Neutral citation [2011] CAT 39

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

18 November 2011

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

-and-

EVERYTHING EVERYWHERE LIMITED

Appellants

-and-

OFFICE OF COMMUNICATIONS

Respondent

-and-

TELEFÓNICA O2 UK LIMITED
VODAFONE LIMITED
CABLE & WIRELESS UK
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD

Interveners

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. On various dates in April 2010, the Tribunal heard appeals by British Telecommunications plc ("BT") and Everything Everywhere Limited ("EE") against two decisions by OFCOM contained in written determinations dated 5 February 2010 and 10 August 2010.

2. The Tribunal determined these appeals in a judgment handed down on 1 August 2011 ([2011] CAT 24, "the Judgment"). The Judgment was supplemented by a ruling consequential on the Judgment dated 12 August 2011 ("the Ruling") and an order of the same date ("the Order"). We take these documents as read, and adopt the terms and abbreviations used therein. (The terms and abbreviations used in the Judgment are set out in Annex 1 to the Judgment.)

3. Paragraph 31 of the Ruling extended the time for requesting permission to appeal under rule 58(1) of the Competition Appeal Tribunal Rules (SI 2003 No 1372, "the 2003 Tribunal Rules") until two months from the date of the Judgment. On 30 September 2011, O2 made an application for permission to appeal the Judgment ("the O2 Application"). On the same date, EE, H3G and Vodafone jointly applied for permission to appeal the Judgment. For the sake of brevity, we shall refer to these three parties collectively as "EE" and to their application for permission to appeal as "the EE Application".

4. The Tribunal invited responses to the Applications from the other parties to the proceedings. In a letter dated 13 October 2011, OFCOM stated that "[w]e do not have any substantive comments on those requests". On 14 October 2011, BT submitted written observations on both the O2 Application and the EE Application ("BT's Observations"), suggesting that both Applications should be rejected. EE responded to these observations on 20 October 2011 ("the EE Response"), and O2 responded on 21 October 2011 ("the O2 Response").

5. We have considered the content of all of these documents. No-one has suggested that an oral hearing is necessary, a view with which the Tribunal concurs. This is

our decision regarding the two applications for permission to appeal under rule 59(2) of the 2003 Tribunal Rules.

6. Decisions of the Tribunal made (as was the case here) under section 192(2) of the Communications Act 2003 ("the 2003 Act") can be appealed pursuant to section 196 of the 2003 Act, which provides:

> "(1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
> (2) An appeal under this section –
> (a) lies to the Court of Appeal or to the Court of Session; and
> (b) must relate only to a point of law arising from the decision of the Tribunal.
> (3) An appeal under this section may be brought by –
> (a) a party to the proceedings before the Tribunal; or
> (b) any other person who has a sufficient interest in the matter.
> (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
> (5) In this section references to a decision of the Tribunal include references to a direction given by it under section 195(4)."

7. Thus, an appeal to the Court of Appeal occurs only where either the Tribunal or the Court of Appeal has given permission and must only relate to a point of law arising from the decision of the Tribunal. The Tribunal must be astute to prevent issues that are not points of law being dressed up as points of law in an attempt to obtain permission to appeal: *Hutchison 3G UK Limited v Office of Communications* C1/2008/0203, 20 February 2008. Permission to appeal should be granted sparingly: *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 at paragraph 15; *Albion Water Ltd v Water Services Regulation Authority* [2007] UKCLR 1577. Permission will usually be granted where there is a real prospect of success or there is some other compelling reason why the appeal should be heard: *IBA Health Limited v The Office of Fair Trading* [2003] CAT 28, especially at paragraphs 4 and 5. This, of course, reflects the similar approach in Part 52.3(6) of the Civil Procedure Rules.

8. The O2 and EE Applications articulate a number of reasons why permission to appeal should be given. In most cases it is suggested that there is both a real prospect of success and some other compelling reason why the appeal should be heard. BT, in its observations, contends the precise opposite: it says that for the most part the Judgment does not turn on points of law, and to the extent that it does,

these have no real prospect of success nor is there any other compelling reason why permission to appeal should be granted.

9. The reasons advanced by O2 and EE as to why permission to appeal should be granted are considered below. When considered in the abstract, detached from the Judgment as a whole, the O2 and EE Applications are not the easiest documents to follow. This is, perhaps, unsurprising, for the Judgment is a long one and (as is pointed out in paragraph 15 of the O2 Application) some of the issues considered in the Judgment (mainly the economic points) are complex. The points taken by O2 and EE can only be understood, and need to be seen and considered in the context of the Judgment as a whole. It is, therefore, of considerable importance that the approach taken by the Tribunal in the Judgment is set out, and the points taken by O2 and EE placed in their context. Unfortunately, this renders this Ruling rather longer than we would like it to be: however, we see no other way of properly stating our reasons for this Ruling, as we are obliged to do under Rule 59 of the 2003 Tribunal Rules.

B. THE JUDGMENT

10. The Judgment determines three appeals, two by BT (Cases 1151 and 1169) and one by EE (Case 1168), in respect of two decisions by OFCOM (the 080 Determination and the 0845/0870 Determination) in which OFCOM resolved disputes concerning the circumstances in which BT was entitled to vary the termination charges that it demanded from other communications providers for terminating 080, 0845 and 0870 calls on its network. The variations to BT's termination charges were made by three notices, described as "Network Charge Change Notices" or "NCCNs", NCCN 956, NCCN 985 and NCCN 986.

11. The disputes were referred to, and ultimately resolved by, OFCOM pursuant to its powers under sections 185 to 191 of the 2003 Act. These powers are described in Section J and paragraphs 241, 437(2) and 444 of the Judgment. As these paragraphs note, OFCOM's powers under this Dispute Resolution Process entitle OFCOM "not merely to <u>determine</u> disputes in the traditional sense of adjudication, but to resolve disputes that may not be about legal rights at all by creating new rights, and

imposing them on the parties to the dispute...It seems clear – and it was common ground before us – that OFCOM could, as a matter of law, override the parties' strict legal rights" (paragraphs 185 to 186 of the Judgment).

12. In determining whether BT's NCCNs should stand or fall, OFCOM applied a test as to whether the new termination charges imposed by the NCCNs were "fair and reasonable" (see paragraphs 160 and 433 of the Judgment). This test was endorsed by the Tribunal in the Judgment:

> "434. There can be no objection to a test so framed, provided always that it has the flexibility to cater for unexpected factors and does not unduly fetter OFCOM's discretion. Precisely the points we made earlier in relation to policy preferences (paragraphs 206 to 209 above) apply here. Equally, the Tribunal must be careful not to create an unduly restrictive approach to dispute resolution that also might fetter OFCOM unduly."

13. In short, both OFCOM and the Tribunal applied a "fair and reasonable" test to the NCCNs, which was a test first articulated in the Tribunal's decision in *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12 (at paragraphs 101 and 178 in particular).

14. Equally, both OFCOM and the Tribunal took the same approach in applying the "fair and reasonable" test. This approach is described in paragraph 6(5) of the Judgment:

> "OFCOM's approach – as we describe it in Section H below – involved two stages. The first stage involved the identification and assessment of those factors that were, in OFCOM's view, relevant to the fairness and reasonableness of BT's tariffs. The second stage involved weighing these factors against each other in order to reach a conclusion: this was by no means straightforward because not all of the factors that OFCOM found to be relevant pointed in the same direction. Our review of OFCOM's approach is similarly structured: first we identify and assess (in Section L below) all of the factors that appeared to us, in the light of the submissions that were made to us, to be potentially relevant when considering whether BT should or should not be entitled to impose its tariffs. Thereafter, in Section M below, we consider how such factors as we have found to be relevant should be weighed in order to reach a determination."

15. When considering OFCOM's approach and the decisions it made in the 080 and 0845/0870 Determinations, the Tribunal noted that this was an appeal "on the merits" (section 195(2) of the 2003 Act) and not in accordance with the rules that would apply on a judicial review (Section K of the Judgment). In other words, the

question before the Tribunal was whether OFCOM's determinations were right, and not whether those determinations lay within the range of reasonable responses for OFCOM to take (see paragraphs 191 to 192 of the Judgment).

16. Nevertheless, the Tribunal noted (in paragraphs 193 to 194 of the Judgment) various *dicta* which stressed that "there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause" (quotation from *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12 at paragraph 82, quoted at paragraph 194 of the Judgment).

17. This was the approach taken by the Tribunal, as is particularly evident in Section L(III) of the Judgment, dealing with OFCOM's "policy preference".

