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IN THE COMPETITION APPEAL TRIBUNAL Case No. 1047/3/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

16th December 2005

Before:
THE HON. MR. JUSTICE MANN
(Chairman)

MR. ADAM SCOTT TD
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED
Applicant

and

OFFICE OF COMMUNICATIONS
Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC Intervener

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

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.

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DIRECTIONS & COSTS HEARING

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1 THE CHAIRMAN: Mr. Green, before you start, you and all the parties will be aware that two of the
2 three parties were content to have this matter dealt with on paper. Your side wished to make
3 oral submissions and that is fine, that is your entitlement, but we are very keen that this should
4 not develop into another round of extensive satellite litigation and so we are minded to impose
5 a time guillotine on each of your respective submissions this morning. Subject to observations
6 you may want to make, we are minded to say that you should at least have a maximum of half
7 an hour (that does not mean that anybody is obliged to take half an hour) going down the line
8 and then, to pick up any little points that have arisen, going back up the line just 10 minutes
9 each by way of replies, because we want to get this well out of the way before the lunch
10 adjournment.
11 MR. GREEN: I would hope I would not be more than half an hour in any event.
12 THE CHAIRMAN: Good. Mr. Barling? Mr. Roth? Very well, Mr. Green?
13 MR. GREEN: There are two issues this morning. The first issue concerns the order, the second
14 concerns costs. The Tribunal will be aware that the parties are agreed as to the terms of the
15 order if the Tribunal is content with that?
16 THE CHAIRMAN: We are and we have no observations to make in relation to that and we can
17 move on to the contentious issue which is costs.
18 MR. GREEN: Right. So far as costs are concerned, it seems to us that there are essentially three
19 issues, and they may be broken down as follows:
20 (i) Should H3G be awarded costs in principle?
21 (ii) If so, what percentage of its costs; and
22 (iii) who should pay them – the allocation between Ofcom and BT?
23 The basis of H3G's claim is as follows: we seek, as we have said in our skeleton, 60 per cent.
24 of our reasonably incurred costs, we therefore do not seek all of our costs. We asked for 60 per
25 cent. because we accept we did not win on some issues. We believe that 40 per cent. is
26 a generous discount because the points that we did not prevail on were largely legal points and
27 would not have accounted for 40 per cent., but that is taking a broad brush approach. We
28 believe that the approach we have taken is consistent with this Tribunal's previous decision
29 making practice in particular in *Unichem*, which is a non-telecoms' case, but also in *Floe*,
30 which was a telecoms' case. The basic position is there is no presumption in this Tribunal as
31 to how costs should go at the end of the case, no presumption that costs follow the event but, as
32 the Tribunal stated in *Unichem* (para.17) the successful party normally gets a portion of its
33 costs. So we accept there are no presumptions in any direction, but as a practice, or a starting
34 point for the analysis we say that the position is as in *Unichem*, that we should get a portion of

1 costs. You will have seen that Ofcom take the opposite view. They rely on the *Backhaul* case
2 and they say that there should be no costs awarded against them whatsoever, and I will deal
3 with their proposition shortly.
4 We submit that we won on a basic point. For Hutchison an SMP determination as
5 a new entrant is a serious regulatory step, not only in this country but also elsewhere in the EC,
6 and that is why Hutchison felt obliged to challenge the findings both in Ireland and in this
7 country. The Tribunal found, after the hearing, that Ofcom had erred in its analysis of end to
8 end connectivity, in its analysis of Ofcom's powers under the access Directive and indeed the
9 interconnection agreement, and that it had failed to take account of the actual evidence
10 pertaining to the negotiations between BT and Hutchison both in the past and in the future.
11 These findings will all impact upon the way that the Tribunal's direction is implemented by
12 Ofcom over the ensuing months. My client has already had a preliminary discussion with
13 Ofcom about how that may be played out. So on the basis of the Tribunal's case law we
14 submit that Hutchison should be entitled to some portion of its costs and that the authorities
15 support us in this regard.
16 Can I take you very briefly to three authorities, and simply pick up some key
17 paragraphs? The first authority is *Unichem* and I just want to show you four paragraphs of
18 *Unichem* (bundle I1, tab 12). *Unichem* was a case concerning a merger under the Enterprise
19 Act.
20 PROFESSOR STONEMAN: Mr. Green, before you go on to this, is there any reason why this is
21 marked "Confidential contains business secrets"?
22 MR. GREEN: None whatsoever.
23 THE CHAIRMAN: It is the usual excessive, compulsive behaviour it might be thought, Mr. Green
24 – not yours personally, you understand.
25 MR. GREEN: You do not know that! (Laughter)
26 THE CHAIRMAN: Mr. Green, I did actually make observations about this before in this case, that
27 the bandying around of this notion is capable of being rather obstructive, or unnecessarily
28 obstructive to the proper conduct of hearings such as we had. It may well be just a word
29 processing mistake – I am sure that it was no more than that because this is a bundle of
30 authorities. But it may actually betoken an attitude which, if I can gently say, needs to be
31 looked at for the purpose of future hearings. I make no ruling and I make no criticism at this
32 particular point, but I made my observations before about this, and I think it needs to be looked
33 at for the future. I am sure it will be.

1 MR. GREEN: We take the point. This was, I am afraid, an administrative error. It was not intended
2 in any way to be confidential.
3 In *Unichem*, who was appealing an Office of Fair Trading Decision which had cleared
4 a merger, the Tribunal stated at para. 15:
5 "The Tribunal made clear in *IBA Health: (Costs)* [a previous merger case] that
6 whether costs will be awarded in a case will depend on the particular circumstances
7 of that case."
8 THE CHAIRMAN: You are reading from somewhere?
9 MR. GREEN: Paragraph 15 of *Unichem.* It is a convenient place where the general position
10 adopted by the Tribunal is set out, and you will see that they cite from paras. 39 and 42 of *IBA*,
11 where they say that there is no general principle that the losing party should always pay the
12 costs "… only if it has been guilty of a manifest error or unreasonable behaviour." So the OFT
13 in that case can be held liable – and was held liable – to pay costs, even though it was not
14 necessarily suggested that they had acted unreasonably or had committed a manifest error.
15 ".. Many factors may be relevant … Such factors may include whether the applicant
16 has succeeded to a significant extent on the basis of new material introduced after the
17 OFT's decision, whether resources have been devoted to particular issues on which
18 the appellant has not succeeded, or which were not germane to the solution of the
19 case, whether there is unnecessary duplication or prolixity, whether evidence
20 adduced is of peripheral relevance, or whether, in whatever respect, the conduct of
21 the successful party has been unreasonable."
22 So in other words, all relevant factors can come in to play. I think it is also relevant just to
23 jump to para. 17, which I think is important and again, it is only a general statement.
24 " 17. However, in general terms, the Tribunal considers that the application of
25 the principles set out in *IBA Health: (Costs)* will normally result in the successful
26 party being awarded at least a portion of its costs in Section 120 cases."
27 So that is in merger cases, of course. Then paras. 24 and 25 in which the Tribunal concludes:
28 "24. It does appear to the Tribunal that substantial parts of the written and oral
29 submissions made by UniChem did not focus on those points in respect of which the
30 Tribunal ultimately accepted UniChem's arguments. In effect, UniChem succeeded
31 mainly on one ground (Ground 3) of the four grounds originally advanced, affecting
32 four paragraphs out of a 50-paragraph decision. As the Tribunal said at paragraph
33 278 of the judgment, much of the contested Decision was soundly based …"
34 and they upheld a number of OFT findings.

1 "25. In the circumstances of this case it appears to the Tribunal that UniChem should
2 recover some of its costs of the application. However, where an applicant has
3 succeeded on only limited grounds, in a finely balanced case, it would not be
4 appropriate to make an award to cover all of its costs. In our view, on a broad brush
5 basis, UniChem should recover half its costs reasonably and proportionately incurred,
6 as assessed excluding the costs incurred wholly or mainly as a result of Phoenix's
7 intervention."
8 So UniChem won on one ground, a substantial ground, in other words a material ground, so it
9 was sufficient to have the Decision set aside, and a 50 per cent. order was made. That
10 confirms the position in *IBA*. In *IBA* – I do not think I need to take you to it unless any of my
11 friends wish me to – the Tribunal emphasised that the Tribunal has a wide discretion. It covers
12 Competition Act 1998 Appeals and Judicial Reviews under the Enterprise Act. There are no
13 presumptions. In that case the Appellant, IBA, who was again complaining about the
14 clearance of a merger, got all of its costs, but this was split 82.5 per cent. against the OFT and
15 17.5 per cent. against the Intervener. The basic principle, said the Tribunal, was that
16 intervener's costs lie where they fall (para.61) particularly for a large, well resourced
17 Intervener, but the Intervener can nonetheless pay some of the successful Appellant's costs.
18 So obviously the two principles are not mutually exclusive (paras. 61-63). That is
19 a competition case.
20 A telecoms' case is the *Floe* case ----
21 MR. SCOTT: Mr. Green, just before you leave *IBA* and *Unichem*, I think it is worth observing that
22 they were both merger cases conducted at considerable speed. There was not the time, as
23 I recall in either case, really to refine down the issues in the way that the Tribunal attempted to
24 invite you to do – well we did invite you to do in this case – and so I think there is a slight
25 difference between a high speed merger case and a case conducted with the deliberation with
26 which this case has been conducted.
27 MR. GREEN: Yes, I see that. I am not certain which way it works. I think it actually works in our
28 favour because we were penalised in *Unichem.* In *Unichem*, as you know, you get a Decision
29 from the OFT which, because of time constraints is generally relatively short, and it is not
30 always self-evident what the underlying reason was. That then becomes much clearer once the
31 OFT puts in its evidence. At that point the parties have an opportunity, even in a high speed
32 procedure, to refine their argument. So what may appear arguable when you see the Decision
33 may become less so once you see the evidence, and that is essentially what happened with
34 *Unichem*. It became plain once the OFT had lodged its evidence that there was a single main

