Neutral citation [2025] CAT 65

Case No: 1712/3/3/25

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 October 2025

Before:

ANDREW LENON KC
(Chair)
JOHN ALTY
PROFESSOR RACHAEL MULHERON KC (Hon)

Sitting as a Tribunal in England and Wales

BETWEEN:

DAVID HENRY

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

(1) COMUX UK LTD
(2) THAT'S TV CHANNELS LTD

Interveners

Heard at Salisbury Square House on 8 July 2025

RULING (STRIKE OUT AND INTERIM RELIEF)

APPEARANCES

David Henry in person (assisted by Pat Monroe as a McKenzie Friend).

Anneliese Blackwood appeared on behalf of the Office of Communications.

CONTENTS

A. INTRODUCTION

1. The Applicant ("Mr Henry") has brought proceedings in the Tribunal (the "Appeal") in which he seeks to appeal various decisions of the Respondent ("Ofcom") relating to the local television broadcast licences held by companies in the That's TV group of companies ("That's TV" or the "That's TV group").

2. This ruling follows the hearing of two applications:

    (1) an application by Ofcom to strike out the proceedings on the ground that the Tribunal does not have jurisdiction to hear the Appeal and/or that the Appeal has been brought out of time; and

    (2) an application by Mr Henry for interim relief to restrain Ofcom, pending the disposal of the Appeal, from renewing the licences granted to That's TV without giving Mr Henry and others the opportunity to bid for the licences.

3. The Interveners ("Comux" and "That's TV Channels", respectively) were given permission to take part in the proceedings, limited to the filing of written materials. Comux provided an explanation of its share structure and how its business is conducted. That's TV Channels (one of the That's TV group) supported Ofcom's case and advanced additional grounds for striking out the Appeal.

B. BACKGROUND

4. Local television stations operate under licences granted by Ofcom, referred to as "L-DTPS", i.e. local digital television programme services, licences. Programmes are broadcast using multiplex technology. This allows different channels to be transmitted via a single data stream. The multiplex technology used by local television stations is operated by Comux, also under licence from Ofcom.

5. There are currently 33 local TV services operating across the UK. 22 of the 33 L-DTPS licences are held by companies in the That's TV group.

6. L-DTPS licensees are required under the terms of their licences to comply with a "localness requirement" and their local programming commitments to ensure that the local service is sufficiently targeted at the particular needs of the location it seeks to serve. These obligations include an obligation to ensure that the main production base of the service is located in the licensed area, unless Ofcom consents otherwise, and that the service reflects the interests and concerns of people living in the licensed area with an emphasis on local news. These obligations reflect the legislative criteria for a service to qualify as a local digital television service set out in section 244 of the Communications Act 2003 (the "2003 Act").[1]

7. The current L-DTPS licences were originally due to expire on 25 November 2025. Ofcom has extended the period for which those L-DTPS licences continue in force by twelve months under section 19ZA(1) of the Broadcasting Act 1996 (the "1996 Act").[2] Ofcom has received applications from That's TV to renew all the licences it holds. Ofcom is considering these applications. Any renewal that is granted will begin on 26 November 2026 for a period ending no later than 31 December 2034.

8. On 6 February 2024, Mr Henry wrote to Ofcom making a number of complaints about Ofcom's handling of the L-DTPS licences granted to That's TV, including, in particular, an alleged failure on the part of Ofcom to enforce the localness requirement in That's TV's L-DTPS licences. He initiated the Appeal by a letter dated 22 November 2024.

9. Shortly afterwards, on 16 December 2024, Ofcom published its decision that That's TV had breached 13 of its twenty L-DTPS licences by failing to maintain

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[1] Section 244 of the 2003 Act empowers the Secretary of State to issue statutory orders modifying existing broadcast regulations in relation to local digital television services which satisfy certain conditions, including a condition that the services meet, or would meet, the needs of the area or locality where they are received.

[2] Section 19ZA of the 1996 Act, as amended by the Local Digital Television Programme Services (Amendment) Order 2024, provides that Ofcom may, with the consent of the licence holder, extend the period for which a L-DTPS licence continues in force by twelve months.

the character of the licensed services in relation to local newsgathering. Ofcom indicated that it would continue to assess That's TV's compliance through the annual return process and expected That's TV to keep its practices under review to ensure compliance. On 16 June 2025, Ofcom announced that it had opened an investigation into possible breaches by That's TV of its local programming obligations.

C. THE APPEAL

10. In the Appeal,[3] Mr Henry challenges the following steps taken by Ofcom:

(1) The transfer of the Scottish L-DTPS licences to That's TV in June 2018 (the "2018 Decision"). Mr Henry alleges that Ofcom agreed to a change in the majority shareholding which controlled these licences, such that That's TV was allegedly given a majority shareholding of Comux, but failed to consider the consequential change in character of the L-DTPS service and the reduction in "localness" that would follow from the transfer. His case is that the change of ownership of these L-DTPS licences should have been dealt with as a transfer of the licences which would have required the same process as an original L-DTPS application and that the transfer of licences substantially altered the character of the service and should not have been permitted.