18. Neither O2 nor EE takes any point in relation to the Tribunal's overall approach in reviewing, on the merits, OFCOM's assessment of the fairness and reasonableness of the NCCNs.

19. Section L of the Judgment lists, and sets out the Tribunal's findings in relation to, all factors that appeared in the light of the submissions made to the Tribunal by the parties, to be potentially relevant in determining the fairness and reasonableness of the NCCNs. These are listed in paragraph 198 of the Judgment, but it is convenient to set them out here:

> 1. *OFCOM's general statutory obligations under the 2003 Act.* Sections 3 to 7 of the 2003 Act impose on OFCOM a range of duties that it must have regard to when carrying out its functions.

2. *OFCOM's "policy preferences"*. In both the 080 and the 0845/0870 Determinations, OFCOM articulated a policy preference: in short, OFCOM's policy preference was that 080 calls ought to be free to the caller and, if not free, as close to free as possible; and that 0845 and 0870 calls should be charged at or as close as possible to each originating CP's local (in the case of 0845 calls) or national (in the case of 0870 calls) rates.

3. *BT's rights and obligations under the Standard Interconnect Agreement.* The Tribunal found that the NCCNs were all introduced by BT pursuant to paragraph 12 of BT's Standard Interconnect Agreement. Paragraph 12 gives BT the right "from time to time [to] vary the charge for a BT service or facility".

4. *BT's motivation in introducing NCCN 956, NCCN 985 and NCCN 986.* BT's motivation in introducing the NCCNs was explored in the evidence before us.

5. *Regulatory obligations and duties on the parties to the dispute.* This referred to the regulatory framework within which mobile network operators set their retail prices for non-geographic calls and within which BT sets its termination charges for such calls.

6. *Welfare assessment.* "Welfare assessment" refers to an assessment of the economic effects of the introduction of the NCCNs on persons whose interests OFCOM should take into account.

7. *The effect on competition.* This is a factor that OFCOM considered distinctly from its welfare assessment and, in the Judgment, the Tribunal did likewise.

8. *The ability of mobile network operators to recover their efficient costs.*

9. *Practicality.* By this was meant whether the NCCNs were, or would be, reasonably practicable to implement.

10. *The forthcoming review of non-geographic numbers.* OFCOM's Simplifying Non-Geographic Numbers Consultation Document was published on 16 December 2010. OFCOM's considerations on this topic were continuing at the

time of the Judgment and, at the time of the Judgment, it was anticipated that at some point in the reasonably near future there was likely to be a new regime in respect of non-geographic numbers like 080, 0845 and 0870 number ranges.

11. *The nature of the Dispute Resolution Process.* The Dispute Resolution Process is intended to be complete within a period of not more than four months, unless exceptional circumstances exist. Clearly, such a limited time frame must constrain OFCOM in the investigations it can undertake when seeking to resolve disputes.

20. These factors are considered, one-by-one, in Section L. Neither O2 nor EE contends that the Tribunal has failed to take into account a relevant factor. (Indeed, such a contention would be very difficult to make good. The parties were invited by the Tribunal, before closing, to identify what they considered to be all relevant or potentially relevant matters, and did so as part of their closing submissions.)

21. However, O2 and EE do contend that the Tribunal erred in respect of three of these factors. In particular, it is said that:

(1) The third factor (BT's rights and obligations under the Standard Interconnect Agreement) was immaterial and/or wrongly decided by the Tribunal (see, in particular, paragraph 28 of the O2 Application and paragraph 17 of the EE Application).

(2) The seventh factor (the effect of competition) was decided by the Tribunal in a manner that was: *(i)* not open to the Tribunal; *(ii)* internally contradictory, false and circular; and *(iii)* wrong (see, in particular, paragraphs 19, 23 and 25 of the O2 Application).

(3) As regards the eleventh factor (the nature of the Dispute Resolution Process), the Tribunal disregarded the true purpose of the Dispute Resolution Process, and ignored the fact that "Ofcom's task in resolving disputes is not simply to decide disputes on the basis of the parties

respective contractual rights" (see, in particular, paragraphs 12 to 15 of the EE Application).

22. Additionally, O2 and EE contend that the Tribunal's approach in weighing the various factors that it had found to be relevant was flawed, in particular as regards the Tribunal's assessment of, and the weight it gave to, the three factors listed in paragraph 21 above. The bulk of the O2 and EE Applications are devoted to describing these flaws.

23. It is plain from the foregoing that, in the case of these disputes, OFCOM's determinations regarding BT's termination charges for 080, 0845 and 0870 numbers was based upon an analysis of what was "fair and reasonable". In other words, OFCOM's determinations were discretionary decisions or were decisions based upon the exercise of OFCOM's judgment. That is particularly so, given the fact that (as we have described) the Dispute Resolution Process contains a regulatory element, which means that OFCOM is not confined simply to determining parties' rights and obligations. Had OFCOM simply been tasked with determining the parties' respective private law rights and obligations, OFCOM's determinations (and the appeals to this Tribunal) would have been confined to the single issue of whether BT was entitled to vary its charges pursuant to clause 12 of the Standard Interconnect Agreement.

24. As Lord Keith noted in *R v Devon County Council, ex parte G* [1989] 1 AC 573 at 604:

> "[i]t is for the authority, and no one else, to decide whether free transport is really needed for the purpose of promoting the attendance at school of a particular pupil. That must depend on the authority's view of the circumstances of the particular case...The authority's function in this respect is capable of being described as a 'discretion', though it is not, of course, an unfettered discretion but rather in the nature of an exercise of judgment".

OFCOM's decisions, and the Tribunal's review of those decisions, involved substantial elements of judgment.

25. The Tribunal is, of course, entitled to review OFCOM's determinations "on the merits" (see paragraphs 15 to 18 above). In other words, an appeal to the Tribunal is not limited to the scope of a judicial review, nor is it confined to a consideration

only of points of law. On the other hand, appeals from the Tribunal to the Court of Appeal are on points of law only. Accordingly, in the case of each of the points raised by O2 and EE, the first question must be whether these points raise questions of law.

C. WHAT IS A POINT OF LAW?

26. The, at times, difficult distinction between points of law and points of fact was considered in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 5 at paragraphs 25 to 35. It is worth setting out the analysis in full. The emphasis is that of the Tribunal:

> "25. In determining this request for permission to appeal, we have addressed, at least provisionally, what is meant by "a point of law arising from a decision of an appeal tribunal" under section 49(1)(a) of the Act. This point is not addressed in Napp's application or skeleton argument, albeit it is briefly mentioned in Napp's further observations.
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> 26. It is trite to say that a point of law is to be distinguished from a point of fact. As is well known, it may be difficult to say, in any given case, where the border lies between the two. In the present case, the issue is whether Napp has committed an "abuse" within the meaning of the Chapter II prohibition. At one end of the spectrum, the Court of Justice and the Court of First Instance have laid down certain legal principles which apply when determining whether the Chapter II prohibition has been infringed. Whether we had, for example, ignored a relevant decision of the Court of Justice, would, we would have thought, be a point of law. At the other end of the spectrum, there will plainly be points of primary fact. For example, whether in this case Napp's prices to hospitals were or were not below the cost of raw materials is a point of fact. However, between these opposite ends of the spectrum there will, so it seems to us, often be questions arising under the Act which are essentially questions of appreciation or economic assessment of a more or less complex kind, depending on the circumstances, in which the Tribunal will be called upon to assess a range of factors, bringing to bear such expertise as it has, in order to determine such matters as the boundaries of the "relevant market", the existence of "barriers to entry", whether "dominance" is established, whether a response by the dominant undertaking is "proportionate" and so on.
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> 27. In the present application, for example, a substantial part of Napp's argument on the hospital pricing abuse is that its pricing policy constituted "normal competition" (grounds 1 (i), (ii), (iii) and (vi) of the request), this being, apparently, a reference to a dictum by the Court of Justice in Case 85/76 *Hoffman La Roche v Commission* [1979] ECR 461, paragraph 91, which refers to a dominant undertaking committing an abuse "through recourse to methods different from those which condition normal competition" (see paragraph 207 of the Tribunal's judgment). The issues surrounding this argument, from the many different angles it has been presented, are dealt with at paragraphs 231 to

352 of the Tribunal's judgment, Napp's contentions being rejected on every point. Whether, on the facts of this case what Napp did can be defended on the ground that it constituted "normal competition" does not seem to us to be a "point of law" as such, but rather a question of appreciation of the various interrelated facts and considerations discussed in paragraphs 231 to 352 of the judgment.

