Neutral Citation: [2006] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL
Victoria House,
Bloomsbury Place,
London WC1A 2EB

Case No: 1047/3/3/04

31 March 2006

Before:

THE HONOURABLE MR JUSTICE MANN (CHAIRMAN)
MR ADAM SCOTT TD
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

and

THE OFFICE OF COMMUNICATIONS

Respondent

Supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Appellant

Mr. Peter Roth QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

JUDGMENT: CONSEQUENTIAL DIRECTIONS AND COSTS

I INTRODUCTION

1. On 29 November 2005 the Tribunal partially upheld an appeal under section 192 of the Communications Act 2003 ("the 2003 Act") by Hutchison 3G (UK) Limited ("H3G") in respect of a determination of the Office of Communications ("OFCOM") that H3G has significant market power ("SMP") in the market for wholesale voice call termination on the H3G mobile network: see [2005] CAT 39 (the "Judgment").

2. In its conclusion, set out at paragraph 145 of the Judgment, the Tribunal stated:

> "145. We therefore conclude and find that OFCOM erred in its determination as to the existence of significant market power because it did not carry out a full assessment of the extent to which BT had countervailing buyer power. Our powers and duties include the following under section 195 of the 2003 Act:
>
> > "(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal."
>
> At present we consider that the appropriate direction would be to require OFCOM to reconsider its determination of SMP taking into account the extent to which countervailing buyer power exists in BT, and considering such other matters as are relevant as at the time of its reconsideration. However, we would wish to give the parties an opportunity to address us on the form of relief to be granted should they wish to do so."

3. By a letter dated 5 December 2005 the Tribunal invited the parties to seek to agree, insofar as possible, appropriate directions. In the event that agreement could not be reached between the parties, the Tribunal set a timetable for any written submissions the parties might be advised to make in respect of appropriate directions and on the question of costs.

II APPROPRIATE DIRECTIONS

4. In submissions filed with the Tribunal's Registry on 13 December 2005 both H3G and OFCOM indicated that they had agreed, subject to the approval of the Tribunal, directions for remission of the appeal to OFCOM in the following terms:

> "(i) The Respondent's decision dated 1 June 2004 is remitted to the Respondent for reconsideration as to whether the Appellant has significant market power in the market for mobile wholesale voice call termination on the Appellant's network taking into account the extent to which countervailing buyer power exists in the Intervener and any other matters as are relevant at the time of the Respondent's reconsideration;
>
> (ii) The Respondent's reconsideration shall take account of the Judgment."

5. BT, in its skeleton argument also filed on 13 December 2005, did not seek to make submissions on consequential orders or relief in relation to the substantive matter, namely OFCOM's reconsideration of H3G's SMP, as it considered that they are primarily matters for resolution between those parties.

III COSTS

6. The parties also entered into correspondence in relation to the issue of costs but they were unable to agree appropriate directions in that regard. Both OFCOM and BT invited the Tribunal to decide the issue of costs on the basis of the written submissions filed with the Tribunal and without recourse to a hearing. H3G, however, requested the opportunity to make oral submissions to the Tribunal on the issue of costs as this "would be an effective means of addressing the issue".

7. Insofar as the Tribunal had provisionally fixed a further hearing to deal with directions and costs for 16 December 2005, the Tribunal acceded to H3G's request.

8. Upon reflection, and having heard counsel for the parties at the hearing on 16 December 2005, we are not persuaded that a costs hearing was necessary in the present case. We consider that the issue of costs could have been dealt with as effectively and

more efficiently on the basis of written submissions, with H3G having the opportunity to file further written submissions in reply.

9. We now turn to the two applications:

- H3G's application for costs against OFCOM and BT, respectively; and

- BT's application for costs against H3G.

H3G's costs application - The views of the parties

10. H3G accepts that it did not succeed on all issues and, accordingly, does not seek to recover 100% of its costs. However, H3G seeks an order to recover 60% of its reasonably and proportionately incurred costs, estimated to be in the region of £1million, to be allocated between Ofcom and BT as the Tribunal considers appropriate. H3G, however, suggests that, in respect of the costs it is seeking to recover, an apportionment of 80% (OFCOM) and 20% (BT) might be appropriate.