(2) A decision, dated 8 July 2019, providing consent to That's TV's proposal to aggregate the studios/main production bases for a number of the L-DTPS licences so that one studio/main production base would serve all licensed services within a particular region (the "2019 Decision"). Mr Henry alleges that the decision was made despite objections submitted by the Advisory Committee for Scotland to Ofcom, highlighting that "the location of the production studios was a central requirement for all L-DTPS services"; he also contends that Ofcom's

[3] Mr Henry's grounds of appeal and submissions are set out in his letter to the Tribunal dated 22 November 2024, a note dated 10 February 2025, witness statements dated 7 and 10 February 2025, letters to the Tribunal dated 28 March 2025, 4 April 2025 and 7 April 2025, a skeleton argument filed on 19 June 2025, an amended application dated 3 July 2025 and post-hearing emails dated 10 July 2025 and 16 July 2025.

decision was in direct conflict with Ofcom's Licensing Local Television Statement dated 10 May 2012 according to which the studio from which the local service will be broadcast should be located in the licensed area.

(3) A decision, dated 1 November 2021, to consent to That's TV's request to further reduce the number of studios/main production bases from seven to five serving all twenty of its L-DTPS licences (the "2021 Decision").

(4) A decision, dated 16 December 2024, allegedly failing to impose a sanction following Ofcom's finding referred to at paragraph 9 above that That's TV had breached the L-DTPS licences covering 13 licensed areas for failure to maintain the character of the service (the "2024 Decision"). Mr Henry submits that "Ofcom has failed to issue any sanctions for the serious and repeated breaches." He says that Ofcom "received a detailed complaint with off air recordings and electronic listing evidence" on 6 February 2024 but failed to investigate the complaint. Mr Henry seeks a "ruling" directing Ofcom "to fully investigate the complaint and to issue sanctions for the L-DTPS licence breaches."

11. Mr Henry's overarching complaint is that Ofcom has acted *ultra vires* by: (i) ignoring the statutory requirement for localness under section 244 of the 2003 Act; (ii) acting in breach of its duty to act in the public interest owed pursuant to section 3 of the 2003 Act;[4] and (iii) acting in breach of its duties in respect of the electromagnetic spectrum for wireless telegraphy.[5]

[4] Section 3(1) of the 2003 Act provides that Ofcom's principal duty in carrying out their functions is: (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

[5] Section 3(2) of the Wireless Telegraphy Act 2006 provides that in carrying out its radio spectrum functions, Ofcom must have regard to (amongst other things) the desirability of promoting: (a) the efficient management and use of the part of the electromagnetic spectrum available for wireless telegraphy; (b) the economic and other benefits that may arise from the use of wireless telegraphy.

D. THE STRIKE OUT APPLICATION

12. Rule 11(1) of the Competition Appeal Tribunal Rules 2015 (the "Rules") provides that the Tribunal may, after giving the parties an opportunity to be heard, strike out an appeal in whole or in part at any stage in the proceedings if:

> "(a) it considers that the Tribunal has no jurisdiction to hear or determine the appeal;
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> (b) it considers that the notice of appeal, or part of it, discloses no valid ground of appeal;
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> (c) it considers that the appellant does not have (or represent those who have) a sufficient interest in the decision in respect of which the appeal is made;
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> (d) it is satisfied that the appellant has habitually and persistently and without any reasonable ground—
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>> (i) instituted vexatious proceedings, whether against the same person or different persons; or
>>
>> (ii) made vexatious applications in any proceedings; or
>
> (e) the appellant fails to comply with any rule, practice direction issued under rule 115, or order or direction of the Tribunal."

(1) No jurisdiction

13. Ofcom's primary case[6] is that the appeal should be struck out pursuant to Rule 11(1)(a) on the basis that the Tribunal does not have jurisdiction to hear or determine the appeals. It submits that the only decisions of Ofcom which may be appealed to the Tribunal are those specified in section 192 of the 2003 Act and that the decisions which Mr Henry seeks to appeal are not within that section.

14. Section 192(2) confers a right of appeal on a person affected by a decision to which section 192(1) applies. Section 192(1) provides as follows:

> "This section applies to the following decisions—

[6] Ofcom's case was set out in in written submissions dated 13 March 2025 and a skeleton argument dated 30 June 2025.

> (a) a decision by OFCOM under [Part 2 of the 2003 Act] or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006 that is not a decision specified in Schedule 8;
>
> (b) a decision (whether by OFCOM or another) to which effect is given by a direction, approval or consent given for the purposes of a provision of a condition set under section 45 [which confers power on Ofcom to set conditions];
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> (c) a decision to which effect is given by the modification or withdrawal of such a direction, approval or consent;
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> (d) a decision by the Secretary of State to which effect is given by one of the following—
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>> (i) a specific direction under section 5 that is not about the making of a decision specified in Schedule 8;
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>> (ii) a restriction or condition set by regulations under section 109;
>>
>> (iia) an order under section 124P;
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>> (iii) a direction to OFCOM under section 132;
>>
>> (iv) a specific direction under section 5 of the Wireless Telegraphy Act 2006 that is not about the making of a decision specified in Schedule 8;
>
> (e) a decision by the [Competition and Markets Authority] to which effect is given by an order made under section 193A."