28. In the well known case of *Edwards v Bairstow* [1956] AC 14, Lord Radcliffe said at p. 36:

"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

29. Following *Edwards v Bairstow* in *Pioneer Shipping Ltd v BTP Tioxide ("the Nema")* [1982] AC 724, Lord Roskill said at pp 752-53:

"My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

30. In *South Yorkshire Transport v Monopolies and Mergers Commission* [1993] 1 All ER 291, the issue was whether South Yorkshire could be "a substantial part of the United Kingdom" for the purposes of section 64(3) of the Fair Trading Act 1973. Giving the judgment of the House of Lords, Lord Mustill dealt with the role of the court where a statutory criterion "is so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case." (p. 298 d). He continued (at p. 298 d-f):

"In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14. The present is such a case. Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment. Indeed I would go further, and say that in my opinion it was right."

31. Applying that test, which is again based on *Edwards v Bairstow*, we would have respectfully thought that an issue such as what is "normal competition" in the particular factual circumstances of this case would be, in Lord Mustill's phrase, "to be an issue broad enough to call for the exercise of judgment rather than an exact quantitative measurement."

If that is correct, the point of law under section 49(1)(a) of the Act would be whether the Tribunal's approach to the issue of "normal competition" was "within the permissible field of judgment".

32. Napp has drawn our attention to decisions of the Court of Appeal on the meaning of a "question of law" in the context of appeals from an employment tribunal to the Employment Appeal Tribunal. Those decisions seem to us to adopt a similar approach. We note that in *O'Kelly v Trusthouse Forte plc* [1984] QB 90, Lord Donaldson MR said, at p. 122H – 123C, again applying *Edwards v Bairstow*:

"Whilst it may be convenient for some purposes to refer to questions of "pure" law as contrasted with "mixed questions of fact and law, the fact is that the appeal tribunal has no jurisdiction to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law...Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant. I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards v Bairstow* [1956] AC 14."

33. Thus a question of law will arise if the Tribunal's decision is perverse, in the sense that it is a conclusion to which no reasonable tribunal could have come: see *Neale v Hereford & Worcester County Council* [1986] ICR 471, at p. 483 per Lord Justice May. Similarly such a question will arise if there is no evidence to support a relevant finding of fact: see *British Telecommunications PLC v Sheridan* [1990] IRLR 27, at paragraph 35.

34. Finally we note that in *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306, the Court of Appeal (Stuart-Smith, Auld and Sedley LJJ) held that an appeal "on any point of law" under section 204(1) of the Housing Act 1996 extended to a consideration of issues which could be raised in proceedings for judicial review, such as procedural error, vires, irrationality or inadequacy of reasons: (see notably Auld LJ at pp 312 H – 313 F).

35. These cases, notably *Bairstow v Edwards* read with *South Yorkshire Transport*, cited above, seem to point to the conclusion that there is a "point of law" under section 49(1)(a) where the issue is whether (i) there is a misdirection on a point of law; (ii) there is no evidence to support a relevant finding of fact; or (iii) the tribunal's appreciation of the facts and issues before it is one that no reasonable tribunal could reach, that is to say the appreciation in question is outside "the permissible field of judgment". In the light of *Nipa Begum*, it may well be that

> the principles to be applied are not significantly different from those applicable in judicial review proceedings. We bear these cases in mind in deciding whether Napp's arguments do involve "a point of law" under section 49(1)(a), and if so whether any such point of law has a real prospect of success."

27. We consider the analysis in *Napp* particularly helpful, not only because of its review of the authorities across a number of areas of law, but also because it was a case considering the sort of economic questions that were before the Tribunal in this case (albeit that this was a communications case, and *Napp* a competition case).

28. We have also considered the decision of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, which considered (amongst other things) appeals from Immigration Appeal Tribunals to the Court of Appeal, which were appeals on points of law. The Court of Appeal considered the distinction between points of law and points of fact (citing a number of the authorities that had been cited in *Napp*). In paragraph 38, Carnwath LJ stated:

> "It is convenient to start from a summary in a recent case in this Court of the principles applicable to an appeal on a point of law from a specialist tribunal, in that case the Lands Tribunal (*Railtrack plc v Guinness Ltd* [2003] RVR 280, [2003] EWCA Civ 188). Having referred to another Lands Tribunal case, in which an appeal had been allowed because the Tribunal had failed to take account of the "whole of the evidence" on a particular point (*Aslam v South Bedfordshire DC* [2001] RVR 65, [2001] EWCA Civ 514), Carnwath LJ (with whom the other members of the Court agreed) said (paragraph 51):
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> > "This case is no more than an illustration of the point that issues of 'law' in this context are not narrowly understood. The Court can correct 'all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings' (*R v IRC ex p Preston* [1985] 1 AC 835, 862 per Lord Templeman; see also De Smith, Woolf and Jowell, Judicial Review 5th Ed para 15-076). Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached 'upon an incorrect basis of fact', due to misunderstanding or ignorance (see *R (Alconbury Ltd) v Secretary of State* [2001] 2 WLR 1389, 2001 UKHL 23, para 53, per Lord Slynn). A failure of reasoning may not in itself establish an error of law, but it may 'indicate that the tribunal had never properly considered the matter…and that the proper thought processes have not been gone through' (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 498. 508)."
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> In the *Guinness* case the issue was whether the Tribunal had misunderstood some of the complicated expert evidence in front of it, resulting in a "double counting" in the valuation. The Court accepted that that was a proper ground of challenge on an appeal limited to questions of law, but held that it was not made out on the facts."

29. Carnwath LJ then went on to consider two more specific matters. First, the relationship between appeals on points of law and judicial review. In this regard, Carnwath LJ noted that whilst a statutory appeal "is normally confined by the terms of the statute to consideration of the decision appealed against, judicial review is not so confined" (paragraph 43), but that otherwise "[i]t would certainly be surprising if the grounds for judicial review were more generous than those for an appeal [on a point of law]" (paragraph 40).

30. The second matter considered by Carnwath LJ was the availability of appeal on a point of law "upon an incorrect basis of fact". On this point, Carnwath LJ held, after a detailed review of the law, at paragraph 66:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

31. Neither of these decisions was referred to in the O2 and EE Applications. Nevertheless, we consider them to be helpful as to the distinction between questions of fact and questions of law, and we bear the above points in mind when considering whether the points raised by O2 and EE constitute questions of law that are appealable pursuant to section 192(2)(b) of the 2003 Act. We consider the following points in the following order:

(1) The third factor (BT's rights and obligations under the Standard Interconnect Agreement) in Section D below.

(2) The seventh factor (the effect of competition) in Section E below.

(3) The eleventh factor (the nature of the Dispute Resolution Process) in Section F below.

(4) The Tribunal's approach in weighing the various factors that it had found to be relevant in Section G below.

32. Finally, we consider in Section H below the contention in the O2 and EE applications that the terms on which the Tribunal remitted the disputes back to OFCOM and the directions made for giving effect to the Judgment should be appealed to the Court of Appeal.

D. THE THIRD FACTOR: PARAGRAPH 12 OF THE STANDARD INTERCONNECT AGREEMENT

33. O2 and EE take a number of points in respect of the Tribunal's construction of the Standard Interconnect Agreement and the extent to which the Tribunal regarded that construction as material to the proper resolution of the disputes in question.

(1) The construction of paragraph 12 of the Standard Interconnect Agreement

34. On the question of construction, O2 contended (in paragraph 28(3) of the O2 Application) that "[a]s a matter of construction the distinction posited in the Judgment between Clauses 12 and 13 is false, or at least significantly overstated". For its part, EE contends (in paragraph 17 of EE Application) that "the CAT was wrong to approach the resolution of the dispute on the basis that BT has a contractual right to adopt the new charges".

35. The Tribunal's analysis of the Standard Interconnect Agreement, and in particular paragraphs 12 and 13 of that Agreement, is contained in paragraphs 47 to 56, 68(3) and 241 to 265 of the Judgment. At the hearing before us – and now – it was accepted by all parties that the variations that BT was introducing to its termination charges were implemented under paragraph 12 of the Standard Interconnect Agreement, and not paragraph 13. However, before the Tribunal, OFCOM and the MNOs all contended that paragraph 12 did not confer any rights of any significance on BT. These contentions are summarised in paragraph 243 of the Judgment, and considered and dealt with in paragraphs 244*ff* of the Judgment.