1 issue. We succeeded on that and we got 50 per cent. of our costs. It might have been said that
2 we could have had 100 per cent. on the basis of the accelerated procedure and, as the Tribunal
3 recognised, there is a necessary refinement process because you do not know what the real
4 arguments are when you see what is a relatively abbreviated OFT Decision.
5 So far as telecoms' cases are concerned, in the *Floe* case the Tribunal awarded costs
6 (tab 9) – the costs' part of that judgment start at para.22. You will see from para.2 of the case
7 that this was more akin to a dominance/abuse case. It was not a dispute resolution case and
8 I think the only thing you need to notice is in para.30 Ofcom was required to pay the costs,
9 even though the applicant did not win on all grounds.
10 "Although Floe was not successful on the primary argument, it was not an argument
11 that was wholly lacking in merit and, in any event, the Tribunal is yet to be satisfied
12 on, and has remitted to OFCOM, the issue of whether the statutory framework
13 complies with the RTTE and Authorisation Directives."
14 Nevertheless, para. 35:
15 "Accordingly, we make an order that Floe's costs of the Appeal … are met by
16 OFCOM on the standard basis, such costs to be agreed …"
17 So there is nothing peculiar about telecoms. cases. Ofcom says that the key to this case is the
18 *Backhaul* case (tab 10) and this brings me to a very fundamental distinction in these cases. In
19 *Backhaul* Ofcom was concerned with the workings of a dispute resolution procedure. In the
20 words, the dispute between the parties had been remitted to Ofcom, in effect, to arbitrate it, in
21 its regulatory capacity of course. But the real question, as the Tribunal identified in para.2 of
22 the judgment was, if you like, should an Arbitrator – who is piggy in the middle – be forced to
23 pay the successful parties' costs.
24 As the Tribunal noted, whoever lost the dispute resolution procedure was going to
25 appeal and Ofcom really had no choice but to defend it. Either they were going to be appealed
26 by BT or by Vodafone and they made that point in para.55. The question which singled out
27 this appeal from others was identified in advance by the Tribunal (set out in para.2).
28 THE CHAIRMAN: Which tab?
29 MR. GREEN: Tab 10, para. 2.
30 "… what is the right approach to costs in a regulatory field like this where there is
31 a real likelihood of litigation of one sort or another between these two particular
32 parties? This is, in a sense, part of the regulatory system and in this particular case
33 the Director was, at least formally speaking, adjudicating on a dispute that had been
34 brought to him by Vodafone to resolve."

1 If you jump to para. 55 the Tribunal says:
2 "The dispute in this case was, therefore, one which the Director resolved pursuant to
3 the then-applicable statutory procedure. Having resolved the matter against BT, in
4 our view OFCOM (which by then had inherited the Director's function) was bound to
5 appear before the Tribunal to defend BT's appeal, against the contested Direction.
6 OFCOM, in our view, would have been in the same position had the Director reached
7 the opposite view and OFCOM had been facing an appeal by Vodafone."
8 So there is a particular type of case where Ofcom is acting as a form of Arbitrator, or
9 adjudicator, and the gist of the question – one can understand why it was posed – was should
10 the Adjudicator/Judge bear the costs of the successful appeal, because either way the
11 Adjudicator is going to find himself defending the position.
12 If one asks oneself is this case on the *Floe* and *Unichem* side of the line, or is it on the
13 dispute resolution side of the line, we would submit unequivocally it falls on the *Unichem,*
14 *IBA, Floe* side of the line. What we were concerned with here was a determination in
15 substance that Hutchison was dominant – had SMP. That, as a first matter, puts you squarely
16 into the traditional regulatory activities which were in issue in *Unichem* and *Floe. Floe* was
17 a s.18 case (an abuse of dominance case). So SMP equals dominance. You then get on to the
18 question of remedies, and although it is not right to call it a punishment as it would be in an
19 abuse case, you are dealing with the consequences which are said to be adverse to competition.
20 This is not a case referred by BT or Hutchison for Ofcom for dispute resolution, so we say we
21 fall squarely on what we say is the correct side of the line, and we therefore fall into the broad
22 presumptions or rules of thumb set out in *Unichem.*
23 So, a summary of the case law: winner should get some portion of costs, issue by
24 issue is a reasonable approach, assessment is broad brush; and Interveners bear their own costs
25 but may be required to pay successful Appellants' costs, at least in some portion.
26 Can I turn from my submissions to the response submissions of Ofcom, set out in
27 particular at para.13 of their skeleton, and I will just summarise each one and say what our
28 response is. Ofcom say in response to my submissions first that they were obliged to
29 determine whether H3G had SMP, but that is quite unlike a dispute resolution case. Ofcom
30 could have delayed, pending more information. Ofcom is in no different position to the OFT
31 in *Unichem*, where the Office of Fair Trading, under the Enterprise Act, had to take a decision
32 either way within a time frame. That is not a point which impacted in costs in *Unichem.* It is
33 not a differentiating point which tells you which side of the line we are on, whether it is *Floe*

1 and *Unichem* and other cases, or whether it is *Backhaul*, in fact, this is a characteristic of both
2 sides of the line.
3 Secondly, they say well, BT could have appealed. But again that is exactly the same
4 as in a merger case. If, in the *Unichem* case the OFT had provisionally concluded against the
5 merger then Phoenix could have appealed. In all of these regulatory cases there is usually
6 a series of competitors, one of whom will appeal. That is a characteristic of all cases. It is not
7 a distinguishing factor of this case.
8 The third point that Ofcom makes, is that it is unrealistic for Ofcom to have
9 withdrawn its Decision. Well, it would have been reasonable for them to have withdrawn it,
10 we would have preferred them to have done so, but in all cases where costs are awarded
11 against the Regulator, it could be said that the Regulator should have withdrawn the Decision.
12 Fourthly, they say there is no previous authority – but again, that is a characteristic of
13 all cases, including those where costs have been awarded, in many cases decided by the
14 Tribunal, extremely important points of principle have been arrived at which have guided
15 Regulators and Parties in the future. It is not something which helps decide which side of the
16 line this case should be on.
17 Fifthly, Ofcom says that it has not acted unreasonably, but the authorities make it
18 clear that that is irrelevant – certainly, that was the point in *IBA* and Mr. Roth has given me this
19 morning a copy of a Court of Appeal Judgment, *Summit Property Limited v Pitmans (A Firm*,
20 in which the Court of Appeal said precisely the same thing that whether or not a party has
21 acted reasonably (para.16) is not a reason for not awarding costs. Of course, if they did act
22 unreasonably or manifestly erred, then that may be a reason for awarding costs. But the
23 Tribunal has already addressed that point and has made it clear in *Unichem* and the other
24 merger cases, that whether they act reasonably or not is not a bar to costs being awarded.
25 Then Ofcom says there is a wider public interest in these issues. Well yes, there may
26 be. My client's interest is in preserving its own position, but precisely the same applies in very
27 many regulatory cases.
28 The final point that Ofcom makes is that there is no financial hardship to Hutchison
29 – there could be some chilling effect, but one could make precisely these points in cases where
30 costs are awarded. It is not a basis for refusing someone costs. In all cases in front of this
31 Tribunal one is very regularly dealing with parties with substantial resources. The chilling
32 effect could, of course, operate the other way. If Regulators escape paying costs whenever
33 they are wrong – which is really the upshot of Ofcom's position, that they never pay costs
34 though they probably have a footnote saying "… save in cases of manifest unreasonableness",

1 but that is the upshot, because they are factors for not paying costs which would arise in almost
2 every single case.
3 PROFESSOR STONEMAN: Mr. Green, if I could stop your flow there. The financial hardship
4 issue, could you let me know what would be the approximate size of H3G's annual regulatory
5 expenditure, regulatory budget?
6 MR. GREEN: I would have to take instructions, I really do not know. (After a pause) In the United
7 Kingdom and Ireland there are two people within Hutchison, but turning that into financial
8 figures I really would not – and if you would like the information we can try and estimate it.
9 I am not suggesting that Hutchison is not a substantial organisation, plainly you only have to
10 look at the website to see that it is. It would seem to be saying that is a factor in cases where
11 costs are awarded, so it is not a bar to costs being awarded.
12 PROFESSOR STONEMAN: I wanted to get a feel for the total expenditure.
13 MR. GREEN: If you would like me to be more precise I can find that after the hearing.
14 PROFESSOR STONEMAN: But if it is two people, then fine. Thank you.
15 THE CHAIRMAN: It must be more than just the cost of two people, because the two people instruct
16 people in litigation and so on, so it is many times the pure salary or employment costs of two
17 people.
18 MR. GREEN: Absolutely, yes.
19 THE CHAIRMAN: We are talking very, very significant six if not seven figures, are we not?
20 MR. GREEN: Anybody who enters these markets pays substantial regulatory costs. It is
21 unavoidable – you cannot avoid it. Of course, you cannot recover these costs. That is
22 a downside. One might say when you into litigation and you win that is the portion of the
23 costs that you can recover.
24 MR. SCOTT: I think the point in the case to which you are referring at the moment, *RBS Backhaul*,
25 there was a reference to BT in fact and its regulatory costs – I do not have the paragraph
26 number immediately to hand.
27 MR. GREEN: I think the logic of the Tribunal's judgment was that ----
28 MR. SCOTT: It is para.62, though this does relate to BT:
29 "BT has benefited commercially from the stance which it legitimately took. We do
30 not consider BT will suffer material financial hardship if the costs of this case are
31 treated as part of the general regulatory costs which BT incurs, by virtue of the fact
32 that it has significant market power."
33 That, you may say, is an argument for you, but we have made no substantive finding in relation
34 to significant market power.