11. H3G submits that, whilst there is no presumption as to costs under the Tribunal's Rules, the starting point in the present case should be that "costs follow the event". In support of its application for costs, H3G relies on the Tribunal's judgment in *Unichem v The Office of Fair Trading* [2005] CAT 31 which, H3G submitted, establishes a general principle that where an appellant has succeeded only on limited grounds in a finely balanced case it should, on a broad brush basis, recover at least half its costs reasonably and proportionately incurred. In those circumstances, H3G considers that it would be appropriate to see this as an indication that it is properly entitled to recover at least 50% of its reasonably and proportionately incurred costs.

12. In H3G's submission it succeeded on the following points:

i. OFCOM erred in taking an over-simplified approach to the effect of the end-to-end connectivity obligation by assuming that its existence inevitably leads to the conclusion that BT had no CBP and that H3G had SMP;

ii. OFCOM erred in failing to take proper account of the evidence in respect of H3G's negotiations with BT during 2001; and

iii. OFCOM erred in failing to take in to account its dispute resolution powers under Article 5 of the Access Directive;

and that these matters constituted part of H3G's core case. H3G notes that, whereas the appellant in *Unichem* succeeded on one main ground, H3G has succeeded on three grounds which formed part of its overall contention that OFCOM had failed properly to analyse BT's countervailing buyer power (CBP) when assessing H3G's SMP. Therefore, H3G contends that it is reasonably entitled to a greater proportion of its costs than 50%.

13. H3G observes that substantial portions of the pleadings and the analytical section of the Tribunal's Judgment were given over to the CBP issue and, in particular, H3G contends that its successful arguments on the relevance of CBP and, in particular, the effect of the "end to end connectivity obligation" and OFCOM's dispute resolution powers on BT's CBP, clarified important points of legal and economic analysis.

14. In respect of the arguments upon which H3G was ultimately unsuccessful, those arguments were, in H3G's submission, legitimate for it to make because of the importance of the appeal for H3G.

15. In respect of the Tribunal's judgment in *British Telecommunications v Director General of Telecommunications (RBS backhaul)* [2005] CAT 20 *("RBS backhaul: Costs"),* which relates to costs in appeals under section 192 of the 2003 Act, H3G submits that it was only on the basis of the particular facts of that case that the Tribunal ordered that costs lay where they fell and that the circumstances of the present case are materially different. In that regard H3G submits that it was central to the Tribunal's conclusions in *RBS Backhaul: Costs* that it was considering circumstances where OFCOM's decision (made in the context of a dispute resolution procedure) would have been appealed by the unsuccessful party whatever conclusion Ofcom came to. Moreover, in *RBS Backhaul: Costs* the issue upon which BT was successful was

described by the Tribunal as a "narrow legal ground"[1]. In the present case, H3G prevailed upon grounds which are relevant to H3G's position in the United Kingdom and elsewhere in Europe.

16. In support of its application to recover a proportion of its costs from BT, H3G submits that the substantive and real purpose of BT's intervention, was to defend OFCOM's finding that BT had no CBP vis-à-vis H3G and that BT was unsuccessful on this key point. In H3G's submission, BT's intervention, particularly in relation to CBP, added significantly to H3G's costs.

17. OFCOM resists H3G's application for costs. OFCOM accepts that in cases under the Competition Act 1998, where the OFT has been unsuccessful in resisting an appeal the Tribunal has generally ordered that it should pay the successful party's costs, but observes that the Tribunal has recognised that a different approach should be taken in cases involving sectoral regulators and refers to paragraph 52 of the Tribunal's judgment in *The Institute of Independent Insurance Brokers and ABTA v The Director General of Fair Trading* [2002] CAT 2 ("*GISC: Costs*"), which states:

> "Cases involving regulated industries where the costs of statutory regulation are recovered, in one way or another, from the industry itself may also raise separate issues".

OFCOM also referred us to the Tribunal judgment in *Aquavitae v Director of Water Services (Costs)* [2003] CAT 23, where the Tribunal held that the unsuccessful appellant should not have to pay the costs of the successful party, a regulator, and concluded, at paragraph 32 of its judgment:

> "in the particular circumstances of this case we consider that the Director's costs of the appeal should be regarded as part of the general costs of regulation in the sector".

18. OFCOM acknowledges that the present case is in a different statutory context and it is the regulator who is the unsuccessful party but, just as the Tribunal found in *Aquavitae* that the costs should lie where they fell when a regulator was the successful party, in

[1] See the Tribunal's judgment at paragraph 59.