36. The Tribunal rejected these contentions because there is a clear difference between the wording of paragraph 12 on the one hand, and paragraph 13 on the other. That difference is articulated in paragraph 56 of the Judgment:

> "There are significant differences between paragraphs 12 and 13 of the Standard Interconnect Agreement. These are considered in greater detail below (see paragraphs 68(3) below), but it is important to note at the outset that:
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> (1) Sub-paragraph 12.2 gives BT a right to vary the charges for services or facilities provided by it under the Standard Interconnect Agreement ("…BT may from time to time vary the charge for a BT service or facility…"), subject to the paragraph 26 dispute resolution procedure should the Operator subject to the new charge not be inclined to accept it.
>
> (2) By contrast, paragraph 13 contains no right in either the Operator or BT to impose a variation in Operator charges. Such changes must be agreed and, if not agreed, are determined by OFCOM pursuant to sub-paragraphs 13.7 to 13.9. It is, no doubt, for this reason that disputes arising out of the service of a Charge Change Notice are excluded from the scope of the paragraph 26 dispute resolution procedure: absent actual agreement between BT and the Operator, it is inherent in the paragraph 13 procedure that OFCOM will uphold or not uphold a non-agreed Charge Change Notice."

37. The provisions of paragraphs 12 and 13 are differently worded, and according to the ordinary rules of construction, a court must give effect to the words that the parties have agreed. It is absolutely clear first that the difference in wording between paragraph 12 and paragraph 13 was carefully thought through (witness, for example, the disapplication of the paragraph 26 dispute resolution procedure to paragraph 13, as opposed to its application in the case of paragraph 12). Neither O2 nor EE make any suggestion as to how paragraph 12 of the Standard Interconnect Agreement could be read any differently, and no alternative analysis of the difference between these provisions or their construction is put forward by O2 or EE.

38. Paragraph 17 of EE's Application makes three points. The third point – at paragraph 17.3 – concerns the effect of the paragraph 26 dispute resolution procedure on paragraph 12 of the Standard Interconnect Agreement:

> "Even if paragraph 12 SIA is given a wide meaning, BT's rights under paragraph 12 SIA must be read as being subject to the Applicants' rights under paragraph 26 of the SIA to refer a dispute to Ofcom, with the resolution of such dispute referral being subject to Ofcom's assessment of broader policy considerations pursuant to its duties under the 2003 Act and CRF. Accordingly, paragraph 12 SIA does not require Ofcom, in resolving that dispute, to adopt any presumption in favour of BT. Contrary to the

> Tribunal's judgment, there is no material distinction between paragraphs 12 and 13 SIA in this respect..."

39. There are three propositions in this paragraph. First, that the paragraph 26 dispute resolution procedure applies to paragraph 12; secondly, that paragraph 12 requires OFCOM to adopt a presumption in favour of BT; and thirdly, that there is, in consequence, no significant difference between paragraphs 12 and 13 of the Standard Interconnect Agreement.

40. The first point is uncontroversial, and reflects the holding of the Tribunal (see paragraph 249 of the Judgment). The second point is controversial and does not reflect any holding made by the Tribunal: nowhere in the Judgment does the Tribunal hold that paragraph 12 requires OFCOM to make any presumption in favour of BT. The Tribunal did find that BT's rights under paragraph 12 were a relevant factor for OFCOM to take into account, and in the Judgment, gave weight to that factor. These points are considered further below, but they certainly do not amount to a "presumption" in favour of BT.

41. The third point is a *non sequitur*. It was specifically considered, and rejected, in paragraphs 248 to 249 of the Judgment:

> "248. EE, Vodafone and OFCOM all contended that there was no material difference between paragraph 12 of the Standard Interconnect Agreement and paragraph 13: both provisions, so it was said, were explicitly subject to OFCOM's dispute resolution jurisdiction: paragraph 12 by virtue of the dispute resolution process in paragraph 26; and paragraph 13 because of the provisions contained within that paragraph...
>
> 249. Whilst it is clearly right to say that paragraph 12 of the Standard Interconnect Agreement is subject to paragraph 26 – and would, even absent paragraph 26, be subject to OFCOM's Dispute Resolution Process – there nevertheless remains a crucial point of difference between paragraph 12 and paragraph 13, in that the former confers on BT the right unilaterally to vary the prices for its services, whereas the latter does not. In our view, that represents – contractually speaking – a substantial and significant difference. Although it is true to say – as Mr Herberg submitted – that (unless the parties can agree) OFCOM gets involved whether the provision in question is paragraph 12 or paragraph 13, the fact is that in the latter case it is OFCOM that has the right to determine what the new charges should be, whereas in the former case OFCOM is reviewing (pursuant to the Dispute Resolution Procedure) BT's right to determine what the new charges should be. The fact that BT has a right under paragraph 12 to vary prices, which it does not have under paragraph 13 cannot, in our view, be

> ignored and is, we conclude, a relevant factor that needs to be weighed by OFCOM when seeking to resolve a dispute."

The point is that paragraph 13 obliges OFCOM to determine what the new charge should be, absent agreement, whereas paragraph 12 allows BT to vary its prices unilaterally subject to the paragraph 26 dispute resolution procedure (which enables OFCOM to review and alter BT's decision). That is why the paragraph 26 dispute resolution procedure applies to paragraph 12 and not to paragraph 13. The EE Application simply fails to address this distinction, and the assertion that "there is no material distinction between paragraphs 12 and 13 SIA" is just that: assertion without substance.

42. Paragraphs 17.1 and 17.2 of the EE Application raise new points, which were not before the Tribunal at the hearing. Both points contend for a limitation on BT's abilities to vary its charges under paragraph 12 of the Standard Interconnect Agreement and contend for a limitation on BT's contractual rights. Essentially, it is said that BT has no right, by virtue of paragraph 12 of the Standard Interconnect Agreement or otherwise, to introduce new termination charges which (a) are not negotiated in good faith with the relevant counterparty, and (b) are not consistent with OFCOM's statutory objectives.

43. In paragraphs 250 to 251 of the Judgment, the Tribunal considered the limits that might exist to BT's rights under paragraph 12 of the Standard Interconnect Agreement (emphasis supplied):

> "250. *Ludgate Insurance Company Ltd v Citibank NA* [1998] LLR (I&R) 221 concerned a provision in the London Market Letter of Credit Scheme (a scheme which facilitated reinsurers in the London market and later, European reinsurers, to conduct business in the United States) giving a bank a broad power or discretion to retain collateral in support of letter of credit issued by it pursuant to this scheme. The provision in question was very different from paragraph 12 in the present case, and there is no parallel to be drawn in terms of construction. However, Brooke LJ had this to say in respect of broad contractual discretions in paragraph 31:
>
> > "It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. We were referred to *Weinberger v Inglis* [1919] AC 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *Docker v Hyams* [1969] 1 Lloyd's Rep 487; and Abu Dhabi National Tanker Company v Product Star Shipping Company Limited [1993] 1 Lloyd's Rep 397 ("The

> Product Star"). These cases show that provided that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be characterised as perverse, the courts will not intervene."
>
> 251. As this passage notes, even a widely framed contractual discretion is not unlimited. By way of example, no doubt an NCCN issued by BT pursuant to paragraph 12 in circumstances where the NCCN infringed either Articles 101 or 102 of the Treaty on the Functioning of the European Union or the Chapter I or Chapter II prohibitions under the Competition Act 1998 would be illegal and ineffective. No doubt there are other limits to BT's powers under paragraph 12: however, since no submissions were made to us that BT's NCCNs exceeded BT's discretion in this way, it is not necessary, for the purposes of this Judgment, to explore the precise limits of the right in BT, and we do not do so."

44. BT's motivation in imposing the NCCNs was the subject of evidence before the Tribunal (see paragraphs 266 to 275 of the Judgment), but the question of whether BT negotiated with the MNOs "in good faith" was never aired before the Tribunal. It is entirely a question of fact whether or not BT did negotiate in good faith; clearly, had a factual basis for an absence of good faith been established, then the legal implications of this would have been considered. But the factual evidence must come first, and the question of whether there is a "good faith" limitation on BT's paragraph 12 powers does not arise in these proceedings and is of academic interest only. It is not a point for appeal to the Court of Appeal. We would observe, in passing, that the legal issue – as opposed to the factual issue – is actually rather straightforward: Brooke LJ himself noted in *Ludgate Insurance* that even a wide discretion would be subject to a good faith limitation.

45. The same is true of the question of whether BT's paragraph 12 rights are subject to a limitation based upon OFCOM's statutory objectives. In the context of the construction of paragraph 12, this point was never raised. Obviously, OFCOM's statutory objectives are a matter of law – in that they are set out in the 2003 Act. But precisely what those objectives require, in any given case, is acutely fact dependent. Again, had EE wished to contend for a specific (presumably, implied) limitation on BT's contractual right under paragraph 12 to introduce the NCCNs, it should have elicited that evidence before the Tribunal.