1 MR. GREEN: BT obviously have a very large regulatory facility and they are extremely well
2 resourced. One of the points which the Tribunal did alight upon is the fact that BT benefited
3 immediately and financially from the dispute resolution procedure, to the tune of many
4 millions – that is not a factor here.
5 Can I deal briefly with four points made by Ofcom which are intended to suggest,
6 I think, some criticism of Hutchison's conduct, set out at para.15 of their skeleton. First, it is
7 suggested that the pleadings lacked clarity. With respect, we would disagree with this
8 fundamentally. The purpose of pleadings under the Rules is to identify in broad terms the
9 issues. The issues that we ultimately argued upon, and elaborated upon, were essentially those
10 which were in the pleadings. We tried to set out the pleadings fully. We were responding to
11 a Decision which – without necessarily being critical – was a short Decision, and which
12 contained some elements which gave rise to real confusion. For example, the suggestion in the
13 key paragraph 3.32 that there was no mechanism for reducing costs under the agreement,
14 which was seen as an important plank of the central paragraph of the Decision. That was
15 a point which, when it came to the actual hearing, Ofcom then said was just a passing
16 comment. That had caused very considerable anxiety in Hutchison, and had stirred Hutchison
17 to produce evidence on a point about costs' movement, and then a debate had arisen with
18 Ofcom. If we had been told that that was a passing comment, and we need not worry about
19 any part of the last few sentences of 3.32 that would have been an entirely different matter.
20 MR. SCOTT: I think if you can pause on that, that was certainly not a passing matter in relation to
21 BT, and one of the matters raised by BT in their request to intervene was their concern that as
22 from 1st September 2004 H3G's weighted average call termination charges would be around 75
23 per cent. higher than T-Mobile, and that other MNOs would be the same or lower. So that
24 non-reduction was of some significance to BT and to the general public who were having to
25 pay the higher retail rates based on those wholesale rates.
26 MR. GREEN: Yes, it highlights the importance of the point we made, which is that it is Ofcom's
27 Decision we are appealing, and if it is a non-issue for them then it is not a hare which any of
28 the other parties needs to set running; and because we were challenging a Decision – not BT's
29 position, we are challenging the Decision – I do not think it is sensible for the Tribunal to get
30 involved in a too-ing and fro-ing about that sort of issue, because there are points that we could
31 make as well.
32 The next point that Ofcom make against us – and I probably have only five minutes
33 left – is witness statement evidence. If Ofcom had made it clear at the outset, for example in
34 relation to this issue, that cost movements were not a serious issue for them – little more than

1 a passing comment – then again, a considerable amount of costs would not have been incurred
2 by us. Hares were set running, which were set running unnecessarily. As to the other
3 evidence, it largely concerned CBP, this was designed to show a real issue, in other words,
4 a material issue which we submitted Ofcom had not considered and that was plainly relevant to
5 the Tribunal's assessment. Then Ofcom say that some of our issues were rejected. Yes, they
6 were, and we accept that on an issues by issues basis a discount is appropriate.
7 Finally, confidentiality, that was an issue between Hutchison and BT – it was not
8 a confidentiality issue between ourselves and the Regulatory, plainly they saw everything. We
9 did make claims for confidentiality, but what ultimately happened was that very quickly
10 a *modus operandi* was agreed with BT whereby BT's external legal advisers and internal legal
11 advisers saw everything without a problem arising, and if there was a problem arising it was
12 agreed that they would come back to us. We brought that to the attention of the Tribunal, the
13 Tribunal said that it was happy for the parties to agree as to confidentiality in that way, and
14 there were no disputes before the Tribunal. In my experience we resolved confidentiality in
15 a quicker and more cost effective way than in many other cases where the parties have an
16 intense and very sensitive relationship between themselves. So there was a bit of too-ing and
17 fro-ing, but it was resolved. The Tribunal was not troubled with confidentiality; and costs
18 were not materially incurred in relation to confidentiality.
19 Ofcom suggested that it had to send a number of letters. Yes, it did, and again I do
20 not submit that it is profitable to go through the correspondence between the solicitors, but
21 Ofcom was bound to be involved in confidentiality in any event. As regulator they would have
22 to have seen arrangements between ourselves and BT and so on. So there is nothing in those
23 suggestions which impacts upon costs.
24 Very finally, just a few points as to BT. BT lost on the key issue of countervailing
25 buyer power. That was the basis upon which they made their application to intervene. They
26 said that was a serious issue for them and they were going to defend that to the hilt, which they
27 did and they lost on that. They lost on the main issue. They introduced evidence, in the form
28 of Mr. Lockyer, which engendered costs, but the Tribunal, having looked at that evidence, has
29 said that it is material, it shows that Ofcom failed to address an issue which it should have
30 addressed.
31 MR. SCOTT: I am sorry, Mr. Green, in which sense are you saying that BT "lost" on countervailing
32 buyer power? We have made no substantive decision on countervailing buyer power.

MR. GREEN: They said that end to end connectivity was the end of the issue. They said they could not have countervailing buyer power, we said end to end connectivity was not a yes or no solution, it was a whole question of fact. BT said ----

MR. SCOTT: Mr. Green, I would like to take you back a bit. You said there was no obligation of end to end connectivity for quite a long time in these proceedings. BT said there was an obligation of end to end connectivity. They believed that that obligation existed at all material times, and you eventually accepted that.

MR. GREEN: Having seen their chronological history we accepted that it went back further than we had originally identified, but it did not affect our analysis, because they were saying that end to end connectivity was the answer, and it went back a very long way. We said "Yes", you do have end to end connectivity but it is not the answer. That was the fundamental issue, and on that we did win.

MR. SCOTT: But, Mr. Green, if you believe that our judgment is a judgment on the substance of countervailing buyer power then we would ask you to re-read our judgment. It is not a judgment on the substance of countervailing buyer power.

MR. GREEN: No, of course it is not, but it is a judgment on the issue whether there is a "binary solution" as the Tribunal put it, in other words connectivity is the answer and negates CBP.

MR. SCOTT: Yes, we are saying it is a more complex issue, the complex issue that Ofcom have to examine.

MR. GREEN: We did not ask you to decide countervailing buyer power. We said that the evidence shows that it is a material issue which Ofcom failed to address.

MR. SCOTT: But in your skeleton argument for today you are using words like "substantially", "lost" in relation to BT, which we find mischaracterising our decision.

MR. GREEN: With respect, obviously you are the authors of your decision, but as I understand your decision you have said that Ofcom erred in failing to examine the facts concerning countervailing buyer power. We did not ask you to decide whether there was or there was not. We simply said that Ofcom has misdirected itself. Evidence was put before you which showed that it was a material issue, and there were real things for Ofcom to grapple with, and therefore that is the issue we prevailed on, because we were not asking you to decide something, ours was a submission that they had failed to address their mind to a central issue which, as I understand your judgment, you agree with us on. BT took Ofcom's line, which was that the end to end connectivity meant that they could not have countervailing buyer power – that was the opposite of our argument.

MR. SCOTT: Yes, as you know, we do not believe that this is a black and white situation.

1 MR. GREEN: Exactly.
2 MR. SCOTT: But our reading of your skeleton for this hearing suggests a mischaracterisation.
3 MR. GREEN: I am sorry if I have mischaracterised it. All I intend to say is that we submitted it was
4 not a black and white issue. We asked you to remit it to Ofcom to be reconsidered in the light
5 of the facts. BT said in effect it was a black and white issue because of end to end
6 connectivity. We submitted end to end connectivity was not a 100 per cent answer. I think we
7 submitted it was not a binary solution, a "yes" or "no".
8 MR. SCOTT: Well, no doubt Mr. Barling and Mr. Roth will come to that in due course, thank you.
9 MR. GREEN: I hope I have not mis-read your judgment on that, but that is as we understand it, we
10 won on that issue.
11 The other point so far as BT are concerned is that BT agreed with us in relation to
12 dispute resolution, so on those aspects the Access Directive and so on, interpretation of the
13 Agreement, there was no basis for BT to disagree with us. So on a substantial issue ----
14 THE CHAIRMAN: I am sorry, Mr. Green, just to take you back to the last submission you were
15 making. You have just said you were not making a case for BT having countervailing buyer
16 power, and certainly that was eventually the case at the hearing, but as I read your skeleton
17 argument until the hearing you were actually making a positive case that they did. You were
18 inviting us in the skeleton argument to make a finding – I am looking at para.112 of your
19 skeleton argument.
20 MR. GREEN: I do not know if you recall what happened was at the first case management
21 conference, where Sir Christopher Bellamy was presiding, we said that you do not need to
22 decide it – I have the transcript references somewhere – because there are no findings in the
23 Decision, it is not something which the Tribunal needs to decide. You need to decide only
24 whether Ofcom has misdirected itself. The President then said "We see that, but we wish to
25 leave it open as an issue". So the Tribunal took the initiative to leave it as an issue which the
26 Tribunal may wish to come back to.
27 As I recollect the first hearing that you presided over the same position was arrived at,
28 that it was left open as an issue, but we were not saying that it was principally our case. Now,
29 we therefore had to leave open the possibility that the Tribunal may wish to decide it, and we
30 therefore had to cater for that but it was never our primary position that that should be the case,
31 and we have made that position I think clear from the very first case management conference
32 – the first substantive one – in November 2004. So we were in the difficult position, we were
33 not contemplating there being a huge bust-up about the actual facts, but we could not
34 completely rule out the possibility that the Tribunal may want to go down that route, but our

1 principal position was that the evidence shows you that it is a material issue which Ofcom did
2 not analyse, and therefore it needs to be remitted for a proper assessment. That is how the
3 matter arose.
4 MR. SCOTT: Another fairly major issue that arose at that case management conference, and it is on
5 p.22 of document 21 in bundle I2, was your assertion that what mattered here was the exercise
6 of SMP rather than the existence of SMP, and that is a major issue it seems to me upon which
7 Ofcom have been upheld rather than losing.
8 MR. GREEN: If I understand you that is the *Tetra Laval* point?
9 MR. SCOTT: That is the *Tetra Laval* point.
10 MR. GREEN: Yes, well I lost on that point and that was largely a question of law, analysis of *Tetra*
11 *Laval*, we accept we lost on that and you will make a discount in any event to take account of
12 that. We have suggested 40 per cent. It did not engage in a lot of factual evidence, it was
13 largely a matter of submissions, but we are in your hands, you will make an assessment and
14 make any award on that basis, we accept that. We take that as a given.
15 PROFESSOR STONEMAN: Could I ask you why then in para. 13(3) of your skeleton for today you
16 seem to be putting forward the argument as BT adopted Ofcom's arguments on *Tetra Laval* we
17 should be giving you greater costs?
18 MR. GREEN: No, I think we are simply saying that so far as BT is concerned, BT's participation on
19 that has not added to the costs in any way. Their written submissions were very brief on *Tetra*
20 *Laval*, their oral submissions largely adopted Mr. Roth's submissions, so far as BT is
21 concerned, the question of *Tetra Laval* did not add or subtract materially to the costs' issue.
22 We suggest it is essentially neutral, but it is not a reason for BT to get costs, because they
23 really did not incur any material costs on that issue. They came into this appeal as they stated
24 in their Notice of Application defend the CBP point.
25 PROFESSOR STONEMAN: But this is an argument (paras. 13 and 14) is why BT should pay
26 H3G's costs and you are saying that because they adopted what we agreed was the correct
27 interpretation of *Tetra Laval* in opposition to yourselves?
28 MR. GREEN: We are asking for a small percentage, with 20 per cent. of our costs from BT to
29 reflect the fact that they lost on countervailing buyer power and the adopted Ofcom's position
30 and we prevailed on that point.
31 PROFESSOR STONEMAN: Not on *Tetra Laval*.
32 MR. GREEN: No, no, doing it mathematically, if we were entitled to100 per cent. of our costs we
33 first of all say only reasonably incurred, and rule of thumb is often 65, 70 per cent. when things
34 are taxed down, so we then say 60 per cent. of 65/70 per cent. You have punished us by