15. Ofcom submits that none of the "decisions" appealed by Mr Henry fall within this list for the following reasons:

    (1) Ofcom does not accept that it made any decision, nor was it required to make any decision, about the transfer of licences in this instance. The matter concerns the corporate sale of the licensed entity STV2 which comprises a number of companies. Ofcom says that it did not have to take a decision about the transfer of the L-DTPS licences as they remained with the same licence holder after the conclusion of the sale; Ofcom's role was limited to conducting checks against any new directors of the licensed company, its associates, and the controlling shareholders of the licence-holding company to establish whether the new ownership caused any issues under section 5 of the 1996 Act which might prevent the licensee from continuing to hold the licence. Ofcom concluded that there were no such issues at that time.

(2) Section 192(1)(a) does not apply as the decisions were not taken under Part 2 of the 2003 Act or the Wireless Telegraphy Act 2006 (the "2006 Act").

(3) Sections 192(1)(b) and (c) do not apply as none of the appealed "decisions" are given effect by "a direction, approval or consent given for the purposes of a provision of a condition set under section 45" of the 2003 Act.

(4) Sections 192(1)(d) and (e) do not apply as the appealed "decisions" are not decisions by the Secretary of State or the Competition and Markets Authority respectively.

(5) There is no separate right to appeal to the Tribunal in relation to an alleged breach of Ofcom's principal duty under section 3 of the 2003 Act.

(6) Decisions taken by Ofcom pursuant to the 1996 Act or the other statutory provisions cited by Mr Henry in the Appeal do not fall within the list of decisions which may be appealed within section 192(1).

16. Ofcom submits that, in the light of the foregoing, the appeal is entirely ungrounded as the Tribunal does not have jurisdiction and that, to the extent that Mr Henry's contentions have any merit (which is denied), they should have been pursued by means of judicial review.

(2) Out of time

17. Rule 9, governing the time and manner of commencing appeals, provides as follows at (1) and (2):

> "(1) An appeal to the Tribunal shall be made by filing a notice of appeal within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.
>
> (2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.

[…]"

18. Ofcom's alternative case is that, if the Tribunal has jurisdiction to hear the Appeal, in so far as it concerns the 2018 Decision, the 2019 Decision and the 2021 Decision, the Appeal should be struck out as it was filed too late and there are no exceptional circumstances which would justify an extension of time under Rule 9(2). Ofcom referred to *British Sky Broadcasting Group Plc v The Competition Commission* [2008] CAT 1 in which the Tribunal noted as follows: "…although such circumstances should not be restricted to cases of *force majeure*, the cases where exceptional circumstances are found to exist are likely, by their very nature, to be rare." Ofcom notes that the Tribunal was cautious in that case about extending time by a matter of a few weeks.

(3) Comux's position

19. In response to the assertion by Mr Henry in the Appeal that the transfer of the five Scottish L-DTPS licences to That's TV gave That's TV a majority shareholding of Comux, referred to at paragraph 10(1) above, and therefore effective control over the local TV broadcast infrastructure, Mr Michael Lever, the CEO of Comux, gave the following description of the shareholding structure of Comux and the voting rights of shareholders as follows:[7]

(1) The holder of each L-DTPS licence is entitled to one ordinary share in Comux per licence held. No other shares in Comux are distributed. This means that Comux is jointly owned by all licensees.

(2) As of 12 June 2025, there were 34 L-DTPS licences and therefore 34 shares in Comux in circulation. As of 12 June 2025, a total of five shareholder groups held the 34 shares. Prior to the purchase of the Scottish L-DTPS companies from STV by That's TV, That's TV owned 14 of the shares. As of 12 June 2025, it owned 22 shares.

(3) The lowest threshold for a resolution to be successful is that for an ordinary resolution. For an ordinary resolution to be passed both of the

[7] Letter to the Tribunal dated 12 June 2025.

following conditions must be met: more than 50% of shares must be cast in support of the resolution, and more than 50% of shareholder groups in existence at the time a resolution is issued must vote in favour of the resolution. This effectively means that no single shareholder group is able to force through any resolution of any type unilaterally.

(4) Comux's articles of association also contain a substantial number of "Reserved Matters" which require approval by a super majority resolution (greater than 75%).

(5) In practice, Comux operates independently of any licensee group, and its services, which are provided under contract to L-DTPS licensees, have not changed as a result of the transaction.

20. This description was not challenged by Mr Henry.

(4) That's TV Channels' position

21. That's TV Channels adopted Ofcom's case that the Appeal should be struck out on the ground that the Tribunal lacks jurisdiction and/or that the Appeal was brought significantly out of time. It went on to submit that the Appeal should be struck out on the additional grounds: first, that pursuant to Rule 11(d), Mr Henry "has habitually and persistently and without any reasonable ground […] instituted vexatious proceedings" and, second, that the Appeal "discloses no valid ground of appeal" (Rule 11(b)).[8]

22. That's TV engaged Kroll Associates UK Ltd ("Kroll") to carry out research into Mr Henry's background and track record. Kroll unearthed the following cases in which Mr Henry had been involved:

(1) *Power TV Ltd v Revenue and Customs* [2008] UKVAT V205675 (1 February 2008) ("*Power TV*"), a tax appeal brought by a company of which Mr Henry was the "controlling director" and sole shareholder.

[8] That's TV Channels' position was set out in its submissions dated 12 June 2025 and in its solicitors' letters dated 24 June 2025 and 11 July 2025.