OFCOM's submission they should also lie where they fall where a regulator is the unsuccessful party.

19. OFCOM submits that the Tribunal should adopt the approach taken to the award of costs in regulatory appeals under section 192 of the 2003 Act in the recent costs judgments in *RBS backhaul: Costs* and *British Telecommunications v Office of Communications (CPS save activity)* [2005] CAT 21 *("CPS save: Costs")* and that there should be no order as to costs.

20. In that regard, OFCOM submits that in the present case it was obliged, under Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive"), to determine whether any undertakings had SMP and if so to identify those undertakings. Since the case made by H3G was heavily based on the bargaining power and position of BT, OFCOM submits that if it had accepted that argument, it could well have faced an appeal by BT as "a person affected by the decision" under s.192(2) of the 2003 Act.

21. OFCOM further submits that a substantial number of the specific factors identified by the Tribunal in *RBS backhaul: Costs* and *CPS save: Costs* are relevant generally to appeals under the 2003 Act and are equally applicable in the present case. In particular OFCOM suggests that the general rule in civil litigation, under the Civil Procedure Rules ("CPR"), that an unsuccessful party will be ordered to pay the costs of a successful party does not apply to an appeal to the Tribunal under the 2003 Act and therefore there is no presumption that costs should necessarily be borne by a losing party.

22. In line with paragraph 57 of the *RBS backhaul: Costs* judgment, OFCOM submits that it is unrealistic to suggest that OFCOM should have withdrawn its decision after H3G lodged its appeal. The issues in the case involved the unusual situation where the seller had a 100% market share and the European Commission's subsequent serious doubts letter on the decision of the German telecommunications regulator supported OFCOM's approach. OFCOM notes that there was no previous judicial authority on the question of how to determine SMP in a situation such as that in the present case.

23. OFCOM submits that the present case was a case in which wider public interests (including those of end users or consumers) were at stake, and not just the private interests of H3G and that there was an important public interest in clarifying the points at issue, in particular, the dispute resolution powers that NRAs such as OFCOM have under Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive").

24. OFCOM submits that H3G is very unlikely to suffer financial hardship if the Tribunal does not make a costs order in its favour, or to be discouraged from making appeals in the future, whereas an order for costs against OFCOM at this early stage under the 2003 Act may have a 'chilling effect' by making OFCOM less resolved to defend its decisions or more ready to compromise when faced with appellants with market power and large financial resources.

25. Aside from the specific considerations that apply to appeals against the decisions of specialist regulators generally or decisions of OFCOM taken pursuant to the 2003 Act in particular, OFCOM observes that the Tribunal has identified questions which are of general relevance in determining questions of costs, [2] which include:

    i. Whether resources have been devoted to particular issues on which the appellant has not succeeded or which were not germane to the outcome of the proceedings;

    ii. Whether there was unnecessary duplication or prolixity;

    iii. Whether evidence adduced is of peripheral relevance;

    iv. Whether, in whatever respect, the conduct of the successful party has been unreasonable.

    OFCOM contends that these factors support its submission that in the present case costs should lie where they fall.

[2] See paragraph 60 of the *GISC: Costs* judgment [2002] CAT 2 and paragraph 42 of the *IBA Health (Costs)* judgment [2004] CAT 6.

26. In particular, OFCOM submits that the arguments contained in H3G's pleadings lacked clarity. Moreover, they were not those which were eventually argued in its skeleton argument or argued by H3G at the hearing. Time and resources were therefore expended on dealing with issues which were unclear and which became irrelevant and, of those issues which were actually argued by H3G at the hearing, a substantial number of them were rejected by the Tribunal in its judgment.

27. OFCOM further submits that H3G spent time in taking certain other unnecessary points, such as on confidentiality and, consequently, OFCOM had to spend a substantial amount of time dealing with these issues which were ultimately dropped by H3G.

28. In respect of H3G's submission that the Tribunal should take the approach to costs set out in its recent judgment in *Unichem*, OFCOM submits that the approach to costs in that appeal was explicitly said by the Tribunal to apply to merger reviews under section 120 of the 2002 Act and was fact specific. In OFCOM's submission, the approach taken in that different statutory context is of limited assistance in the present case.