1 discount on *Tetra Laval*, which is why we only get 60 per cent. of reasonably incurred costs, so
2 we are now in the realms of those issues upon which we substantially prevailed and therefore
3 you allocate a portion as between those parties. So in our formulation we have already taken
4 account of the fact we lost on that point.
5 PROFESSOR STONEMAN: Go to para.13 in your skeleton, you say because of (1) H3G should get
6 some costs from BT. Because of (2) what way is that going? Because of (3) what way is that
7 going?
8 MR. GREEN: It is (1), it is the point ----
9 PROFESSOR STONEMAN: So it is just (1), so (2) and (3) are irrelevant.
10 MR. GREEN: Maybe 13 is slightly misleading. It is simply intended to summarise what BT's
11 position was on the main issues. On some issues they lost, some they agreed with us and some
12 they adopted Ofcom's argument, and that is all it is intended to do. But we do say their
13 participation in relation to CBP added to costs.
14 THE CHAIRMAN: I am sorry, Mr. Green, it is intended to do more than summarise the issues
15 because from those conclusions you draw your conclusions in para.14.
16 MR. GREEN: If it is misleading, I apologise. It is not intended to be, but I think the way in which
17 we worked out the formulation of 20 per cent. is simply a reflection of the CBP issue, that is all
18 it is intended to do.
19 THE CHAIRMAN: So we can ignore (2) and (3), or if we think (2) and (3) are important, we can
20 count them against you as opposed to for you.
21 MR. GREEN: Well they are not against us because BT cannot agree with us on a point and then get
22 its costs against us for those points.
23 PROFESSOR STONEMAN: But on (3)?
24 MR. GREEN: What were BT's costs? There were a few paragraphs in writing and it adopted
25 Mr. Roth's submissions, so there is nothing substantial in relation to that.
26 PROFESSOR STONEMAN: Just before we move on, I do not know if you are allowed to tell us,
27 I would find it useful if I found the ball park figure of what you are after, what are the total
28 reasonably incurred costs in this case? I am not asking for the last penny, I am asking for the
29 ball park figure?
30 MR. GREEN: Of what we are asking for?
31 PROFESSOR STONEMAN: What are the total costs that have to be covered by whoever is paying
32 them, total H3G costs – reasonably incurred?
33 MR. GREEN: The reasonably incurred costs?
34 PROFESSOR STONEMAN: Yes, 100 per cent.

1 THE CHAIRMAN: Mr. Green, if it helps, I think what Professor Stoneman would like is basically
2 100 per cent. from which you then start making the deductions to which you have referred?
3 MR. GREEN: (After a pause) It is approximately £1 million.
4 PROFESSOR STONEMAN: Approximately £1 million, thank you.
5 MR. GREEN: I think that is my time.
6 THE CHAIRMAN: Well yes, I have let you run on, Mr. Green, because you were interrupted quite
7 a bit, so if you think you have other things to say you should say them.
8 MR. GREEN: If I can just crystallise our position on BT, and that is all I wish to do. So far as BT is
9 concerned we simply say they contributed significantly to the costs on CBP, but if you are with
10 us on a portion of our costs then the question of apportionment arises. So it arises at that stage
11 of the analysis. If so, we suggest that the split is 80:20 and that simply reflects the fact that we
12 won on CBP against BT's position, BT supporting Ofcom, and that is the long and the short of
13 it.
14 THE CHAIRMAN: Thank you very much, Mr. Green. Mr. Roth?
15 MR. ROTH: May it please the Tribunal, very briefly can I respond to a few points Mr. Green has
16 made for the Appellants. He says both in his written submission and today that although there
17 is no presumption as to costs the starting point is that costs follow the event. With respect that
18 is wrong. The starting point is Rule 55 para.2 of the Tribunal Rules, a provision which is
19 strikingly absent from any reference in both the written submission of Mr. Green, and indeed
20 in his oral submissions today. It is quoted in our written submission, (para.4, p.2), it is quoted
21 in full in BT's written submission and, as you will see, Sir, it is in strikingly different terms
22 from CPR Rule 44.3(2) which does, indeed make a starting point that costs follow the event.
23 This does not, it leaves it completely open – "… any order it thinks fit in relation to the
24 payment of costs by one party to another …" "… may take account of the conduct of all
25 parties in relation to the proceedings." That distinction (from the CPR) was made clear by this
26 Tribunal in its early decisions on costs, in the first one, the *GISC* case, in the *Napp* case, which
27 you have in the bundle of authorities at tab 3, p. 6, para. 22. It was their Rule 26 because it
28 was the previous Rules which have now been replaced, but it is in the same terms – a wide
29 discretion on the question of costs, to be exercised in the particular circumstances of the case.
30 There is no explicit rule before the Tribunal that costs follow the event, but nor is there any
31 rule that costs are payable only when a party has behaved unreasonably. All will depend on
32 the particular circumstances of the case. That was a penalty case – an appeal against a penalty
33 imposed *Napp* who had been found guilty of infringement of the Chapter II prohibition under
34 the Competition Act, and been subject to a large fine.

The first specialist regulator case to which we refer is *Aquavitae*, (tab 7) again a Chapter II prohibition case. *Aquavitae* brought an unsuccessful appeal against an Ofwat Decision and Ofwat sought its costs, which were refused. If you go to p.3 in the judgment, para. 8 you will see Ofwat's submission to the tribunal.

> "… the appeal was dismissed in its entirety and that considerable work and diversion of Ofwat's limited resources from other ongoing investigations by the proceedings should be compensated by an order for costs against *Aquavitae*."

and some figures are set out. The Tribunal referred back to the *GISC* decision (p.6, paras.18 and 19)

> "19. We also note that in GISC costs at para.52 the Tribunal expressly left open the question of whether cases involving regulated industries where the costs of statutory regulation are recovered, in one way or another, from the industry itself may raise separate issues to those considered in GISC."

Then they return to the application and they refused the Director's application for costs.

MR. SCOTT: Mr. Roth, while you are referring to *Aquavitae*, in that we are taken to our reference to *AEI Rediffusion* in *GISC*, and if you turn back to tab 2, para.50, I was in *GISC* and one of the points that we drew from *AEI Rediffusion* was the second part of 50:

> "There may well be cases before this Tribunal where, whatever the formal outcome, the substance of the result is "a draw" or "somewhere in the middle". It seems to us that in such circumstances, in accordance with *AEI Rediffusion*, the costs should lie where they fall if neither side has prevailed in a decisive way."

I think Mr. Green is saying to us that his clients have prevailed in a decisive way, and you may well take a rather different view of that. It does seem to me that the issues have fallen out in a way that is something more in the middle than the decisive way with which we contrasted it.

MR. ROTH: In a sense there are two points that I am making, and one is that there are different considerations that apply in regulatory cases, under a regulatory regime, which is para.52 of your judgment in *GISC* – just below.

MR. SCOTT: Absolutely.

MR. ROTH: Secondly, I then come on to say "Well what actually did you decide here?" – we do say it somewhere in the middle. Just following on the first point, the *Floe* case, to which my friend referred, was also a Competition Act case, it was a Chapter II prohibition case. He referred to the *Unichem* case and can I just ask you quickly to look at that again at tab 12, because I know that Mr. Scott immediately made the point that this was a merger, but the references indeed, if

1 one goes to the first paragraph from which Mr. Green read, which is p.4, para. 15, with regard
2 to the approach to costs, quoting from *IBA Health: (Costs)*:
3 "The Tribunal made clear in *IBA Health (Costs)* that whether costs will be awarded
4 in a case will depend on the particular circumstances of that case. A number of
5 different factors will be taken into account in assessing whether costs should be
6 awarded:
7 '39. In cases under the 2002 Act' …"
8 This is relating to the Enterprise Act 2002. Then again, para.17 over the page:
9 "However, in general terms, the Tribunal considers that the application of the
10 principles set out in *IBA Health (Costs)* will normally result in a successful party
11 being awarded at least a proportion of its costs in Section 120 cases."
12 Those dicta and those observations are very much tied to the merger regime s.120 of the
13 Enterprise Act. That is a very different statutory framework, as you know it is a Judicial Review
14 situation, not a regulatory regime.
15 When one comes to the Communications Act 2002 and specifically appeals under
16 s.192, as the present case was, that is why we say the two judgments of this Tribunal in *RBS*
17 *Backhaul* and *CPS Save* do give guidance. They were both appeals under s.192 of the
18 Communications Act, in one of them BT won and in the other one BT lost and Ofcom won.
19 Judgments on the same day clearly seeking to give general guidance on costs in
20 Communications Act Appeals, and although Mr. Green is, of course, right that *RBS Backhaul*
21 was a dispute resolution, when he said it was rather akin to an Arbitrator, CPS say it was not
22 a dispute resolution case, it was a complaint. Perhaps one can look at *CPS Save* therefore at
23 tab 11, p 11, para.36 is the general statement by the Tribunal, not linked to the position of BT
24 at all.
25 "It is also relevant in our view that in a regulated industry such as this, the principal
26 parties to these proceedings will be in a constant regulatory dialogue with OFCOM
27 on a wide range of matters. The costs of maintaining specialised regulatory and
28 compliance departments, and taking specialised advice, … [i.e. from outside
29 solicitors] … will not ordinarily be recoverable prior to proceedings. We accept that
30 the situation changes once proceedings before the Tribunal are on foot, by virtue of
31 Rule 55 of the Tribunal's Rules. However, the question whether costs orders should
32 be made in any particular case, or whether the costs should lie where they fall, arises
33 against a background in which the participants in this industry are routinely incurring
34 regulatory costs which are not recoverable."