The case involved a claim for repayment by HM Revenue & Customs of VAT which had been wrongly credited to Power TV. The VAT Tribunal was critical of the evidence given by Mr Henry. As well as dismissing the claim, the Tribunal made a costs order against Mr Henry. In doing so it expressly acknowledged that such orders were "not usually granted save in cases in which there has been a waste of time and or have demonstrably no merit", but held that "there has been demonstrated to be neither logic, substance, merit or equity in the position adopted by the Appellant" and therefore that it had "no hesitation" in making such an order.

(2) In *Rapture Television plc v Ofcom* [2008] CAT 6 ("*Rapture*"), the claimant, a company controlled by Mr Henry, appealed a decision by Ofcom concerning charges levied by British Sky Broadcasting Limited ("Sky"). After the appeal was dismissed, the Claimant applied unsuccessfully for permission to appeal. Mr Henry made the application himself. The Tribunal refused his request for an oral hearing on the grounds that "all of the points raised are manifestly without merit".

(3) In *Virgin Media, Inc. & ors v Ofcom* [2010] CAT 16 ("*Virgin Media*") multiple parties challenged licences granted by Sky in respect of its pay TV channels. Mr Henry applied to intervene. That application was rejected on the ground that Mr Henry lacked a sufficient interest in the outcome of the proceedings, the Tribunal noting that "the matters raised by Mr. Henry in his letters appear to be at best tangential and at worst irrelevant to the issues which the Tribunal is likely to have to decide."

(4) In *British Sky Broadcasting Limited v Ofcom* [2010] CAT 29 ("*Sky v Ofcom*"), Mr Henry made a separate, successful application for a variation of an interim order, such that his company Real Digital EPG Services Ltd ("REAL") was added to the limited group of companies in respect of which a decision of Ofcom took effect pending the outcome of the appeals. In agreeing to vary the interim order, the Tribunal commented that the grounds of the application were "many and varied", noted that "[s]ome of them may be described as somewhat extravagant",

and noted that if possible "it would be in everyone's interest, not least REAL's" for Mr Henry and REAL to have the benefit of legal representation in future, because "some of the contentions in the written material presented to the Tribunal on behalf of Mr Henry and REAL were very wide of the mark."

(5) *Henry t/a SBC TV v Ofcom* [2019] CAT 3 ("*Henry v Ofcom 1*") concerned Ofcom's decision to permit the BBC to launch a new television channel for audiences in Scotland. The relief sought by Mr Henry was "a direction that Ofcom reopen their consultation and revoke the licence for the launch of the new channel until they had fulfilled their statutory duty to secure sufficient plurality of TV and radio services in Scotland and solutions to offset the damage to media plurality can be put in place." The appeal was rejected on the ground that there was no right of appeal. The Tribunal ordered Mr Henry to contribute to Ofcom's costs of the oral hearing. In doing so it highlighted that Mr Henry "did not appear to have a valid reason for failing to seek any legal advice in relation to his appeal which, had it been obtained, would probably have avoided the need for an oral hearing."

23. That's TV Channels also drew attention to documents submitted by Mr Henry in support of his Appeal which it submitted cast light on how Mr Henry viewed proceedings before the Tribunal:

(1) In an email dated 29 May 2018 to STV Mr Henry said "I have experience of winning an appeal at the CAT up against both BSkyB and Ofcom. Any appeal will delay the BBC Scotland channel by 18-24 months and cost the BBC and any other intervener a sizeable legal bill. My only cost will be my time."

(2) That's TV Channels submitted that the reference to "winning an appeal" must have been a misleading reference to his successful application in *Sky v Ofcom* for the variation of an interim order in the case and that the reference to appeal in relation to the BBC must be a reference to the proceedings that became *Henry v Ofcom 1*, and that Mr Henry's attitude

seemed to be that, by filing an incoherent appeal, other parties would be forced to incur significant costs in attempting to make sense of it and that this would give him a degree of leverage.

(3) In an email dated 2 November 2021 to Mr Jeff Henry (no relation), a minority shareholder in That's TV Channels' ultimate parent company, That's Media Limited, Mr Henry stated as follows: "Our group's approach to That's TV has remained unanswered. I wondered if you could help arrange a meeting with Daniel [Cass] before I launch a world of pain for him and his That's TV in Scotland? […] I have support for the SBC project to take over the 5 licenses […]". That's TV Channels submitted that Mr Henry's persistent complaints to Ofcom about That's TV, and the Appeal itself, were part of the implementation of Mr Henry's threat to cause That's TV Channels "a world of pain".

24. That's TV Channels submitted that the cases and the emails referred to above showed a pattern of disregard for the proper processes of litigation and a willingness to invoke the jurisdiction of a Tribunal and to put other parties to substantial cost and inconvenience without taking sufficiently seriously the obligations on a litigant to pursue its case in an orderly way. It contended that this was the essence of vexatious conduct.

25. Kroll also discovered that in 2011 Mr Henry was made subject to an eight-year disqualification from acting as a company director arising from the events that were the subject of *Power TV*. That's TV Channels submitted that the disqualification meant that at the time of the change of control in 2018, which was the subject of the Appeal, Mr Henry was not legally in a position to act as a director of a company seeking to operate a licence under the 1996 Act and that, even if there had been an open competition, no company of which he was a director (including a shadow or de facto director) or a shareholder exercising control, would have been able to participate in it.