46. Both OFCOM and the Tribunal considered OFCOM's general statutory obligations under the 2003 Act as a distinct factor relevant to the "fair and reasonable" test: see paragraph 198(1) and Section L(II) of the Judgment. It was not contended – either before OFCOM or before the Tribunal – that the NCCNs were in breach of specific duties under the 2003 Act. Had that been the Tribunal's conclusion, then it would have been a relevant factor to weigh in the balancing exercise; but the point could also have been argued as an implied limitation on BT's contractual rights. Either way, however, the point did not arise on the facts.

47. We conclude again that this is not a point for the Court of Appeal because its relevance turns on questions of fact which (at least as far as paragraph 12 of the Standard Interconnect Agreement was concerned) were never aired before the Tribunal.

48. We accept that the construction of paragraph 12 of the Standard Interconnect Agreement is a question of law. As such, the Tribunal has the power to grant permission to appeal to the Court of Appeal. However, we consider the meaning of paragraph 12 to be clear-cut. Moreover, neither O2 nor EE have advanced any alternative construction. Accordingly, we do not consider there to be a real prospect of success on this point.

49. EE makes the point that the Standard Interconnection Agreement governs BT's provision of all its services, not merely termination charges, and that as regards some of these services, BT may very well have significant market power (see paragraph 21 of the EE Application). This point is clearly right: see paragraph 263 of the Judgment.

50. As we noted above, and as we consider further below, BT's rights under paragraph 12 of the Standard Interconnect Agreement are merely one factor to be taken into account by OFCOM in the context of dispute resolution. The significance of that factor will vary from case to case. There can be no doubt that, were BT to abuse its rights under paragraph 12 so as to increase, without justification, its rates for a service where BT did have significant market power, so as (in effect) to exploit a monopoly position, that would be a most material factor for OFCOM to take into

account. However, that is not this case: here, the Tribunal made no finding of significant market power (see paragraph 150 of the Judgment). We do not consider the pure question of construction to be a matter that is so important that it amounts to a compelling reason for the Court of Appeal to consider it.

(2) Paragraph 12 of the Standard Interconnect Agreement as a material factor

51. In "Ground 2" of the O2 Application, it is contended that the Tribunal "erred in law in finding that the existence of a BT contractual right to impose the NCCNs under clause 12 of the [Standard Interconnect Agreement] was a material (or even potentially decisive) factor in favour of upholding the NCCNs".

52. EE did not go so far as to contend that BT's contractual rights were wholly immaterial to the question of whether the NCCNs were "fair and reasonable", although EE did contend that the Tribunal placed too much weight on this factor (see, for example, paragraph 19 of the EE Application).

53. Here, we consider only whether paragraph 12 was "a" relevant factor for OFCOM and for the Tribunal to take into account. We do not consider here the question of what weight should have been attached to it (assuming it to be "a" relevant factor): that question is considered in Section G below.

54. We consider the suggestion by O2 that BT's rights and obligations under the Standard Interconnect Agreement are immaterial (in the sense of wholly irrelevant) to be unarguable. At the hearing before us, OFCOM and the MNOs sought to persuade us that paragraph 12 was of no contractual significance: as we have described, those arguments failed. At the hearing, no-one sought to contend that if paragraph 12 of the Standard Interconnect Agreement gave BT the power to vary its charges, that this was a matter to be left out of account: see paragraph 241 of the Judgment. Indeed, OFCOM accepted in terms that contractual rights between the parties to a dispute before OFCOM were a potentially relevant factor to be taken into account: see paragraph 252 of the Judgment. The proposition that OFCOM and

this Tribunal should ignore as immaterial the private law rights and obligations subsisting between the parties to a dispute only needs to be stated to be rejected.

55. We do not consider the question of the materiality of paragraph 12 of the Standard Interconnect Agreement to be a point of law at all. The factor that a regulator like OFCOM or a tribunal like the Competition Appeal Tribunal takes into account when determining whether a charge is "fair and reasonable" is pre-eminently a question of judgment and can amount to a point of law only when (to adopt the words used in paragraph 35 of *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 5) "the tribunal's appreciation of the facts and issues before it is one that no reasonable tribunal could reach, that is to say, the appreciation in question is outside the permissible field of judgment".

56. In short, we decline to give permission to appeal on this point also: we do not consider the point to be a point of law; in any event, we consider the point to be unarguable; and we can see no compelling other reason why permission to appeal should be granted.

E. THE SEVENTH FACTOR: EFFECT ON COMPETITION

57. We turn to the seventh factor – the effect on competition. No-one disputes that effect on competition is a factor relevant to the assessment of whether or not charges are "fair and reasonable". However, it is suggested by O2 that this factor was decided by the Tribunal in a manner that was: *(i)* not open to the Tribunal; *(ii)* internally contradictory, false and circular; and *(iii)* wrong. O2's point is articulated in "Ground 2" of the O2 Application. This provides:

> "18. At §443 the Judgment states that subjecting the BT NCCNs to a stringent test risked distorting competition from BT (and other [terminating CPs]) in an area that was not subject to *ex ante* price controls and that this potential risk of "*distortion of competition*" was a "*powerful indicator"* in favour of allowing the NCCNs to stand.
>
> 19. [O2] submits that it was not open to the Tribunal to make such a finding in circumstances where it had found that the consumer welfare effects of the NCCN were "*inconclusive*" (§379), and that the conclusion reached in respect of the "*distortion of competition*" is inconsistent with the Tribunal's conclusions on the welfare assessment.

> 20. ...the Judgment considered all relevant consumer welfare issues (subject to the available evidence) and decided that the net consumer welfare position was inconclusive. Plainly therefore it was perfectly *possible* that the net position would be bad or good for consumers.
>
> 21. Where the Judgment errs is in then seeking to interpose or overlay a "*distortion of competition*" principle on the (inconclusive) consumer welfare assessment. In so far as OFCOM considered a "*distortion of competition*" issue it was an entirely different one to that identified in the Judgment...
>
> 22. ...the Judgment then developed an entirely new and quite separate "*distortion of competition*". As noted the Judgment finds that not allowing the NCCNs risked preventing innovation and so would distort competition. [O2] can find no reference to such a ground of appeal in BT's Notice of Appeal. Moreover the Judgment itself seriously questions whether a distortion of competition point has an *existence* independent of the consumer welfare assessment of the NCCNs. Thus the Judgment notes that "*the interrelationship between Principle 2(i) (benefits to consumers) and Principle 2(ii) (avoiding material distortion of competition) is a difficult one*" (§440(1)) and that there was "*a very close relationship...between welfare assessment and an assessment of competitive effects*" (§198(7)).
>
> 23. However, [O2] submits that the distinction is non-existent and that, in circumstances where the consumer welfare effects of the NCCNs were found to be "*inconclusive*", it was fundamentally inconsistent, and wrong, for the Judgment to find that a risk of a "*distortion of competition*" was, separately, a "*powerful indicator*" in favour of the NCCNs being allowed to stand. The Judgment is internally contradictory and makes a false and circular distinction in this regard."

58. It is plain that O2 is contending both that the Tribunal took into account an irrelevant (or even non-existent) factor and that (even if that factor existed) the Tribunal placed too much weight on it. EE, by contrast, appears to take only the latter point (see, e.g. paragraphs 20*ff* of the EE Application).

59. This Section deals only with the question of whether the Tribunal decision to take this factor into account as "a" relevant factor should be appealed to the Court of Appeal: the separate question of weight, and whether that is a matter for the Court of Appeal, is considered in Section G below.

60. The Tribunal's reasoning on this point is contained in paragraphs 391 to 397 of the Judgment under the heading "The importance of competition". It is entirely right to say this was a factor not considered to be material by OFCOM (see the conclusion at paragraph 418(3) of the Judgment). It arose out of the Tribunal's consideration of OFCOM's "welfare assessment" (the sixth factor), and is directly linked to it.

"Welfare assessment", as we have noted, refers to an assessment of the economic effects of the introduction of the NCCNs on persons whose interests OFCOM should take into account (paragraph 198(6) of the Judgment).

61. In this case, the welfare assessment involved a detailed economic analysis which is described and considered in Section L(VII) of the Judgment. Neither O2 nor EE challenges this part of the Judgment. Ultimately, the Tribunal agreed with OFCOM's conclusion that "[w]hilst it is possible to conclude that prices for 080, 0845 and 0870 calls will, on balance, fall, it cannot be said how far they will fall, nor what volume of calls there will be at any given price" (paragraph 379). For this reason, at the time of the Judgment, the welfare analysis was held to be "inconclusive" (paragraph 379 of the Judgment).