1 We set out, as you saw, in paras. 10 to 13 of our written submission, how the various factors
2 identified by this Tribunal in both *RBS Backhaul* and *CPS Save* are very similar to the
3 circumstances of this case. What is the reality here? This was an issue of significant market
4 power which turned entirely on the question of countervailing buyer power in the hands of BT.
5 Hutchison argued heavily on the basis of negotiations before the contract with BT, and BT's
6 behaviour in those negotiations, that BT did have that countervailing buyer power. There is
7 also a question of the scope of clause 13 of the contract itself, as you remember. If Ofcom had
8 accepted that argument, put and sustained and maintained by Hutchison, clearly there was
9 a strong likelihood of an appeal by BT. It is exactly the sort of situation that arose in *CPS Save*
10 and *RBS Backhaul;* and with great respect Hutchison did contend that BT had countervailing
11 buyer power. There was no equivocation about this. You referred, Sir, in a question to Mr.
12 Green, to the paragraph in the skeleton, which made that clear – so too did the amended Notice
13 of Appeal, in the amended passage, so put in on the amendment, which is in the pleadings
14 bundle, C1, at tab5, p.213, para.E2.3 and 2.4:

> 15 "For the avoidance of doubt the appellant also takes the position that upon a true
> 16 construction of the decision the respondent did find as a fact that it was at least
> 17 possible that BT did have countervailing buyer power and, in such circumstances, it
> 18 was an error for the respondent not to proceed to make a definitive finding. In the
> 19 alternative the appellant submits that BT did, in fact, exert countervailing buyer
> 20 power such as to negate any alleged SMP on the part of the Appellant. However, the
> 21 appellant also submits it is not necessary for the Tribunal to make a finding in this
> 22 respect if it finds in favour of the appellant in respect of paragraphs 2.2 and 2.3
> 23 above. In the circumstances the appellant reserves its position in this respect."

24 So one was absolutely dealing with the situation of these two parties, both very large
25 companies, both participated in the extensive regulatory process and all this in the background
26 here H3G routinely incurs regulatory costs which are not recoverable. It is, of course, a public
27 law obligation on Ofcom under the framework direction to decide whether any operator has
28 SMP and to identify them. Very far removed from a Competition Act decision of an
29 infringement or non-infringement of the Chapter I prohibition, or the Chapter II prohibition,
30 which is a recrimination, which involves a potential penalty which exposes the party to private
31 actions in damages and all the rest of it. Of course, there was an important public interest in
32 this case. There was a new and important issue as to whether and to what extent regulatory
33 powers are to be taken into account in the assessment of SMP, and one thing I do agree with
34 Hutchison's written submission is what Mr. Green says at para.7(5):

1 "The forward looking analysis required by the EC market review mechanism is new
2 and unlike the *ex post* analysis used in competition enforcement cases."
3 So we say that there is a close parallel with those two other decisions, a s.192 appeal on costs
4 that were given by this Tribunal earlier in the year. Of course, they do not lay down an
5 absolute rule – the point is there are no absolute rules – but they give a general approach to
6 such appeals under this regulatory regime, subject to the particular circumstances of this case,
7 and now I do come to the particular circumstances of this case.
8 May I deal briefly with one point made in the written submissions and it is in
9 Hutchison's written submissions on p.5 in what is para.7(7) on p.5:
10 "H3G also conducted the procedural aspects of the case so as to be expeditious and
11 helpful to both the Tribunal and the parties. In this regard, H3G resolved matters of
12 confidentiality with BT by mutual agreement and without recourse to the Tribunal.
13 Where the Tribunal indicated that disclosure ought to be given during the main
14 hearing, H3G sought to resolve the matter without requiring unnecessary debate."
15 and footnote 5:
16 "Ofcom's correspondence on the issue of confidentiality matter on 20, 24 and 27
17 September was instigated solely by Ofcom and was ultimately rendered
18 unnecessary."
19 Well with great respect, to say that is a spin on the facts is something of an understatement and
20 may I just take five minutes to deal with that? The position is that H3G claimed
21 confidentiality for significant parts of the Notice of Appeal and the evidence and you may
22 recall that some of the witness statements had complete confidentiality business secrets applied
23 to them. Then BT applied to intervene in the case and the matter was discussed at the first case
24 management conference, chaired by the President who then had the conduct of the case, on
25 13th September 2004, and that is in the other bundle, bundle I2. One sees on p.1 the issue of
26 confidentiality was raised by the President at lines 14-20, and Ofcom were told to check with
27 3G "… there is nothing in the Ofcom defence that is confidential that should not go to BT".
28 Then on p.2, lines 1-16 that is how this started. Following that, as you see in the next tab 6,
29 my clients wrote to Hutchison's solicitors, Freshfields, to ask which parts of Ofcom's Defence
30 were confidential. That is the first letter complained of in that footnote, because large parts
31 were claimed for confidential treatment. We expressed some concern about that, which is the
32 letter of 20th September (tab.8).
33 MR. SCOTT: Just pausing at tab.8 I note the "confidential" marking on it.

1 MR. ROTH: Yes, because we were discussing with Freshfields what part of the issues were
2 confidential.
3 MR. SCOTT: Absolutely, when I read this last night, one of the points that was brought back to my
4 attention was that there appeared to be a claim of confidentiality for material, which in the
5 terms of the letter of 20th September BT should either have known or ought to be known to BT.
6 MR. ROTH: That is right, and that is something we found surprising, and we persisted in verifying
7 with Freshfields whether that could possibly be the case vis-à-vis BT. Freshfields wrote back,
8 as you see at tab 9 enclosing a redacted version of the Defence and making clear in the second
9 paragraph that Hutchison seeks confidential treatment of the whole of the witness statements of
10 Mr. Myers and Mr. Mickel – Mr. Myers is Ofcom's witness. That led to the response that you
11 find at tab 10 of 24th September. I will not read the whole letter – it goes into some detail – but
12 you see, for example, on p.4 of the letter, the response regarding the witness statement of
13 Mr. Myers and Mr. Mickel.
14 "Ofcom does not agree that any of the witness statements of Mr. Myers and
15 Mr. Mickel should be confidential for the following reasons:
16 (i) Both Mr. Myers and Mr. Mickel produce their calculations using Ofcom's 2G
17 LRIC model, which has been published …
18 (ii) Their calculations are then further based on the Appellant's 3G licence fee,
19 which is public knowledge …"
20 And they go into some detail. They say at the end of that section:
21 "Ofcom therefore disagrees that such information could be said to significantly harm
22 the Appellant's legitimate business interests. Indeed, it is again difficult to see how
23 this request could even be said to satisfy the first prerequisite under the above-
24 mentioned confidentiality test."
25 That was the next letter and that was then not agreed and there is Freshfield's response at tab
26 11 of 27th September, but they hope that they can narrow the issues.
27 Then came the second case management conference – I think by this stage Mr. Scott,
28 sir, you had joined the Panel, if I can put it that way, for this case – which is at tab 21, 19th
29 November 2004. There was, incidentally, one notes on p.1, lines 27 and 28, the President
30 expressing some concern about lack of clarity in the pleadings and the issues, but for present
31 purposes going on to p.27 at line 9:
32 "… could you also perhaps collectively think about the other issue that we must
33 address this afternoon, which is confidentiality? There is some fairly wide claimed
34 confidentiality at the moment. There at least two aspects to it. There re first of all

1 matters should not be in the public domain … and; secondly, matters not in the public
2 domain but there is no reason to keep them confidential from BT because BT knows
3 them already, for example, the course of the negotiations – so there is that distinction
4 as a first distinction.
5 As far as matters that are in the public domain are concerned (or are not in the public
6 domain) one also has to bear in mind that the Tribunal also has to write a Judgment.
7 In order to write the Judgment we have to explain what the arguments are …"
8 and so on. Then on p.29 ----
9 MR. SCOTT: I think just while you are on p.27, we did, as I recall, retire, and we came back and
10 expressed our concern about the questions of the issues (line 33) "… whether the issues in this
11 case can be further refined in the light of the present state of pleadings." I think at that point
12 we were concerned that what was going on was not likely to lead to the expeditious and helpful
13 conduct of the proceedings.
14 MR. ROTH: Sir, indeed, absolutely, and that theme is echoed again. On p.29, following on from the
15 point you have just made, sir, at line 20, the President saying:
16 "However, that leaves the exact state of the argument in a degree of uncertainty. We
17 are not entirely comfortable with a situation in which in the letter of 17th November
18 2004 the Appellant has set out is position while the Notice of Appeal, which was
19 served on 28th July 2004 still formally maintains a rather wider position and
20 effectively invites us to enter into the facts of the relevant negotiations."
21 It was suggested that an amended Notice of Appeal be served.
22 MR. SCOTT: And then we had the amendment.
23 MR. ROTH: Then there is the confidentiality point picked up again on p.31 Mr. Green at line 30
24 says:
25 "So far as the public is concerned, we would simply wish to retain confidentiality
26 with residual matters insofar as they do concern relations with third parties – internal
27 perceptions of the market, or internal costs' matters.
28 THE PRESIDENT: Well on that point, Mr. Green, we had quite an extensive request
29 for confidential treatment from the Appellant, I think it was as long ago as August,
30 covering quite a lot of matters. It may be now that not all the things that were first
31 thought to be subject to confidential treatment are still asserted."
32 and they invite the Appellant to look again at what was identified as a business secret, and
33 refer to the section in the Reply and so on.
34 Then there is the point taken by Mr. Fowler, then acting for Ofcom at line 24 on p.32:

1 “On the question of confidentiality, and I am sure that my friend and those instructing
2 him will consider this in response to your request, but we have objected to the cover
3 of confidentiality over Mr. Myers’ statement in particular which is really dealing with
4 matters which do not involve confidential information at all, they are simply about
5 Ofcom’s possible approach to 3G costs in general.
6 THE PRESIDENT: Thank you for reminding me of that, and we had indeed noted it.
7 What I am very much hoping is that the Appellants will be able to make a revised and
8 more limited claim for confidentiality, if indeed they claim confidentiality for
9 anything, and insofar as it remains open then we may have to rule on it, but I am not
10 by any means saying that if there is a more limited claim for confidentiality that more
11 limited claim will necessarily be allowed, because we have to take into account
12 Ofcom’s submissions on all those points too.”
13 and making some observations saying it is a bit difficult to see how this could be confidential.
14 That was the second CMC.
15 There was a third CMC, by which stage, Sir, you had become Chairman of the Panel,
16 which is at tab 27, on 1st March 2005. If I go to p.14, line 30, you say:
17 “The last point is merely an observation, we note what is said in everybody’s
18 skeleton about confidentiality and that a successful regime has been put in place and
19 we are sure it will be dealt with sensibly. There is just one caveat from the Tribunal
20 that I think more than one Member of the Tribunal has been puzzled about the extent
21 to which confidentiality has been claimed in this case in respect of matters which we
22 have some difficulty in seeing are confidential. The more material in respect of
23 which confidentiality is insisted upon the greater the chances that something will
24 accidentally leak out. We may all have to live with that, but if anybody takes
25 a wholesale view that a lot of the claims of confidentiality is not going to be insisted
26 after all, which would no doubt be helpful in terms of expedition in this case, we will
27 live with what we will live with, but if life gets too difficult then I think we just put
28 down a marker that we may start taking a view about confidentiality if we think we
29 need to have a debate in a form which is not conveniently permitted by the present
30 fairly wholesale claims of confidentiality – we will cross that bridge when we come
31 to it but we thought it useful to mention that at this stage.”
32 Then you will recall in the hearing itself you made observations about confidentiality. It is in
33 day 2, pages 42 and 43.

