TURNER: Yes.

22 THE CHAIRMAN: It may be that part of the observations to
23 be submitted might draw his attention to the fact that,
24 after all, it was not such a useful exercise to confine
25 himself to the original situation and that, either for
26 general reasons or by reason of a further complaint,
27 his right approach to such an issue would be to look at
28 it more widely, or that he ought at least to take into
29 account things that have happened since. For example,
30 what is to happen to the knowledge we now have that it
31 was a six month extension of the offer rather than a
32 three month extension of the offer?

33 MR TURNER: Sir, in relation to that, the Tribunal has
34 made points about the inadequacy of the subsequent e-
35 mail written by the officer Naaz Rashid, although she
36 did say, and it was confirmed in subsequent
37 representations on behalf of the Director, that that
38 had been assessed in the same way as the three month

1 extension had been assessed.

2 THE CHAIRMAN: Yes.

3 MR TURNER: Sir, in conclusion we take on board what you
4 say. We think that it is appropriate to address the
5 situation from scratch, as it were, in relation to the
6 original material. But there is an important caveat,
7 which is that if the matter is to be opened out
8 essentially by way of a further complaint about
9 subsequent matters, it does make it very difficult to
10 set any form of deadline.

11 THE CHAIRMAN: Yes, I see that.

12 MR TURNER: Sir, Mr Gordon has helpfully mentioned to me
13 as well that one approach we might take is to produce
14 in draft what we are minded to publish for Freeserve
15 and BT to comment upon as a starting point.

16 THE CHAIRMAN: That might be a useful way of proceeding.
17 Thank you for that suggestion, Mr Gordon. It would at
18 least give the parties a bit more of a target to aim at
19 rather than be firing rather at random.

20 MR TURNER: Sir, this discussion has somewhat unravelled
21 my proposed form of undertakings. Perhaps if we were
22 to proceed upon that basis subsequent to this hearing,
23 we might sort out the terms of an undertaking.

24 THE CHAIRMAN: Well we, the Tribunal, will need to withdraw
25 in a moment to see what we think. I think we will do
26 that now, unless anyone has got anything more they want
27 to say to us.

28 MR FLYNN: Sir, if I might just say, I was intending to
29 reply to one or two points on costs. It will be very
30 short.

31 THE CHAIRMAN: But on that last point, is something along
32 those lines sound to you sensible?

33 MR FLYNN: Yes, it does sound sensible and plainly that is
34 not something which could be achieved in two months.
35 We entirely recognise that.

36 THE CHAIRMAN: I would have thought, with all respect for
37 the need for things to be done with due expedition, it
38 is more important to get this right than to hurry it

1 unnecessarily.

2 MR FLYNN: Quite. That would be our position, Sir.

3 Something for us to respond to, with an opportunity to
4 put before the Director such facts as we may think
5 relevant. That would seem to us entirely appropriate.

6 In relation to costs, if I could respond briefly
7 to one or two of the points made by my learned friends,
8 in relation to Freeserve's conduct. Mr Turner I think
9 gave you five reasons why we have been bad and one
10 reason why he had been beyond reproach. We do not
11 question that. There is no suggestion from our side
12 that there is any conduct --

13 THE CHAIRMAN: No. The Director has dealt with this case
14 impeccably.

15 MR FLYNN: Impeccably. Irreproachable is the word I have
16 written down.

17 In relation to Freeserve's conduct, if I may make
18 a general response, the procedure before the Tribunal
19 is that one has to put in the application simply
20 everything that one may during the course of the
21 procedure have to seek. There is very limited
22 opportunity for amending it. I think what has
23 commended itself to the Tribunal in various proceedings
24 is a layered approach to deciding the issues and the
25 relief which may be necessary as the case progresses.

26 It is fully accepted that the application
27 contained a request that the Tribunal should itself
28 decide the issue. That was formally not persisted in
29 at the substantive hearing but, Sir, that is a matter
30 which is open to the Tribunal to do and it is open to
31 Freeserve to seek it. I do not think it is a matter of
32 the conduct within the meaning of the rules that it
33 should have done that.

34 In relation to the disclosure point - this is
35 common to both Mr Turner and Ms Bacon's arguments -
36 there was a mutual misunderstanding, is the point that
37 we are trying to impress upon the Tribunal. The
38 application was not abandoned at the case management

1 conference. The application for disclosure was in the
2 application document, that Freeserve's intention, as
3 has been explained to the Tribunal, was to raise that
4 as an agenda point at the hearing. There was not
5 anything, from our point of view, to correct when we
6 saw the Tribunal's agenda. It was simply a matter for
7 discussion.

8 Mr Barling's bundle I believe I received on the
9 morning of the hearing and immediately informed him
10 that there had been a misunderstanding. Certainly by
11 the time we came to the hearing it was known, certainly
12 to Mr Barling and I hope to Mr Turner, that we were not
13 intending to make a heavy disclosure application
14 without having put in any sort of submissions or
15 authorities to the Tribunal. That is the point I
16 remember making to the Tribunal itself.

17 Mr Turner says the application was diffuse if not
18 prolix. I am not sure that I know what the distinction
19 is. It was certainly lengthy but, for the reasons I
20 have explained, really everything has to go in and it
21 is later for the parties to explain to the Tribunal the
22 relative weight to be given to different parts of the
23 case and in which order they are to be taken. I submit
24 that Freeserve has handled that properly in accordance
25 with the developing procedure of the Tribunal which,
26 after all, none of us can yet be completely familiar
27 with.

28 In terms of our relative success, perhaps I can
29 simply say that the approach of my learned friends is
30 to count how many headings did one succeed or fail in.

31 Ours is rather that the Tribunal should attach some
32 weighting to it and it was on the principal argument on
33 which we succeeded.

34 Lastly, if I may, on the remainder of Ms Bacon's
35 application, Sir, it is always going to be the case, as
36 long as we have a regulator whose task is to consider
37 complaints against bodies which may be in a dominant
38 position, that appeals in such cases involve and

1 affect the interests of the body against whom the
2 complaint is made. Of course they are always going to
3 be entitled to intervene, which is their choice, and if
4 they do intervene they may well be expected to assist
5 the Tribunal by providing material that is not
6 available to the Director. But, in my submission, the
7 general rule in this Tribunal and in the administrative
8 courts is that there is a costs neutrality as regards
9 an intervener, except in exceptional cases. In my
10 submission, this is not an exceptional case. It is a
11 normal case and a complainant's appeal before this
12 Tribunal. A declaration may well be sought as to
13 infringement and it is not right to regard BT in this
14 case as the real defendant. The real defendant is the
15 Director and his decision. Sir, in my submission,
16 there is nothing exceptional which should lead to
17 Freeserve having to bear any part of BT's costs.

18 Unless I can assist the Tribunal further?

19 THE CHAIRMAN: No. Thank you. We will rise for a short
20 while.

21 **(Adjourned from 11.35 am to 12.35 pm)**

22 (See separate transcript for judgment on costs)

23