26. As to the further ground for striking out the Appeal (such that it "discloses no valid ground"), That's TV Channels submitted that the documents filed in support of the Appeal did not make clear what powers, if any, Mr Henry is

asking the Tribunal to exercise, or what the Tribunal was being asked to do and on what basis. To the extent that any such allegations could be discerned, they were unarguable.

E. THE INTERIM RELIEF APPLICATION

27. Rule 24 (1)(c) provides that the Tribunal may make an order on an interim basis granting any remedy which the Tribunal would have the power to grant in its final decision.

28. Mr Henry sought an interim injunction preventing Ofcom from "accepting any notice of transfer or renewal from That's TV for any or all of the 20 L-DTPS licences until such time as the Appeal decisions have been ruled on by the tribunal or the case has been settled."

29. Mr Henry made clear in his oral submissions that what he would like to achieve through his interim relief application is the cessation of the current licence renewal process on the ground that it would not be in the public interest for That's TV to continue as licensee and the replacement of the current process with a process which would enable him and others to bid for the licences. He submitted that if interim relief was withheld, he would suffer the loss of the business opportunity to launch a local channel in Scotland.

30. Mr Henry also sought an injunction preventing Ofcom from effecting transfers of L-DTPS licences from That's TV. Ofcom pointed out, however, that there are no longer any outstanding L-DTPS licence transfers to That's TV.

31. Ofcom resisted the application for interim relief primarily on the ground that the whole Appeal should be struck out but if, contrary to its primary case, the Appeal survived the strike out application, Mr Henry's application for interim relief should be dismissed. Ofcom referred to the principles governing the grant of interim relief as summarised by the Tribunal in *B&M European Value Retail S.A. v Competition and Markets Authority* [2019] CAT 13:

> "[90] The Tribunal's approach to an application for interim relief, now under Rule 24, was first set out in *Genzyme Limited v OFT* [2003] CAT 8

("*Genzyme*"), where, at [79], the Tribunal identified five questions which fall to be considered. That approach was slightly modified in the more recent case of *Flynn Pharma Ltd v CMA* [2017] CAT 1 ("*Flynn*"), especially at [29] to [33], to take account of the introduction of Rule 24 and other developments in the law.

> [91] In *Flynn* the Tribunal re-framed the so-called "*Genzyme* questions" in the following terms:
>
> > "(a) Are the arguments raised by the applicant as to the merits of its substantive appeal, at least *prima facie*, not entirely ungrounded, in the sense that the applicant's arguments cannot be dismissed at the interim stage of the procedure without a more detailed examination?
> >
> > (b) Is urgency established?
> >
> > (c) Is the applicant likely to suffer significant damage if interim relief is not granted?
> >
> > (d) What is the likely effect on competition, or relevant third party interests, of the grant or refusal of interim relief?
> >
> > (e) What is 'the balance of interests' under heads (c) and (d) taking into account all the relevant circumstances including the existence and adequacy of any offer of an undertaking as to damages?"
>
> [92] The *Genzyme* questions involve a two-stage assessment of whether or not interim relief should be granted. In the first stage the Tribunal must ask questions (a) to (c) to establish whether it has jurisdiction to grant interim relief. The second stage involves the exercise of the Tribunal's discretion and reflects the terms of Rule 24(3). The Tribunal must ask questions (c) (for the second time), and (d) and reach a view on the balance of interests under question (e). Only if the balance of interests favours the grant of interim relief will the Tribunal exercise its discretion to make such an order."

32. Ofcom submitted that the leisurely pace at which Mr Henry had brought the Appeal undermined his case for urgency. He made complaints to Ofcom about the matters raised in the Appeal as early as February 2024 but did not take any concrete steps to issue a notice of appeal until 22 November 2024. The Tribunal notified Mr Henry on 26 November 2024 that, as he had failed to comply with certain requirements, the Tribunal was unable to register and proceed with this matter. Mr Henry did not provide the necessary additional information to the Tribunal until February 2025, nearly three months later.

33. Ofcom further submitted that Mr Henry had not provided any evidence to demonstrate that he would suffer damage, let alone significant damage, if the interim relief sought were not granted. In his witness statement dated 10 February 2025, Mr Henry referred to a "loss of opportunity directly linked to

the Ofcom decisions to allow That's TV to acquire the L-DTPS licences in Scotland without any opportunity for a third party to be considered." Ofcom contended that this claimed loss appeared to be limited to loss flowing from the 2018 Decision, not loss which would arise if an interim injunction were refused, and moreover there was no indication of the quantum of any alleged loss arising from the withholding of an interim injunction. In the absence of any evidence of loss, there was no factual basis on which the Tribunal could conclude that Mr Henry was likely to suffer significant damage if the interim relief were not granted.

F. THE TRIBUNAL'S ANALYSIS

(1) The strike out application

34. In *Henry v Ofcom 1* the Tribunal held as follows:

> "[24] The Tribunal is a creature of statute (section 12 and Schedule 2 to the [Enterprise Act 2002]). Unlike the High Court, it does not enjoy inherent jurisdiction but rather derives its jurisdiction principally from the 2002 Act, the Competition Act 1998 and the 2003 Act. In order to establish the jurisdiction of the Tribunal, it is not enough for Mr Henry to assert that Ofcom has acted in breach of duty or that the Decision raises competition issues. It is necessary to identify a statutory provision conferring jurisdiction on the Tribunal to determine the appeal."