1 THE CHAIRMAN: Mr. Roth, what, if anything, had happened in relation to confidential material
2 between the President's observations at the second CMC, and my observations at the third.
3 You have just read to us his observations at the second CMC and, putting it very shortly, he is
4 saying "Please do something about it." Did anything happen at all?
5 MR. ROTH: (After a pause) My understanding, and I will be corrected if I am wrong, as you know
6 I was not in the case then, as far as confidentiality between BT and H3G, quite a lot of progress
7 was made, and I think that was sorted out, that the material could be given to BT.
8 THE CHAIRMAN: Yes,
9 MR. ROTH: As far as the second of the two points, namely, the public domain, on my
10 understanding very little progress had been made, and that is why when the Appeal opened you
11 noted the sweeping claims of business secrets ----
12 THE CHAIRMAN: Indeed.
13 MR. ROTH: -- and the way Mr. Myers was still completely a business secret and so on. One just
14 has to look at the bundle of witness statements that was before you ----
15 THE CHAIRMAN: Well I did, yes.
16 MR. ROTH: -- and that has not been withdrawn. I think then in the hearing, on pressure – gentle
17 pressure, if I can put it that way – from yourself, Sir, those claims started to fall away. But
18 I have taken rather a lot of time of my limited time, just to respond with, I have to say, some
19 outrage, to the suggestion in the written submissions that H3G was being expeditious and
20 helpful on the issue of confidentiality and that it was correspondence from Ofcom which
21 instigated the problem, and it was ultimately rendered unnecessary. We say that is a complete
22 misrepresentation of the position.
23 MR. SCOTT: Are you taking us to the hearing itself?
24 MR. ROTH: I can do, sir, we have the bit of the transcript here, it is on tab 37. You will appreciate,
25 sir, I do not want to take up my time on what is a very small history. Tab 37, and you will see
26 it is on the bottom of p.42 where Mr. Green refers to a document, and says that it is a
27 confidential document, and that prompts the intervention from the Chairman on p.43 at line 18
28 – I will not read out what is said there.
29 So our primary position here is that the s.192 guidance of the two Decisions of *CPS*
30 *Save* and *RBS Backhaul* should apply if costs lie where they fall in a regulatory function of
31 Ofcom under s.192. One of the considerations set out in *RBS Backhaul* and *CPS Save* you will
32 recall is that if Ofcom is hit with an order for costs that could have a chilling effect on Ofcom's
33 regulatory function. We have now heard the level of costs that have been incurred for a three

1 and a half day hearing, and even 50 per cent. of that is a very, very significant figure to visit on
2 the Regulator.

3 If one does take an issues' approach, and consider the number of issues argued, and
4 who succeeded on each, which is of course the approach now favoured even under the CPR
5 regime, as the notes in the White Book show then, of course, the implications of that approach
6 are that the parties successful on their particular issue would have its costs of that issue. So it
7 goes both ways. The short Court of Appeal judgment, of which I hope you have a transcript
8 before you, which is the case referred to in the notes in the Supreme Court Practice – *Summit*
9 *Property Limited v Pitmans*. You will see from the start of Lord Justice Longmore's judgment,
10 para.1:

11 "This is an appeal on costs from the order of Parker J, after a six day trial … in the
12 Chancery Division, in which he gave judgment for the defendant firm of solicitors.
13 He ordered the unsuccessful claimant property company to pay 30 per cent of the
14 successful defendant's costs and he ordered the successful defendant firm to pay 65
15 per cent of the costs of the unsuccessful claimant."

16 Then there are some figures set out.

17 "2. The reason why the judge made this comparatively unusual order is that the
18 defendants failed on what he regarded as the main issue in the case, viz the question
19 whether they were in breach of duty as solicitors to their client. They succeeded
20 ultimately on what he called a point of law on causation or, perhaps more accurately,
21 the quantum of the claim, namely that, even if the defendants had performed their
22 duty and had obtained for the claimant the benefit of the transaction which they lost,
23 the claimant would have obtained that benefit by virtue of being in possession of
24 confidential information from a third party and could not have kept that benefit
25 because it would have been accountable for it to that third party."

26 Then on the general approach to costs at para. 12 there is set out Rule 44.2 of the CPR, and
27 therefore the general rule that I referred to 44.3(2)(a). Then at paras.13 to 17 the application
28 of an issues' based approach and the encouragement of an issues' based approach is set out,
29 starting with a quotation from Lord Woolf, then Master of the Rolls Judgment in *PPL v AIE*
30 *Rediffusion Music Ltd* [1999] 1 W.L.R 1507:

31 "I draw attention to the new Rules because, while they make clear that the general
32 rule remains, that the successful party will normally be entitled to costs, they at the
33 same time indicate the wide range of considerations which will result in the Court

making different orders as to costs. From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

He cited four principles set out in the judgment of Lord Justice Nourse in *Re Elgindata Limited (No.2)*.

"The principles are these :

(i) Costs are in the discretion of the Courts.

(ii) They should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made.

(iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, *but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of the costs.*

(iv) Where the successful party raises issues and makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs."

The Master of the Rolls goes on:

"The "well established practice" on which Nourse LJ based his third principle is, as I have already indicated less generally followed than it has been in the past and it is no longer necessary for a party to have acted *unreasonably* or *improperly* to be deprived of his costs of a particular issue on which he has failed."

Lord Justice Longmore continues:

1 "In my judgment, it is also no longer necessary for a party to have acted
2 unreasonably or improperly before he can b e required to pay the costs of the other
3 party of a particular issue on which he (the first party) has failed. That is the
4 substance of what the Master of the Rolls was there saying. That that must be so is
5 shown partly by the earlier citation at pages 1522H-1523B but, more importantly, by
6 the only other case to which, for my part, I would have thought it was necessary for
7 this court to be referred, namely the case of *Johnsey Estates (1990) Limited v*
8 *Secretary of State for the Environment* [2001] EWCA CIV 6535, judgment given on
9 11th April 2001. In that case Chadwick LJ, giving the judgment of the court with
10 which the other members of the court agreed, set out the principles in paragraphs 21
11 and 22 as follows:"
12 Might I ask you just to read those two paragraphs to yourselves? (After a pause) You will
13 then see para.17 in which Lord Justice Longmore says:
14 "It is thus a matter of ordinary common sense that if it is appropriate to consider costs
15 on an issue basis at all, it may be appropriate, in a suitably exceptional case to make
16 an order which not only deprives a successful party of his costs of a particular issue
17 but also an order which requires him to pay the otherwise unsuccessful party's costs
18 of that issue, without it being necessary for the court to decide that allegations have
19 been made improperly or unreasonably."
20 Lord Justice Tuckey agreed, and Lord Justice Chadwick at para.27 (on the last page) also refers
21 to the implications of an issue based approach. Again, if you would just cast your eye down
22 para. 27.
23 The only refinement to that approach is that the Court of Appeal subsequently said that if
24 taking an issues' approach it is much preferable to do it by percentage proportion, and that is
25 the case in the bundle that we referred to, *English v Emery Reimbold & Strick Ltd* [2002]
26 1 W.L.R. 2409 and I do not ask you to turn it up. They are basically saying to the courts please
27 do not do it by issue, do it by percentage apportionment based on what the issues have involved
28 because of the taxation problems for a taxing master ----
29 THE CHAIRMAN: That is actually encapsulated in the CPR, is it not? If you are minded to make
30 the one sort of order you should nevertheless make a global sort of order if you can. Is that not
31 what the CPR says?
32 MR. ROTH: Make an order in percentage terms, and not as in "**this** issue to the claimant", "**that**
33 issue to the defendant".
34 THE CHAIRMAN: Yes.

MR. ROTH: That is all, of course, under Rule 44.3 of the CPR, where you do have a starting point.

MR. SCOTT: Mr. Roth, can we just stay with *English* for a moment, because apart from preferring the percentage based approach my recollection is at para.28 of the ----

MR. ROTH: This is tab 4 of the authorities' bundle.

MR. SCOTT: Yes, this is Lord Phillips, as I understand it.

> "It is, in general, in the interests of justice that a judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under the Civil Procedure Rules this will be possible in many cases."

Now, he goes on in the following paragraph to say that the Civil Procedure Rules sometimes require a more complex approach but there seems to be a preference, if one can, for simplicity, speed and not being complicated about it.

MR. ROTH: Yes, and that is picked up, is it not, in para.115 ----

MR. SCOTT: That is right, 115 and 116 they come back to the percentage based approach.

MR. ROTH: Yes, there they are referring to a judgment of Mr. Justice Neuberger who had done it by issues, and they are saying without criticising him, it is better done by proportions – it is the end of para.116:

> "Wherever practicable, therefore, the judge should endeavour to form a view as to the percentage of costs to which the winning party should be entitled or alternatively whether justice would be sufficiently done by awarding costs from or until a particular date only …"

MR. SCOTT: Yes, I think part of their view was that Mr. Justice Neuberger had been there and seen what had been done, and when one has done that it is easier to come to a percentage view than it is for an appellate body to revise that view.