29. In the event that the Tribunal was minded to make such an order to reflect the fact that H3G has succeeded on one of its grounds of appeal, OFCOM submits that the Tribunal should exercise its discretion so as to produce an outcome similar to that which might pertain in the Court of First Instance in Luxembourg, as described in paragraph 46 of the Tribunal's judgment in *GISC: Costs* and, on that basis, the Tribunal should order that OFCOM pay only a small proportion of whatever H3G's costs are determined to be on a detailed assessment by the Tribunal. In OFCOM's submission such an order would go some way towards achieving "some rough balance … between the requirements of fairness to the parties, on the one hand, and the need to contain the costs of litigation, on the other hand" (see paragraph 46 of *GISC: Costs*).

30. In particular, such an order would, in OFCOM's submission, recognise the fact that, of those issues which were actually argued by H3G at the hearing, a substantial number of them were rejected by the Tribunal in its judgment.

31. Such an approach is also recognised under the CPR on costs. CPR, Part 44.3(6)(a) provides that the Court may make an order that a party must pay a proportion of

another party's costs. As was stated in the Court of Appeal's judgment in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at para.111, it is open to a judge, in the light of the wide powers conferred by the CPR, to conclude that a party that has been successful in only part of his case should only have a proportion of his costs.

32. OFCOM also submitted that it was open to the Tribunal to take an issues' based approach to costs and consider the number of issues argued and who succeeded on each - which is the approach now favoured under the CPR regime. In that regard, OFCOM referred to the judgment of the Court of Appeal in the case of *Summit Property Limited v Pitmans* [2001] EWCA Civ 2020, [2002] C.P.L.R. 97.

33. BT also resists H3G's application for costs. In BT's submission there are no grounds for imposing any of H3G's costs on BT. At the hearing on 16 December 2005, Counsel for BT submitted that:

> "There is no ground for going beyond the normal rule so far as their costs are concerned. Costs are not normally awarded either for or against the Intervener, regardless of the outcome of the particular appeal, provided obviously that the Intervener has not acted unreasonably or taken points that should not have been taken and so on. I think we can say, with some justification on that, that we have tailored our submissions on almost everything to the very bare minimum throughout, both in writing and orally to make sure that we did not add to the overall costs of the case more than was inevitable by the intervention." [3]

34. BT acknowledges that H3G's arguments in relation to the dispute resolution powers of OFCOM were successful. However, insofar as BT actually supported H3G's arguments in relation to what appeared to be a misreading by OFCOM of the legislation and their powers thereunder, BT does not accept that H3G's success on this point supports H3G's application for costs against BT.

35. In respect of the question of whether BT had CBP and therefore whether there was SMP, BT submits that it sought to keep out of the fray as much as possible in relation

[3] Transcript page 31, lines 2 to 7.

to H3G's attack on OFCOM's reasoning. BT took the view that OFCOM was perfectly capable of defending its own reasoning, and, accordingly, BT deliberately did not delve into OFCOM's finding of SMP. In those circumstances, BT submits that it did not act unreasonably or take points that it should not have taken, that it tailored its submissions to avoid duplication and to ensure that BT did not add to the overall costs of the case more than was inevitable by the intervention.

BT's costs application - The views of the parties

36. BT notes that the Tribunal has previously indicated that "in some cases it will be proper to make orders either in favour of or against interveners…"[4] and that "…we would not wish to fetter our general discretion … to the effect that there may never be circumstances where costs orders will be made in favour of, or against, interveners."[5]

37. However, BT seeks an order that the H3G pay 80% (or such other proportion as the Tribunal shall consider appropriate) of BT's costs of its intervention, to be assessed if not agreed. BT accepts, in the light of the case law that, all things being equal, an intervener's costs normally would lie where they fall, absent some circumstance that produces a different result. However, in BT's submission, by advancing and maintaining a series of serious allegations about the manner in which BT conducted negotiations between itself and H3G prior to the conclusion of the BT Agreement, H3G mounted a direct attack on BT's integrity and, accordingly, BT was entitled to and necessarily had to intervene in order to counter these allegations which were in the event rejected by the Tribunal. In these circumstances, BT submits that, applying the Tribunal's approach in *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 ("*Aberdeen Journals: costs*"), BT is entitled to an award of costs in its favour against H3G.