35. As this passage makes clear, in order to pursue the Appeal, it was necessary for Mr Henry to identify the relevant statutory provision conferring jurisdiction on the Tribunal. His original appeal letter dated 22 November 2024 complained about Ofcom's alleged breaches of duty but did not address the question of jurisdiction. Even after Ofcom's strike out application, which squarely raised jurisdiction, Mr Henry did not put forward any grounds on which jurisdiction could be based.

36. In his skeleton argument and in his oral submissions, Mr Henry sought to rely on section 45 of the 2003 Act ("section 45"), and on the 2006 Act, which are referred to in section 192(1)(a) and (b), as grounding jurisdiction. This was on the basis that: (i) local TV services make use of telecommunications networks through their use of QR codes in advertising; (ii) this triggers the application of

section 45 and the 2006 Act as these provisions apply to telecommunications networks. There is, however, no sustainable basis for the contention that either section 45 or the 2006 Act provide any jurisdictional foundation for the Appeal. Section 45 regulates the setting by Ofcom of certain types of condition applicable to persons providing an electronic communications network or service. The decisions challenged by Mr Henry are not decisions "to which effect is given by a direction, approval or consent given for the purposes of a provision of a condition set under section 45" as required by section 192(1)(b) of the 2003 Act. As for the 2006 Act, this regulates the use of the radio spectrum via a licensing regime which is separate to the L-DTPS licensing regime. The fact that local TV services make use of multiplexes operated by Comux, which is licensed pursuant to the 2006 Act, does not confer jurisdiction on the Tribunal to determine appeals from the decisions challenged in these proceedings which were not decisions under the 2006 Act.

37. In short, the Tribunal accepts Ofcom's submission that none of the Decisions which is the subject of the Appeal are decisions of the kind referred to in section 192(1) of the 2003 Act and that consequently the Tribunal does not have jurisdiction to determine the Appeal.

38. Given the Tribunal's conclusion on jurisdiction, it is not necessary for the Tribunal to rule on Ofcom's alternative ground for its strike out application, namely that the Appeal was out of time in relation to the 2018, 2019 and 2021 Decisions. Had it been necessary to do so, the Tribunal would have accepted Ofcom's submission that the Appeal was clearly out of time in relation to those Decisions and that there were no exceptional circumstances justifying an extension.

39. It is similarly unnecessary to determine whether the Appeal should be struck out on the two additional grounds advanced by That's TV Channels, namely that Mr Henry has "habitually and persistently and without any reasonable ground instituted vexatious proceedings" and that the appeal "discloses no valid ground of appeal" (Rule 11(b)).

40. Had it been necessary to do so, the Tribunal would have decided that the first of the two additional grounds was not made out. The criticisms of Mr Henry's submissions made by the VAT Tribunal in *Power TV,* and by the Tribunal in *Rapture* and *Virgin Media* were not to the effect that any of these proceedings were "vexatious" in the sense of being brought to harass or annoy. The email correspondence relied on by That's TV Channels does provide some support for the contention that Mr Henry views proceedings in the Tribunal as a means of putting other parties to expense, delay and "pain". However, even assuming in That's TV Channels' favour that *Henry v Ofcom 1* and the Appeal had been brought by Mr Henry with a view to obtaining leverage in his dealings with Ofcom rather than for the purpose of obtaining any determination by the Tribunal of any legal question, the bringing of two sets of proceedings would not establish that that Mr Henry "habitually or persistently" instituted vexatious proceedings.

41. The second ground advanced by That's TV Channels ("no valid ground") is essentially duplicative of Ofcom's case.

(2) The interim relief application

42. As the Appeal is to be struck out, Mr Henry's application for interim relief falls away. There is no jurisdictional basis for the Tribunal to require Ofcom to halt the ongoing licence renewal process or to require Ofcom to readvertise the licences. It is therefore unnecessary to consider whether the Tribunal should grant or refuse interim relief on discretionary grounds.

G. COSTS

43. Rule 104(2) provides that the Tribunal has a discretion, at any stage of the proceedings, to make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. In the normal course, costs orders are made shortly after the delivery of the decision. Rule 104(4) sets out the factors that the Tribunal may take into account in making a costs order, including: the conduct of all the parties; any schedule of incurred or estimated costs filed by the parties; whether a party has succeeded

in part of its case, even if that party was not wholly successful; whether costs were proportionately and reasonably incurred; and, whether costs are proportionate and reasonable in amount. As Bacon J held in *Riefa v Apple Inc. & ors* [2025] CAT 34 at [13], whilst there is no prescribed general rule corresponding to Civil Procedure Rule 44.2(2)(a) that the unsuccessful party should pay the costs of the successful party, the Tribunal generally follows the practice of the High Court. Accordingly, where a party has been wholly successful it should generally be awarded its costs.