MR. ROTH: Yes, and I think they were also saying that although the percentage view may be based on the Judge's sense that on issues 1, 2 and 3, **this** party succeeded, on issues 4 and 5 **that** party succeeded, it is preferable if the Judge can turn it in and express it as a percentage, and not leave it as saying the costs of issues 1, 2 and 3 to the claimant; and the cost of issues 4 and 5 to the defendant, because then that just leads to further arguments later.

MR. SCOTT: Absolutely.

MR. ROTH: Go to the next stage and put it as a proportion. If one takes the logic of the issues' approach, as made clear in the *Summit Property* judgment, it is of course that each side gets the costs from the other of the issues on which it succeeded. Sir, my time is up, and secondly, it would be presumptuous, if not impertinent, to go through your judgment identifying the issues and making clear what you have decided on each one. You would say to me "Well, we know

1 what we decided, we wrote it", and that would, of course, be right. But it is abundantly clear
2 that although of course they won on a major issue, you set out at various points what are the
3 propositions advanced, and the argument, and whether you accept it or reject it. We say that it
4 is quite clear on that basis that there are a lot of issues on which Hutchison had not succeeded,
5 if one takes an issues' based approach Ofcom should have its costs of those issues as against
6 Hutchison. We say the primary position, taking all that into account, is no order for costs. If
7 I fail on that, and you are minded to make a proportionate order against Ofcom then I would
8 invite you to exclude the costs of experts who are not referred to at all, or relied on, and no
9 doubt significant, and to give Hutchison only a small proportion of the balance.
10 PROFESSOR STONEMAN: Mr. Roth, can I ask you the same question I asked Mr. Green? Can
11 you give us a ball park figure for Ofcom's costs for this case?
12 MR. ROTH: Can I just take instructions? (After a pause) We do not have a final figure and, to be
13 fair to Hutchison, I should say that with Ofcom they were done in-house, there were no outside
14 solicitors involved. Miss Smith, Mr. Fowler and I of course are on Government rates – alas
15 – but we believe at the outside it would be £200,000 maximum.
16 PROFESSOR STONEMAN: Thank you.
17 MR. BARLING: Can I meet the anticipated question on that straight away by saying we do not have
18 a figure at the moment. We have dealt very much, and assumed, perhaps wrongly, that the
19 Tribunal's preference at this stage would be to deal with things as a matter of principle and
20 proportions and via the usual way if the parties cannot agree whatever is reasonable then, God
21 forbid, one actually comes back and troubles the Tribunal.
22 THE CHAIRMAN: Yes. I do not think you can assume that we are not asking for the numbers
23 because we are proposing to specify any particular numbers.
24 MR. BARLING: No, just to get a feel for it. I am sorry, I cannot help on that. We have, as you
25 know, made an application against H3G for a proportion of our costs which we have put at 80
26 per cent. That is very much finger in the air as to a reaction to how much effort and time was
27 spent dealing with one discrete issue. We have also said that obviously if that is not the
28 reflection that the Tribunal feels then it very much would be a matter for the Tribunal
29 ultimately if they were minded to accede to our application, whether that was the right
30 proportion.
31 We quite realistically accepted, as I think one must in the light if the case law, that all
32 things being equal, an Intervener's costs normally would lie where they fall absent some
33 circumstance that produces a different result. In other words, one would pay one's own costs
34 of intervention but not normally be expected to pay anybody else's or a proportion of anybody

1 else's. There are, however, some exceptions, as you know, and we say that this case falls very
2 clearly within one of those because there was raised a discrete point – it was a point raised
3 before BT was involved. We were not initially aware of it until sometime after we had become
4 interveners we saw the pleadings, and then of course we saw the Notice of Appeal and
5 Mr. Westby's evidence – or some of it. It then emerged that in order to bolster their case
6 against Ofcom on countervailing buyer power they had massaged the facts to attempt to show
7 that BT had in some way acted unreasonably, thrown its weight about and so on. They put that
8 on the record and have reiterated it time and time again. They never retracted that, even up to
9 the very last minute – it is the point obviously that was called the *amour propre* at the oral
10 hearing – but it has some wider significance than that as both H3G themselves and the Tribunal
11 have accepted in relation to how conduct of negotiations might take place in the future is the
12 way Mr. Green put it in his submissions at the hearing and indeed accepted to that extent by the
13 Tribunal as being possibly relevant – that is at para.81 of your judgment.
14 Once we became aware of that allegation obviously refuting it becomes a very
15 substantial part of BT's effort in intervening. As you see from the witness statements that we
16 had to deal with, Mr. Lockyer's witness statements on the facts, and then answering
17 Mr. Westby's succession of statements, our skeleton, the various tables and indexes that we put
18 in were all related to the facts of the negotiations, we gave an index of evidence and we gave
19 a table of the documents, all in an effort basically to shorten our submissions on that but
20 nevertheless to make sure that the Tribunal had the necessary material. Probably we would, it
21 is right to say, have maintained our intervention anyway, but absent those allegations it would
22 almost certainly have been more in the nature of the usual kind of watching brief. We did have
23 a number of other concerns, that is true.
24 THE CHAIRMAN: Not only is it true, Mr. Barling, it is the reason that you intervened in the first
25 place.
26 MR. BARLING: It is, we entirely accept that, and one of the main reasons of course was what
27 appeared to us, right in fact until almost after Mr. Green had sat down at the oral hearing, that
28 there was a risk that the Tribunal was going to be asked to make findings about whether there
29 was or was not countervailing buyer power, and Mr. Roth has taken you to a passage in the
30 amended Notice of Appeal at p.213 I think it is, p.2.4 where, even in the amended Notice of
31 Appeal H3G make it quite plain that they are not abandoning the possibility that the Tribunal
32 might have to decide that point itself on the substance, and he could also have shown you
33 where they state as an allegation in the amended Notice of Appeal that we did have and
34 exercise countervailing buyer power (bundle C1, p.215 para.2.10)

1 That was obviously one of the concerns that we had and as I said in my oral
2 submissions now that Mr. Green is not asking you to make any findings that obviously
3 conditions the way I deal with the conduct in the negotiations and I hope the Tribunal will
4 accept that we acknowledge the Tribunal's desire that I should be brisk, and I do not think
5 I took very long at all on anything, in fact. There will be other issues of course, the odd
6 position taken by both parties in their different ways as to the dispute resolution powers that
7 Ofcom had. That was a matter of some concern to us because we had so many agreements, and
8 anything that reflected on what those agreements meant, and how they inter-reacted with the
9 regulatory position was obviously going to be a matter of great importance. So yes, there were
10 certainly other matters too, but we invite the Tribunal to find that realistically it would have
11 been a much easier task for us had we not had to refute what were, in effect, quite unpleasant
12 allegations, without wanting to over egg it.
13 In those circumstances we do pray in aid the principles that the Tribunal has clearly
14 set out in the *Aberdeen Journals* case that we cited in our written submissions and if I can just
15 refer you to where we quote from the *Aberdeen Journals* case – it is in the bundle of authorities
16 – but at paras. 7c and d of submissions for this hearing we set out the general position, that
17 costs lie where they fall normally, but then say that there can be an order for costs in favour of
18 an Intervener in certain circumstances and, in particular, when the Appellant launches
19 a specific attack on the Intervener which amounts to an attack on its integrity, which the
20 Intervener necessarily has to counter and which is entirely rejected by the Tribunal. That is on
21 slightly different facts but, we submit, by analogy perfectly applicable to this case the position
22 in the *Aberdeen Journals*' case itself.
23 We set out, I hope at some length, in our written submissions precisely how those
24 allegations developed, how they were maintained and what we had to do in order to refute
25 them and, of course, then culminating in para.81 of your judgment when you basically
26 accepted what BT had submitted and, as might be said to be reasonably clear from the
27 documents, but nevertheless had to be dealt with. We submit that this is one of those cases
28 where it would be appropriate for that to be reflected in some award of BT's costs. We accept
29 not 100 per cent., because some costs inevitably would have been incurred in any event, and
30 we are very content to leave it to the Tribunal to decide – if you accept our submission in
31 principle, what that proportion should be.
32 At the very end I will deal with some of the odd points, and come back in a sense to
33 deal with one or two points that H3G made in their written submissions, but can I just turn first
34 to their application that we should pay part of the global costs. They suggested we should pay

1 20 per cent. of the 60 per cent. There are absolutely no grounds for imposing any of H3G's
2 costs on BT. There is no ground for going beyond the normal rule so far as their costs are
3 concerned. Costs are not normally awarded either for or against the Intervener, regardless of
4 the outcome of the particular appeal, provided obviously that the Intervener has not acted
5 unreasonably or taken points that should not have been taken and so on. I think we can say,
6 with some justification on that, that we have tailored our submissions on almost everything to
7 the very bare minimum throughout, both in writing and orally to make sure that we did not add
8 to the overall costs of the case more than was inevitable by the intervention.
9 The two related points on which H3G were successful were first of all the reliance
10 placed, and found by the Tribunal to be misplaced, on the regulatory connectivity obligations
11 of BT, over reliance on that in dealing with whether BT had countervailing buyer power and
12 therefore whether there was SMP. That was the point on which they were successful, and they
13 were also successful in relation to the dispute resolution powers of Ofcom. Of course, as they
14 said we actually supported their arguments, I think we actually made them first, but we were
15 both rowing in the same direction – H3G and ourselves – in relation to what appeared to be
16 a misreading of the legislation and their powers by Ofcom. It is fair to say also that H3G had
17 taken a rather different view earlier in the proceedings than the one they ultimately took at the
18 hearing about that, as the Tribunal pointed out.
19 As far as the main point is concerned, the point on which the matter is going back
20 now to Ofcom to reconsider it, we sought to keep as much as possible out of the fray in
21 relation to Ofcom's reasoning, which was the main attack. Ofcom were perfectly capable of
22 defending their own reasoning, and we deliberately did not delve into that so far as their
23 finding of SMP was concerned. The furthest we really went was first of all to draw the
24 Tribunal's attention to the full width of the connectivity obligation which we felt had not
25 perhaps been dealt with as fully by Ofcom as it could have been. I think Mr. Green has
26 accepted today that the material that we showed actually changed his view to some extent,
27 made them realise one or two of the points they were making probably should not be pursued,
28 based under the old and the new regime, and we made some observations on the case law about
29 the test for countervailing buyer power, and on the Greenfield test. So I accept we made
30 submissions and we said in effect, I think our culminating submission was, in those
31 circumstances it is very difficult to see how BT could have countervailing buyer power, but
32 that was as far as we went.
33 So we submit that there is nothing in our intervention that could possibly justify an
34 award against us in relation to that. It might be helpful to look at the position in the *RBS*