62. The welfare assessment was, ultimately, regarded as inconclusive because of the paucity of the economic data before the Tribunal. Despite the assistance of no less than seven expert economists (paragraph 29 of the Judgment), the Tribunal, like OFCOM, found that "the welfare analysis is inconclusive, due to a lack of empirical evidence" (paragraph 379 of the Judgment).

63. However, the Tribunal went further than OFCOM in the conclusions it drew from the economic evidence that comprised the welfare assessment. In the course of considering the welfare assessment, the Tribunal identified a number of significant limitations in the analysis:

(1) The formal modelling done by Professor Dobbs (BT's expert) assumed that BT was the <u>only</u> terminator of 080, 0845 and 0870 calls (i.e. was a 100% monopoly supplier), when in fact (as was common ground) BT's share of this market was of the order of only 25%: see paragraph 381 of the Judgment and the analysis of the evidence before the Tribunal at paragraphs 147-150. In other words, the modelling carried out by Professor Dobbs was based upon a simplifying (but false) assumption that the 080, 0845 and 0870 call termination market was effectively bilateral (i.e. subsisting between BT on the one hand and anyone originating 080, 0845 and 0870 calls on the other) when in fact it was multilateral (i.e. subsisting between multiple call

terminators, including BT, and anyone originating 080, 0845 and 0870 calls on the other).

(2) This, in hindsight, obvious point was overlooked by all the parties and their experts (including Professor Dobbs) and was only pointed out by Professor Stoneman on Day 4 of the proceedings (see paragraph 381 of the Judgment).

(3) Once articulated, the point was, however, an obvious one, and no-one sought to gainsay it. BT, it is fair to say, contended that whilst the fact that of the order of 75% of 080, 0845, and 0870 calls would not be terminated by BT might have a "diluting" effect on the NCCNs (see paragraph 382 of the Judgment), the effect of the NCCNs would nevertheless be downwards and the model was therefore (subject to this diluting effect) still sound.

(3) Be that as it may (and as we have noted, we found the welfare assessment inconclusive even on a bilateral basis), the reality of the situation is that the majority of 080, 0845 and 0870 calls (of the order of 75%) would be terminated by communications providers other than BT, each of whom would be entitled to price according to its own interests. (As we have found elsewhere in the Judgment, and as is not contested, termination charges are not regulated and communications providers are free to price as they wish: see paragraph 107 of the Judgment).

(4) It inevitably follows that – absent intervention – there will be an interaction between the prices for terminating calls set by BT and the prices set by competing terminating communications providers. As we noted in paragraph 383(1) of the Judgment, "[t]hese communications providers will not act in a vacuum, but will take account of each other's conduct in order to improve their respective positions. In other words, each terminating communications provider will seek to maximise its profits by offering what it perceives to be the most advantageous (for it) form of pricing for the termination of 080, 0845 and 0870 calls".

(5) The problem with a rigorous test for the justification of the new termination charges introduced by BT is that exactly the same test would apply to any other communications provider also seeking to introduce new charges. That was the evidence of Mr Myers, OFCOM's Director of Competition Economics (see paragraph 391 of the Judgment) and (as we noted) that evidence is entirely unsurprising. Given that the "fairness and reasonableness" test applies across the board – to all terminating CPs irrespective of market share – it would be irrational for OFCOM to apply one test to BT's prices and a different test to the prices of a different terminating CP.

(6) The consequences of the point at paragraph 63(5) are important, and are spelt out in paragraphs 392 to 397 of the Judgment:

> "392. ...The ability to price differently, and to introduce innovative pricing structures, is a key aspect of competition between suppliers. If too restrictive a test is imposed on the introduction of innovative pricing structures, then competition will not be enhanced, but restricted. We noted in paragraphs 380 to 384 above that determining the effect of BT's NCCNs was much more complicated than simply looking at the bilateral economic relationship between BT and the mobile network operators whose calls BT terminated: the role of BT's competitors – the other terminating CPs – needs to be borne in mind. If the ability of terminating CPs to vary their pricing structures is constrained, then the dynamic of competition between terminating CPs is inhibited.
>
> 393. Professor Dobbs' evidence on this point was instructive (Transcript Day 8, pages 95-96):
>
> > "…One of the things with innovations in pricing is that in the first instance when they're first introduced, they're not necessarily going to hit the nail on the head. I think to some degree one could say this may well be the case here. What one can say is that in the market place, decision-makers tend to improve their decisions, particularly when you have got something as new as this. This ladder pricing is quite innovative in my opinion, it's the first time I've ever seen it…"
>
> 394. One of the reasons decision-makers improve their decisions is because of the reactions of others in the market.
>
> 395. It is clear that, in promulgating a stringent test that must be satisfied before BT can introduce its NCCNs, which will be applied to other terminating CPs should they seek to introduce similar measures, OFCOM is significantly restricting communication providers' commercial freedom to price which – absent the Dispute Resolution Process – is not constrained by regulation. It might be said that a test that simply seeks to assess whether a price change provides benefits to

> consumers (Principle 2(i)) and does not materially distort competition (Principle 2(ii)) is not especially stringent. But that is to overlook the lack of empirical evidence as to what BT's pricing would do in this market, and the sheer difficulty (in the absence of such evidence) of demonstrating through modelling that the NCCNs would be beneficial to consumers.
>
> 396. The crucial question is what is a regulator to do in the context of such uncertainty? Essentially, the regulator has two choices:
>
> (1) To prevent change unless it can be demonstrated that the change is beneficial – in which case it may well be said that the dead hand of regulation is constraining behaviour which may actually be beneficial to consumers. We stress that our conclusion regarding Principle 2(i) was that the welfare assessment was inconclusive, not that consumers would be harmed.
>
> (2) Alternatively, to allow change despite the uncertainty, even though there is a risk that the change may result in a disbenefit to consumers, recognising that an undue fetter on commercial freedom is itself a disbenefit to consumers.
>
> 397. In the Determinations, OFCOM clearly opted for the first choice. But it did so without articulating or considering the alternative. We consider that this is a matter that OFCOM should have considered during the course of its Determinations."

64. The short answer to O2's point is that the Tribunal's findings at paragraphs 391 to 397 of the Judgment arose directly out of the Tribunal's findings regarding the limitations of the welfare assessment, and specifically the finding in paragraphs 382 to 384 that the welfare assessment assumed a monopoly terminating CP for 080, 0845 and 0870 numbers (i.e. BT), whereas the market in fact contained multiple terminating CPs for these number ranges.

65. OFCOM had required BT to prove that the NCCNs were economically beneficial. BT failed to do so – the welfare assessment was, as we have said, inconclusive. BT went to considerable lengths to seek to demonstrate the economic advantages of the NCCNs, but was unable to do so simply because there was no empirical data. For this reason, OFCOM declined to find that the NCCNs were fair and reasonable.

66. What OFCOM overlooked was that precisely the same test would apply to other communications providers (such as C&W), who would equally be inhibited in varying their prices. This, we stress, was no purely academic concern: other terminating CPs had, at the time of the hearing, already submitted proposed changes

to their termination charges. These changes were held in abeyance pending the Tribunal's judgment in these appeals. The effect of OFCOM's determinations was to place a significant restriction on the ability of all terminating CPs in this market from varying their prices, given that OFCOM would expect its approach to BT's variations, all other things being equal, to be "read across" to other terminating CPs.

67. We consider the effects on competition between CPs terminating 080, 0845 and 0870 numbers to be a question of fact, not law. As in the case of paragraph 12 of the Standard Interconnect Agreement, the factors that a regulator like OFCOM or a tribunal like the Competition Appeal Tribunal takes into account when determining whether a charge is "fair and reasonable" is pre-eminently a question of judgment and can amount to a point of law only when (as *per* paragraph 35 of *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 5) the tribunal's appreciation of the facts and issues before it its one that no reasonable tribunal could reach. Here, the Tribunal's findings in relation to competition arise directly out of its factual findings regarding the welfare assessment. Accordingly, this is a question that cannot be appealed to the Court of Appeal, because it is not a question of law.

68. In any event, we do not consider the point to have any real prospect of success and we can see no other compelling reason why permission to appeal should be granted.