38. At the time of BT's request for permission to intervene BT had not seen H3G's Notice of Appeal. BT accepts that it was not initially aware and that it was not until sometime after it had been admitted to the proceedings as an intervener and had seen the pleadings that it "then emerged that in order to bolster their case against OFCOM on countervailing buyer power [H3G] had massaged the facts to attempt to show that BT

[4] *Freeserve.com plc v Director General of Telecommunications*, at page 11, line 20 to 21.
[5] *GISC: Costs*, at paragraph 79.

had in some way acted unreasonably, thrown its weight about and so on".[6] In BT's submission, once it became aware of that allegation, refuting it obviously became a very substantial part of BT's effort in intervening. BT concedes that it would have maintained its intervention in any event but, absent the allegation, its intervention "would almost certainly have been more in the nature of a watching brief".[7]

III THE TRIBUNAL'S ANALYSIS

39. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Tribunal's Rules. Rule 55 replaced rule 26 of the Competition Commission Appeal Tribunal Rules 2000, SI 2000 No. 261. The Tribunal's decisions on costs under rule 26, which is materially in the same terms as rule 55 of the Tribunal's Rules, are of equal relevance to the application of rule 55.

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

> "**Costs**
>
> 55.-(1) For the purposes of these rules 'costs' means costs and expenses recoverable before the Supreme Court of England and Wales ….
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court …."

41. In the *RBS backhaul: Costs* and *CPS save: Costs* judgments, cited above, the Tribunal observed that "unlike the position in some other Tribunals … Parliament has not provided for any special rule concerning costs of appeals under the 2003 Act and, therefore, the costs of such appeals are subject to the Tribunal's wide discretion under

[6] Transcript page 29 line 3 to 7.
[7] Transcript page 29 line 21 to 22.

rule 55". It has been noted that, unlike the position under the CPR, there is no prima facie rule that the unsuccessful party pays. That doubtless reflects that fact that the public interest has a larger part to play in litigation in this Tribunal than in most civil litigation governed by the CPR.

42. We consider that the correct approach in this case is not to proceed by way of analogy with other cases, but to apply the clearly established principle that costs have to be determined on a case by case basis, relying on authorities for principles where appropriate. The Tribunal has indicated that it will deal with situations flexibly and its decisions as to costs should not be allowed to harden into rigid rules. See *GISC: Costs* at [39] and [48]; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6, ("*Freeserve: Costs*") at [11]; *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 ("*Aberdeen Journals: Costs*") at [19] and *Aquavitae v Director of Water Services (Costs)* [2003] CAT 23 at [17]. Most recently in, its judgment on costs in the cases of *The Racecourse Association & others v Office of Fair Trading* and *The British Horseracing Board v Office of Fair Trading* [2006] CAT 1 ("*RCA & BHB: Costs*"), the Tribunal reiterated, at paragraph 10 of the judgment, that "…as in all cases, there is no immutable rule as to the appropriate order for costs; and how the discretion will be exercised in any case will depend on its particular circumstances".

43. We have carefully considered the authorities cited to us by the parties and we have taken them into account so far as relevant and helpful, even if they are not cited in the judgment. We have carefully considered the various contentions as to the principles to be extracted from the cases relied on by the parties. Having done so, we consider that the correct decision in relation to the costs is that all parties should be left to bear their own costs. Our reasons for reaching that decision are as follows.

44. We deal first with costs as between H3G and OFCOM. While H3G has succeeded, it has succeeded only in part. It would be a mischaracterisation of our judgment to suggest that H3G has "substantially" succeeded on its appeal. H3G did not succeed on a very significant number of the issues that were advanced by way of argument, and those issues took significant time and effort. Furthermore, the extent to which it succeeded was reflected in the limited point which our order specifically sent back to OFCOM for reconsideration. The attack launched by H3G was far more extensive than

the level of its success. The extent of the relevant successes and failures can be judged from our judgment in the appeal. Furthermore, H3G's case was to some extent a moveable feast. At a case management conference on 19th November 2004 the Tribunal expressed concern as to the lack of clarity in H3G's case. The result was an Amended Notice of Appeal which differed considerably from the original, and there were other subsequent developments of the case. Dealing with this shifting material will have caused the incurring of unnecessary costs by the other parties. Doing the best we can to reflect the time and costs involved in the issues on which it fought and won, fought and lost, and the shifting ground, we consider that the right order for costs would be that there be no order for costs.