44. Ofcom submitted that, as the losing party, Mr Henry should pay its costs and that, in making its costs order, the Tribunal should take account of Mr Henry's conduct in bringing an unmeritorious appeal without identifying a statutory provision which conferred jurisdiction on the Tribunal despite being aware, as he must have been following the judgement in *Henry v Ofcom 1*, of the need to do so and the importance of obtaining legal advice.

45. In *Henry v Ofcom 1*, the Tribunal held that it would be reasonable and proportionate to require Mr Henry to pay approximately half of Ofcom's costs, taking into account: the importance of access to justice; the fact that the appeal raised a matter of public interest; the efficient way in which Mr Henry presented his case at the hearing; the fact that Mr Henry requested an oral hearing, having been warned that he might face a costs order if his appeal was dismissed; and the fact that he did not appear to have a valid reason for failing to obtain any legal advice in relation to his appeal which, had it been obtained, would probably have avoided the need for an oral hearing (at [30]).

46. The same factors are relevant to the exercise of the Tribunal's discretion in this case, with the difference that Mr Henry appears not to have paid heed to what was said by the Tribunal in *Henry v Ofcom 1.* We accept Ofcom's submission that, following the Tribunal's judgment in that case, it was particularly unreasonable of Mr Henry to pursue the Appeal without identifying any jurisdictional basis on which the Tribunal could determine the Appeal and without obtaining legal advice. The fact that, as Mr Henry pointed out, the grounds of the Appeal were not the same as the grounds of the appeal in *Henry v Ofcom 1* did not mean that he could safely ignore what was said by the

Tribunal about the need to identify a jurisdictional basis for an appeal. Mr Henry's explanation for not obtaining legal advice was that the one lawyer he approached asked for a significant amount of money on account which he did not have available to him. In the Tribunal's view, this was not an adequate explanation. It might have been possible to obtain more affordable advice if Mr Henry had looked further.

47. The Tribunal recognises that compliance by That's TV with the conditions in its licences relating to local programming is a matter of public interest and Mr Henry has raised a number of concerns in this regard. It does not, however, follow, in the Tribunal's view, that Ofcom should have to bear the costs of responding to an unfounded appeal which should not have been brought.

48. In these circumstances, the Tribunal considers that it would be fair and reasonable to require Mr Henry to pay all of Ofcom's reasonable and proportionate costs which it summarily assesses, after reducing the number of solicitors' hours claimed in Ofcom's schedule, in the sum of £30,000.

49. That's TV Channels also sought an order that Mr Henry pay its costs amounting to £52,308, including the costs of Kroll's investigation in the sum of £12,600, on the indemnity basis.

50. The Tribunal's Guide to proceedings 2015 states that the general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: see, for example, *Ryanair Holdings plc v Competition Commission* [2012] CAT 29 at [7]. Comux did not seek any order in relation to its costs. That's TV Channels submitted that its independent interest in responding to the Appeal separately from the regulator, and the contribution it made to the proceedings were sufficiently distinct from Ofcom's as to justify treating it as an active participant, and that there should be no presumption as to the irrecoverability of its costs in the event that the appeal is struck out.

51. Given that the Tribunal has rejected the main ground of That's TV Channels' intervention and the second ground added nothing material to Ofcom's case,

there is no reason to depart from the general rule that That's TV Channels' costs should lie where they fall.

H. CROWDFUNDING

52. Mr Henry has sought to use crowdfunding in order to support the Appeal. For that purpose, Mr Henry established a crowdfunding website (the "Website") which is to be found at: https://www.crowdfunder.co.uk/p/support-legal-fees-for-a-scottish-tv-channel#start. At the time of the hearing, some 24 donors had contributed the sum of £778 in order to help to defray Mr Henry's legal costs associated with this Appeal. As at the date of this ruling, 13 further donors have come forward, and the sum of £1,376 has been raised.

53. Crowdfunding – involving the raising of finance for a specific litigation matter via an online platform – is a legitimate and potentially very useful source of funding. As a concept, crowdfunding has been recognised for several centuries (indeed, Mozart crowdfunded a tour of 1783 by offering concerto manuscripts to those who agreed to finance the tour), while the crowdfunding of litigation emerged in England in the early 2000s.[9] In its recent report, *Review of Litigation Funding*, published 2 June 2025, the Civil Justice Council recognised the utility of crowdfunding, albeit that it recommended regulation of such funding, regardless of whether or not the donors had provided the funds on the basis that they would receive a financial reward if the funded litigation was successful.[10] Presently, however, crowdfunding in England remains unregulated, except for a system of voluntary self-regulation by the UK Crowdfunding Association and by judicial scrutiny and comment *ex post facto*.

54. Certain aspects of Mr Henry's crowdfunding campaign on the Website were of concern to the Tribunal and merit some cautionary comment. At the time of the hearing, it was stated on the Website that, "Ofcom the UK broadcast regulator has been in breach of its statutory duties by allowing a company called That's TV to operate 20 local TV licences including 5 in Scotland that do not deliver a

[9] See, e.g., the discussion in R Mulheron, *The Modern Doctrines of Champerty and Maintenance* (Oxford University Press, 2023), at pages 35-37, and the sources cited therein.
[10] See recommendations 32–34.

minimum statutory requirement of local news" (per the "Overview" tab). This statement was incorrect. Ofcom had not committed any statutory infringements in transferring the Scottish L-DTPS licences to That's TV in June 2018. This inaccuracy was pointed out to Mr Henry at the hearing, whereupon the Website was subsequently amended so as to state that, "Ofcom the UK broadcast regulator has failed to prevent a company called That's TV who operates 20+ local TV licences including 5 in Scotland that do not deliver a minimum statutory requirement of local news." Hence, the assertion of a breach of statutory duty by Ofcom was removed from the Website by Mr Henry (or at his direction) following the hearing.