F. THE ELEVENTH FACTOR: THE NATURE OF THE DISPUTE RESOLUTION PROCESS

69. At various points in the EE Application, it is suggested (the point is never put with absolute clarity) that the Tribunal misunderstood or misapplied the Dispute Resolution Process. Thus, in paragraph 14 of the EE application it is said:

> "The provisions set out below show that Ofcom's task is to impose a solution that meets the public policy objectives of the [Common Regulatory Framework. There is no countervailing factor of private law rights or "*commercial freedom to price*". The significance of those provisions for the approach which Ofcom should adopt is not addressed in the CAT's judgment." (Emphasis added.)

70. A little less extremely, in paragraph 15 of the EE Application, it is stated that "Ofcom's task in resolving disputes is not simply to decide disputes on the basis of

the parties' respective contractual rights", the implication being that this was the approach of the Tribunal (see the opening words of paragraph 16, "Further, the CAT was wrong to rely...").

71. The Tribunal described the nature of the Dispute Resolution Process in paragraphs 179 to 188, 241, 437(2) and 444 of the Judgment, which all make clear that the Dispute Resolution Process is *(i)* capable of overriding private law rights such as those of BT under the Standard Interconnect Agreement, and *(ii)* a third regulatory restraint operating in parallel with OFCOM's powers to impose SMP conditions and not legally subordinate to this aspect of OFCOM's regulatory powers.

72. If EE is contending that it is impermissible to have regard at all to the private law rights subsisting between the disputing parties before OFCOM in a Dispute Resolution Process, then (for the reasons set out in paragraph 54 above) we reject this proposition as simply unarguable (and, moreover, something that was never argued before us at the substantive hearing).

73. It may be that EE's real point was that the Tribunal failed, in its review of OFCOM's exercise of its dispute resolution powers, to place proper weight on the various factors before it or placed undue weight on BT's rights under the Standard Interconnect Agreement. This point is the one to which we now turn – namely the evaluation process, by which the Tribunal considered OFCOM's conclusion as to the fairness and reasonableness of the termination charges imposed by the NCCNs, and whether this is a matter in respect of which permission to appeal should be given.

G. THE WEIGHING PROCESS

(1) Introduction

74. In its conclusions to Section L of the Judgment (paragraphs 416-419), the Tribunal set out its views regarding the eleven factors that it had considered in that Section. Some factors the Tribunal concluded were irrelevant; some factors (the most numerous) the Tribunal considered to be relevant and to have been properly taken

into account by OFCOM; three factors the Tribunal considered to be relevant, but not to have been taken into account by OFCOM. Two of these three factors O2 and EE seek to appeal (namely, BT's rights under the Standard Interconnect Agreement and the effect on competition), and for the reasons we have given, we do not give permission.

75. However, the weight that the Tribunal gave to the factors that it considered to be relevant is a different matter, and needs to be considered separately. As we have noted above, the fundamental test applied by both OFCOM and the Tribunal was whether the variations to BT's termination charges imposed by the NCCNs were "fair and reasonable".

76. In order to assess this issue of fairness and reasonableness, OFCOM applied (in the case of these determinations) three cumulative principles, which are described in paragraphs 163 to 167 of the Judgment, and which the Tribunal accepted as "a good analytical framework" (paragraph 439 of the Judgment). Principle 1 and Principle 3 are relatively straightforward and were found to have been satisfied (see paragraph 439 of the Judgment). There is no appeal in respect of these matters, which are in any event purely questions of fact.

77. That left Principle 2, which itself fell into two limbs. It requires consideration of whether the variation in charges:

(1) Provides benefits to consumers; and

(2) Avoids a material distortion of competition either amongst originating CPs or amongst terminating CPs.

78. The Tribunal's approach is described in paragraphs 439 to 450 of the Judgment. It is fair to say that the Tribunal's approach differed from that of OFCOM in two important regards. First, as regards the Tribunal's assessment of the effect on competition; and secondly, as regards the Tribunal's views regarding paragraph 12 of the Standard Interconnect Agreement. As regards the first of these factors, OFCOM had concluded that the introduction of the NCCNs would not distort

competition. So far as that went, the Tribunal agreed. However, as has been described, the Tribunal concluded that the imposition of a stringent test on all terminating CPs, requiring them to justify their charges, was distortive of competition, particularly: *(i)* where the ability to introduce price changes was otherwise unconstrained; and *(ii)* where the welfare assessment regarding the price changes sought to be introduced by BT was inconclusive because of an absence of empirical data, and would be similarly inconclusive for any other terminating CP.

79. Accordingly, the Tribunal found – weighing these factors – that the danger of distortion on competition was a powerful factor in favour of allowing BT to introduce the new prices (paragraph 443 of the Judgment), buttressed by the fact that BT had the contractual right to do so (paragraph 444 of the Judgment). In these circumstances, the question was whether BT's inability to prove a positive welfare impact should override these factors, and prevent the introduction of the new charges. The Tribunal considered that an inconclusive welfare assessment was not sufficient to override these other factors, and accordingly allowed the NCCNs to stand as fair and reasonable.

80. This question – and the Tribunal's findings in relation to it – seems to us to be *par excellence* a question of fact, where the Tribunal is weighing divergent factors, and making a judgment upon them. *Prima facie*, therefore, it seems to us that this is a question of fact and not of law.

81. Having made these preliminary comments, we turn to the points made in the O2 and EE Applications. Essentially, it was contended that:

(1) The Tribunal had placed too much weight on BT's contractual rights and on the distortion to competition and that, as a result, had imposed too burdensome a test on the MNOs seeking to challenge the NCCNs by requiring the welfare analysis to "demonstrate, and demonstrate clearly, that the interests of consumers will be disadvantaged" (quotation from paragraph 448 of the Judgment). Indeed, EE went so far as to suggest that this test was "asymmetric" and so unduly benefited BT.

(2) In previous cases, before differently constituted Tribunals, an altogether different approach had pertained, at least as regards those cases where the dispute had centred on price.

We consider these points in turn below.

(2) Too much weight and an asymmetric approach

82. EE's basic objection was that "the CAT erred in law in holding that Ofcom needed to clearly demonstrate that the NCCNs would act as a material disbenefit to consumers" (paragraph 4.1 of EE's Application). The Tribunal's approach was wrong because:

(1) Too much weight was placed on BT's contractual rights (see, in particular, paragraphs 15 to 18 of the EE Application and paragraph 28 of the O2 Application).

(2) Too much significance is attached to competitive distortion as between terminating CPs (see, in particular, paragraph 20 of the EE Application and paragraphs 18 to 27 of the O2 Application). EE incorrectly labels this point as "the Tribunal's reliance on BT's "commercial freedom to price". That, it should be noted, is very much not the point: the point that concerned the Tribunal was a pricing inhibition on all terminating CPs, including, but not restricted to, BT.

83. The consequence, *pace* O2 and EE, is that the Tribunal placed too high a burden on MNOs seeking to challenge the NCCNs. Thus, the O2 Application states:

> "29. The Judgment criticised OFCOM for requiring BT to show that its NCCNs benefitted consumers as being too "*stringent*" (see, eg, §§395, 442), in part because of BT's contractual right to impose a variation and also because BT's termination prices were not subject to an *ex ante* regulation.
>
> 30. But the Judgment imposes an even higher burden on the MNOs to "*clearly and distinctly...demonstrate...that the introduction of the NCCNs would act as a material disbenefit to consumers*" (§448). And yet the Judgment finds that, for example, the extent of the Direct Effect was "*impossible to ascertain*" (§343) and the MTPE waterbed was "*essentially unknown"* (§379). Indeed, it is precisely because of the difficulties that regulation errs on the side of caution when considering change and why therefore the burden rests with the party seeking to

> vary the charge. This principle is not to be disregarded simply because the charge is introduced in a market where there is no SMP. There is as much of a prudential principle of not risking harm to consumers in a non-SMP market as a SMP one.
>
> 31. This asymmetic burden imposed on the MNOs under the Judgment is contrary to the MNOs' right to an effective dispute resolution remedy under the EU regulatory framework for communications..."

84. In large measure, these paragraphs simply re-state the Tribunal's own conclusion that the welfare assessment was inconclusive. The problem – as the Tribunal noted in paragraph 396 – is what to do in such a context. The relevant passage is quoted in paragraph 63(6) above, but the choice is between preventing change unless it can be proved that such change is beneficial on the one hand, and allowing change even though it cannot be shown that the change will be beneficial.

85. The Tribunal concluded that, in such a case, it was not appropriate to allow an inconclusive finding in respect of the welfare assessment to override the two factors that the Tribunal had identified in favour of allowing the NCCNs to stand. That is, we consider, fundamentally a matter of judgment, and so a question of fact.