45. None of the other relevant factors detracts from that conclusion, in our view. Indeed, they probably reinforce it. We reiterate that this appeal took place in the context of a new European regulatory framework for electronic communications networks and services which entered into force in the United Kingdom on 25 July 2003 and was the first appeal in the context of the detailed market reviews required within that framework to be undertaken by each NRA. In particular we note that under that framework, the Decision was made in the context of a market review which the Director General of Telecommunications (OFCOM's predecessor) was obliged to carry out in the public interest. We also note that the Decision was endorsed by the European Commission. Whilst this context of itself might not mean that OFCOM should not pay costs if it gets something wrong and loses an appeal, it must be borne in mind that so far as OFCOM is concerned this is not commercial litigation.

46. This was a case in which wider public interests were at stake, not just the private interests of H3G. In particular, the Tribunal notes that the starting point of a determination of SMP is the definition appearing in Article 14(2) of the Framework Directive:

> "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording the power to behave to an appreciable extent independently of ***competitors, customers and ultimately consumers***"(emphasis added).

The public interest element means that costs might not follow the event to the same extent as in other litigation.

47. The point relied on by OFCOM that an order for costs against OFCOM at this early stage under the 2003 Act may have a "chilling effect" also supports the order that we propose to make, even if it would not, by itself, be sufficient to justify depriving H3G of costs to which it might otherwise be entitled (as to which we do not express a view). We do not, however, accept the relevance of that factor as one affecting a commercial body such as H3G.

48. For those reasons, therefore, we say that there should be no order as to costs as between H3G and OFCOM.

49. The same order is appropriate in relation to the costs of BT. In *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6 the Tribunal held that in the telecommunications sector where Interveners are likely to appear regularly before the Tribunal, the costs of intervention will often in justice lie where they fall. That is doubtless because the intervener is usually not a necessary party and will often intervene for its own purposes, or perhaps partly for the purpose of assisting the Tribunal. Those factors will often make it unfair to expect either of the original parties to pay the intervener's costs, or to recover costs from the intervener. They apply in the present case.

50. In respect of BT's application to recover 80% of its costs from H3G, the Tribunal observes that BT's original request for permission to intervene in the present case was made on 24 August 2004, before BT had seen any of the pleadings in the appeal. In paragraph 9 of that request BT set out its grounds for intervening as follows:

    i. A finding that BT does have countervailing buyer power would have adverse consequences for BT and its customers were this finding to result in the Respondent removing the Appellant's SMP status in the market. Were the case to set a precedent, the harm is likely to be significantly increased if other providers of call termination services (in both fixed and mobile markets) were able to avoid

SMP designation and therefore SMP conditions and take advantage of BT's position as a forced purchaser of this essential input;

ii. There is a risk that BT could suffer harm as a result of the disclosure to a competitor of commercially sensitive information and furthermore that this could have a detrimental impact on the competitive process; and

iii. BT anticipates that it can provide assistance to the Tribunal and the Respondent in the provision of information in respect of the Appellant and BT's negotiations and the BT agreement.

51. We note BT's submission that by advancing and maintaining a series of allegations about the manner in which BT conducted negotiations between itself and H3G prior to the conclusion of the BT Agreement, H3G mounted a direct attack on BT's integrity. However, that came later. At the stage at which it saw the pleadings containing the allegations, BT had already intervened on the grounds set out above. So we do not accept that BT "necessarily had to intervene in order to counter these allegations", though resisting them became appropriate at the later stage.

52. Whilst the Tribunal acknowledges that much of BT's intervention in the final stages of the appeal focused on the negotiations between itself and H3G, we consider that the evidence and submissions provided by BT in respect of the negotiations fall in the main within ground (iii) of the grounds upon which BT was permitted to intervene, rather than simply refuting H3G's allegations. With regard to *Aberdeen Journals: costs*, the Tribunal notes that a number of the allegations made by the appellant in that case were only distantly related to the issue that the Tribunal was considering and were described as "little more than unparticularised assertions".[8] In the present case the only allegations made by H3G related to the core issue of CBP.

53. For those reasons, therefore, we think that much of the purpose underlying BT's intervention was the protection (albeit legitimate) of its own position and interest, though we acknowledge the assistance that its participation gave to the Tribunal. In the all the circumstances we think that the order in relation to the costs of the intervention

[8] See *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11 at paragraphs 196 and 201.

is that they should lie where they fall. For the sake of clarity, we would add that we can see no reason whatsoever why it should bear any of H3G's costs.

The Hon Mr Justice Mann Adam Scott Paul Stoneman

Charles Dhanowa 31 March 2006
Registrar