55. However, there are other statements which persist on the Website and which remain of concern to the Tribunal. For example, it is stated that "Ofcom is fighting against the case even though the evidence is very clear", and that if Mr Henry is successful in this Appeal, "then That's TV will see all of their local broadcast licences end on the 25th of November this year" (per the "Updates" tab). In respect of the former statement, it is for the Tribunal, and not for the crowdfunded litigant, to consider the cogency of the evidence being adduced in support of any application which is made before it. In respect of the latter statement, there is no question of That's TV's L-DTPS licences ending on 25 November 2025, for, as set out earlier in this ruling, Ofcom has exercised its power, legitimately, to extend the period for which those L-DTPS licences continue in force by 12 months under section 19ZA(1) of the 1996 Act. The subject matter of the Appeal is not whether Ofcom had power to extend those licences (as it clearly does), but whether Ofcom should be prevented from renewing That's TV licences, pursuant to section 19ZB of the 1996 Act, from 26 November 2026 onwards.

56. The inaccuracies referred to in the previous two paragraphs are directed toward the "pitch" of the Website. Inevitably, crowdfunding is "marketed" to the general public or to a sector of it, for it is *they* who must be convinced by the campaign's legal merits and/or its moral worthiness. Incorrect or false statements contained within a crowdfunding pitch may have potentially serious

ramifications for the proper administration of justice.[11] While the Tribunal does not consider that the inaccuracies on the Website match the level of seriousness which has been identified by the courts in other cases, it is important to emphasise that a crowdfunding page should never be used as a "weapon" in a dispute as part of some sort of "lawfare", to adopt a phrase used by the Court of Appeal in *Re A (a child)* [2022] 4 WLR 25, [2021] EWCA Civ 1749, at [41]. The proprieties which the litigious process demands must be observed by both the crowdfunding host and by the litigant who is the beneficiary of the funding, in the interests of fair and proper justice.

57. It is also important that donors to crowdfunding sites do not conduct themselves in any way that could be viewed as "improperly stirring up [another's] litigation", as it was described in *In Re Trepca Mines Ltd (No 2)* [1962] 3 All ER 351, [1963] Ch 199 (CA) at 219, for any such conduct could potentially be regarded as constituting maintenance. Although conduct amounting to maintenance or champerty has not constituted either a tort or a crime since the enactment of the Criminal Law Act 1967, sections 13(1) and 14(1), it remains the case that a funding contract which is so tainted may be "treated as contrary to public policy or otherwise illegal" (per section 14(2)). To that end, it is inadvisable for donors to publicly express views about the merits of a case on a crowdfunding website, or to make statements which could be perceived as having the aim of helping a crowdfunded litigation to secure more funding.

58. It is plain from the Website that Mr Henry's stated purpose in bringing this application is to establish a Scottish TV channel himself. The Website states that, "[e]veryone who donates will be invited to the launch of the new Scottish TV channel that I am planning to launch using the 5 Scottish Local TV licenses. I have a detailed business plan for the TV channel and have attracted interest from potential private investors but I need to fund this legal case first." Several of the donors on the Website explicitly express their support for this ultimate aim. Some state that Mr Henry's new TV channel would result in an

[11] This issue has been the subject of judicial comment in recent cases (see *Crosbie v Ley* [2023] 11 WLUK 10, [2023] EWHC 2626 (KB); *Ware v French* [2022] 11 WLUK 419, [2022] EWHC 3030 (KB), and other cases reviewed in: R Mulheron, "The Private Funding of Litigation: A Critical Analysis of Crowdfunding in England and Wales" in X Kramer et al (eds), *Sustaining Access to Justice: New Avenues for Costs and Funding* (Hart Publishing, 2025), chapter 6.

"independent, truthful, TV service [which] is vital for Scotland's cause. I hope the tribunal decision is favourable"; further, "[l]et's bring these licenses into Scottish ownership and give people the service they deserve", and that "[w]e really need an independent news channel to get us over the line". While the Tribunal does not consider that these or any other of the statements made by the donors on the Website reach the level of "improperly stirring up" Mr Henry's litigation, it is nevertheless inadvisable for donors to express views on matters which go beyond the scope of the application in question which is being funded. Mr Henry's application in the instant case was for interim relief in order to prevent Ofcom from renewing any That's TV L-DTPS licences, and whatever the ultimate aims of Mr Henry's application might be, any comments from donors which go beyond the application in question must be cautioned against.

I. DISPOSITION

59. For the reasons set out above, the Appeal is struck out and the application for interim relief is dismissed. Mr Henry is to pay the costs of Ofcom summarily assessed in the sum of £30,000.

Andrew Lenon KC Chair	John Alty	Professor Rachael Mulheron KC (Hon)

Charles Dhanowa CBE KC (Hon) Registrar	Date: 21 October 2025