86. This does not impose an "asymmetric burden" on MNOs challenging the NCCNs. There is a burden going each way: BT bears the burden of showing a welfare benefit (if it wishes the charges to stand), whereas the MNOs bear the burden of showing a welfare disbenefit (if they wish the charges to fall). If BT were able to demonstrate, and demonstrate clearly, that the interests of consumers would be advantaged, that would be a cogent factor in favour of allowing the NCCNs. What the Tribunal was not prepared to countenance was an inconclusive welfare assessment overriding all other relevant considerations.

(3) Disregarding the approach of previous cases

87. Both the O2 and the EE Applications contended that a specific approach to resolving disputes had previously been laid down by a differently constituted Tribunal in *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12. Thus, O2 suggested that "the Judgment reaches findings...that go against the grain of Tribunal judgments in previous dispute resolution cases" (paragraph 10 of the O2

Application). Equally, EE suggests that "there is a tension between the CAT's approach to BT's putative contractual rights and that previously adopted by the CAT to the parties' contractual rights..." (paragraph 19 of the EE Application).

88. O2 went so far as to suggest that the Tribunal ignored "previously given guidance on how OFCOM should approach dispute resolution" – referring to the decision in *T-Mobile*.

89. The Tribunal in fact considered the decision in *T-Mobile* in some detail in paragraphs 422 to 432 of the Judgment. The decision in *Orange Personal Communications Services Ltd v Office of Communications* [2007] CAT 36 was not considered, because that case concerns OFCOM's jurisdiction to consider disputes, and not how such disputes should be determined. The Tribunal's approach to dispute resolution cases was that OFCOM has been statutorily tasked with the resolution of disputes between communications providers. The criteria by which those disputes are to be resolved are nowhere articulated in the 2003 Act, and the Tribunal attached weight to the width of OFCOM's discretion. Thus, in commenting on the "fair and reasonable" test, the Tribunal observed, in paragraph 434 of the Judgment, that "[t]here can be no objection in a test so framed, provided always that it has the flexibility to cater for unexpected factors and does not unduly fetter OFCOM's discretion...Equally, the Tribunal must be careful not to create an unduly restrictive approach to dispute resolution that might also fetter OFCOM unduly". The Tribunal stressed – accepting the guidance given by Mummery LJ in *Floe* – that "in this Judgment we are resolving an appeal from the Disputes, and not laying down a general approach" (paragraph 435 of the Judgment).

90. In short, the Tribunal was not seeking to create a new, general norm. Nor did it consider that the Tribunal had done so on previous occasions. Commenting specifically on *T-Mobile*, the Tribunal noted in paragraph 436 that "if the Tribunal in *T-Mobile* were laying down a single – cost reflective – approach for OFCOM to adopt in all future cases (which it was not), then this would have amounted to an improper fetter on OFCOM" – and, indeed, the Tribunal.

91. The Tribunal took an individuated approach to the various factors before it. The Tribunal did not seek to lay down a specific approach for all cases involving disputes over price. In this case, in the Tribunal's judgment, the relevant factors pointed in favour of the NCCNs and not against them. That, after 449 paragraphs, is what the Tribunal found (paragraph 450 of the Judgment).

(4) Conclusion

92. We remind ourselves that we can only give permission to appeal on a point of law, and – if a point of law arises – should only give permission where there is either a real prospect of success or some other compelling reason why the appeal should be heard.

93. The Tribunal has approached the question of how the relevant factors that it has found to exist should be weighed as a matter of discretion or judgment. If that is right, then this is plainly a question of fact, not law. In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] EWCA Civ 796, Buxton LJ stated at paragraph 34:

> "These findings do not and could not involve points of law, at least unless it were to be contended that the conclusions had been arrived at on the basis of no evidence at all: something that is not and could not possibly be said. They cannot therefore be reviewed in this court. But even if we did have authority to review such findings, as the conclusion of an expert and specialist tribunal, specifically constituted by Parliament to make judgements in an area in which judges have no expertise, they fall exactly into the category identified by Hale LJ in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, as an area which this court would be very slow indeed to enter."

We also have in mind the statements of Carnwath LJ in paragraphs 26 to 30 of *Secretary of State for the Home Department v Akaeke* [2005] EWCA Civ 947. BT noted, to similar effect in paragraph 4(2) of BT's Observations, that "[t]his is the classic weighing of detailed economic and other factual matters that a specialist Tribunal is best placed to undertake. It does not involve a point of law."

94. But what if the Tribunal's approach is wrong? Both O2 and EE are contending that the Tribunal should have adopted a course that was more in line with previous decisions of the Tribunal, and that the course the Tribunal set in this case is inconsistent with those decisions. For the reasons we gave in the Judgment, we

were not persuaded that these decisions lay down a specific, always to be followed, approach to "pricing" disputes. Clearly, like cases must be treated alike, but no-one is suggesting that this case is (for instance) on all fours with the facts in *T-Mobile*. Indeed, as both EE and O2 must accept, one of several differences is that this was a "paragraph 12", whereas *T-Mobile* was a "paragraph 13" case. Moreover, *T-Mobile* involved *ex ante* price controls, whereas this case did not.

95. Be that as it may, a key element in the O2 and EE Applications is that the Tribunal erred in its approach when weighing the various factors that it found to be relevant to the issue of whether the NCCNs were "fair and reasonable". That question – how to weigh the multiple relevant factors that feed into the binary decision of whether the NCCNs are or are not to be allowed to stand – can amount to a question of law if the Tribunal's basic approach that this was all a question of judgment or discretion is wrong.

96. Thus, by way of example, the EE Application contends that "[d]ispute resolution inherently requires Ofcom to set a price, where the price is the subject of the dispute" (see paragraph 16.2 of the EE Application). That was not the approach taken by either OFCOM or the Tribunal. OFCOM did not set a price, and the Tribunal did not require it to do so. In the case of these appeals, the approach of both OFCOM and the Tribunal was to ask whether the price set by NCCNs was fair and reasonable: if it was, then BT's price was to be allowed to stand; if it was not, then the prices that pertained prior to the NCCNs were to apply.

97. We consider this question of approach to be capable of amounting to a point of law, on which the Tribunal can give permission to appeal to the Court of Appeal. We agree with both O2 and EE that the issues arising here are of importance. Although the Tribunal sought to resolve only the instant case before it, these issues do have a general importance in that other terminating CPs are seeking to implement their own changes to their termination charges for 080, 0845 and 0870 calls.

98. This is a point of general importance and we consider that there is a compelling reason why an appeal on this point should be heard. Accordingly, we give EE, H3G,

Vodafone and EE permission to appeal to the Court of Appeal on the following issue:

Whether the Tribunal erred in its approach to weighing the factors that it found to be relevant when deciding whether NCCN 956, NCCN 985 and NCCN 986 were fair and reasonable.

We stress that we do not give permission to appeal on the Tribunal's conclusions (set out in paragraphs 416 to 419 of the Judgment) as to which factors were relevant.

H. THE TRIBUNAL'S ORDER AS TO PAYMENT

99. The reasoning behind the Tribunal's order in this regard is at Section N of the Judgment. Essentially, the Tribunal made various directions to OFCOM as to how its power under section 190(2)(d) of the 2003 Act should be exercised. The case was remitted back to OFCOM with these directions.

100. We consider this to be pre-eminently a matter of judgment and discretion, and so a question of fact. Accordingly, we refuse permission to appeal.

101. We should note, in passing, that O2's contention that the findings against it were discriminatory were considered and rejected in paragraph 21 of the Ruling. O2 paid BT's charges according to the NCCNs, when they were introduced. When OFCOM made its decision regarding the NCCNs, overpayments based on those NCCNs were repaid by BT. There is no discrimination in now requiring O2 to comply with the NCCNs. Indeed, to draw a distinction between O2 and the other MNOs would, of itself, be discriminatory.

I. PERMISSION TO APPEAL

102. For the reasons that we have given, we grant O2, EE, H3G and Vodafone permission to appeal on the sole issue of the approach taken by the Tribunal in weighing the factors that it found to be relevant so as to conclude that the NCCNs were fair and reasonable. This is the issue considered in Section M of the Judgment.

103. On all other points, the O2 and EE Applications are refused. These applications may be renewed to the Court of Appeal within 14 days pursuant to CPR rule 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, along with the written submissions identified at paragraphs 3 and 4 above, should be placed before the Court of Appeal.

Marcus Smith QC Peter Clayton Professor Paul Stoneman

Charles Dhanowa
Registrar Date: 18 November 2011