1 *Backhaul* case that has been referred to (tab 10) where, if you recall, there was a dispute
2 between Vodafone and BT about the charges for backhaul, and Ofcom entered upon a dispute
3 resolution of that, but this case is not actually nearly as helpful as Mr. Green is putting forward
4 from his point of view. He is saying well that was just them arbitrating, and that was a wholly
5 different position from the position here. That is not, in fact, the case. The only issue in that
6 case was Ofcom's jurisdiction. BT had said all along that Ofcom did not have any jurisdiction
7 to entertain that dispute and deal with it. Never was there any appeal or issue about the
8 substance of what they decided. The only point in the case was did Ofcom have the power to
9 look at it at all. Vodafone, as you see from the last proper paragraph of the judgment,
10 Vodafone – and O_2 latterly – "entered the fray" (as it is put here) in support of Ofcom by
11 taking an active role in the proceedings, and they really did, they were vigorous participants in
12 those proceedings, albeit it was only about Ofcom's jurisdiction, and they lost on the only
13 point. But still, no order for costs was made against them as Interveners. We submit first that
14 that, contrary to what Mr. Green has submitted, is perfectly parallel with the present case
15 insofar as what was a reality, if you like, against Ofcom in which they somewhat viciously but
16 understandably played a role. Secondly, we submit it really supports the point that we have
17 made that really there is no ground in this kind of case for disturbing the ordinary rule that
18 Interveners are not required to pay costs in the circumstances that Mr. Green has suggested we
19 should. Because if ever there was a case where a successful appellant was going to get costs
20 against an Intervener then RBS was it.
21 I should have taken a note of my time, but I reckon I must be about half way through.
22 I just want to make a few points, if I may, on what Mr. Green said in his skeleton for the
23 hearing – some of them I have probably already covered.
24 It is suggested that we intervened in order to defend Ofcom's finding of no
25 countervailing buyer power, and we say that does mischaracterise our intervention for the
26 reasons that I have really already given.
27 THE CHAIRMAN: Why do you say that you originally intervened then – your original
28 intervention?
29 MR. BARLING: I will have to look at the letter, but I think it was done as a matter of caution,
30 basically. It is in the bundle. We had seen the Notice of Appeal but of course we knew what
31 was at issue here, and if one turns to tab 3 it is there set out. We make the point in para.10 that
32 we have not yet seen the Notice of Appeal. If you look at the points we make, we say:
33 " A finding that BT does have countervailing buyer power would have adverse consequences
34 for BT."

1 We say also that there is a risk that we could suffer harm as a result of disclosure to
2 a competitor of confidential and commercially sensitive information and that, of course, is
3 always an issue where one needs to think about intervening in order to make sure that one's
4 confidential information is protected, and that I recall now is a real concern in that case. Also,
5 as we have said in 9(iii) we anticipated that we could provide assistance to the Tribunal and the
6 Respondent in the provision of information in respect of the negotiations. So although we had
7 not seen the allegations we had no reason to believe that anything wrong was being said. We
8 obviously had in mind that it might be useful that the Tribunal should have the benefit of the
9 other side in the negotiations there and as it turned out, of course, that was absolutely crucial in
10 our submission, because otherwise Ofcom were not in a position to deal with really what
11 happened in the negotiations. Therefore it was something absolutely discrete that BT was the
12 best person to come along and make sure that the full picture was given. So those were the
13 reasons then but of course they then devolved as we got to know what was being said. There
14 was then the concern about the attack on our conduct and ultimately the worry about Ofcom's
15 feeling about its dispute resolution and whether, in fact, there would be only one bite of the
16 cherry if the Tribunal was going to decide CBP rather than it being remitted to Ofcom. That
17 was obviously a worry because inevitably in this kind of situation there may be circumstances
18 where it will be right, but in this kind of case it is almost certainly Ofcom who is in a better
19 position to do the fact finding and collect the information if it becomes necessary than the
20 Tribunal, so we were concerned about that.
21 MR. SCOTT: Just pausing on 9(i) in your request, you were concerned about the wider implications
22 of the case there?
23 MR. BARLING: Yes.
24 MR. SCOTT: And wider implications come up in Mr. Green's skeleton for this hearing in para.10.
25 In para.10 Mr. Green properly refers to *RBS Backhaul* para.68 where the Tribunal said that
26 Ofcom's funding arrangements were too indirect to be taken into account, a point repeated at
27 para.40 of the *CPS Save* case. But he then goes on to talk about the award being paid out of
28 Ofcom's administrative costs and therefore borne indirectly by the rest of the industry, and
29 goes on to say that the rest of the industry can be said to have benefited from the clarification
30 of the CBP issue. As we understand it, when it comes to the rest of the industry Ofcom have
31 now taken something in excess of 50 Decisions in this series of Decisions on markets. Only
32 one of those Decisions has been appealed as we understand it, and only one of five parties has
33 actually appealed one of those Decisions. It may be that the three of you want to comment on
34 how far this case is principally for the benefit of H3G, and how far it is for the benefit of the

1 wider industry. An initial view might be that this case is principally for the benefit of H3G,
2 and that might need to be taken into account notwithstanding what we have said about not
3 looking at the funding arrangements.
4 MR. BARLING: Yes, well can I think about that one?
5 MR. SCOTT: Yes, of course.
6 MR. BARLING: I have a feeling that you are probably right in your last hypothesis, principally
7 obviously it is a matter concerning H3G, but I see how we put it in 9(i).
8 MR. SCOTT: Yes, you were concerned about the implications.
9 MR. BARLING: Yes, undoubtedly there are implications and as one sees the way the Commission
10 deals with these matters, and there is obviously a tension between what appears to be a very
11 strong presumption, almost but not quite irrebutable, where you have a 100 per cent. market
12 share and absolute barriers to entry and the idea that one has to look very closely to the facts.
13 That has now, to some extent been clarified.
14 MR. SCOTT: Yes.
15 MR. BARLING: And to that extent undoubtedly it is helpful. In terms of issues, we do say
16 effectively that we did not in fact lose on any point, that we ultimately were obliged to argue,
17 or wanted to argue about contrary to Mr. Green's suggestion in his skeleton, and that we in
18 effect won on the main one which sucked up most of the costs and effort, namely the
19 allegations about our conduct which, on Mr. Green's approach, would have amounted to the
20 exercise of countervailing buyer power, and that was very much the way it was put in their
21 documents, that the fact that we were able to exercise, were able to do those unreasonable
22 things was evidence that we had CBP. It was put like that.
23 Turning to para.12 of H3G's skeleton, why they suggest that the Tribunal did not
24 make findings about this – that is what they are intending to say because clearly the Tribunal
25 did, see para.81 of the judgment. Then dealing with the point made in 12(2) which suggests
26 that no one invited the CAT to rule on the negotiations, that is not really correct, and if I can
27 just give you references to the transcript: 25th May p.78, line 25 – page 80, line 11; and 26th
28 May, p.1, line 24 – p.3, line 20, those are probably the most relevant passages in the transcript.
29 I do not want to take time up now because the way it was put by Mr. Green at para.2.4 of his
30 amended Notice of Appeal was that in certain circumstances the Tribunal would not have to
31 rule, but they reserved their position, and we were never sure, really ever, as to what the
32 Tribunal had to do in the light of their submissions.
33 As to the point made in 12(2) I am afraid we just scratch our heads about that – they
34 withheld – had they known that you were going to rule on it they would have made a lot more

1 submissions about it. We are just bewildered by that point, we do not remember anything
2 being said about that – I may be mistaken, but I cannot recall anything being said "Oh well in
3 that case we will not bother you with all these submissions that we are going to make about it.
4 I would have thought here were ample submissions. There were all Mr. Westby's statements,
5 and plenty of submissions as well. It is difficult to see what else could have been said. In any
6 event, it was really the facts that mattered.
7 So far as 12(3) is concerned, we say the issue is not whether it was appropriate to
8 look at the negotiations, but whether H3G were putting forward an accurate account of what
9 happened is really what matters.
10 12(4) of H3G's skeleton – in fact we took very little time to make our points, as the
11 transcript shows, and we did most of it really via supplementary documents such as the table
12 and the index of evidence, and in any event the Tribunal thought it clearly appropriate to make
13 some findings on it.
14 In para.13 they say that BT added to their costs. If so it is, we submit, mainly
15 because it was necessary to refute the wholly baseless allegations in the Notice of Appeal and
16 the evidence, and therefore there is no real merit in the point made in para.13. I have made the
17 point about *RBS.*
18 We submit then, Sir, that there really is nothing in the allegation that we should
19 contribute to their costs, and there are strong grounds for saying that the Tribunal is
20 considering making some award in favour of BT against them. I do not think really I can say
21 any more.
22 THE CHAIRMAN: Thank you very much, Mr. Barling. Mr. Roth, briefly – do you want to respond
23 to anything that Mr. Barling has said? I assume not?
24 MR. ROTH: No, Sir.
25 THE CHAIRMAN: Thank you. Mr. Green – 10 minutes.
26 MR. GREEN: Can I just deal with the first point about the implications of the judgment. It plainly
27 is of importance to Hutchison but given that Ofcom itself is conducting a new review and
28 proposes to produce directions I think in 2004, the discussions which my client has already had
29 with Ofcom make it clear that it is an important matter which it will take into account in all of
30 its new determinations, which is important to my client and to the industry. I do not think that
31 could be gainsaid.
32 The next point: was this a score draw, or did Hutchison prevail in a substantial way,
33 whether on penalties or otherwise? Let me deal with this position of countervailing buyer
34 power. If I could just remind the Tribunal of the way in which it expressed Hutchison's own

1 position in para.101of the judgment: "It is part of H3G's case that OFOCM did not consider
2 this factor to a sufficient degree". That was the way in which we principally put it. You will
3 note at section G of our skeleton argument on this point was entitled "Error 4 – the failure to
4 investigate whether in fact BT had countervailing buyer power", we did leave open the
5 theoretical possibility that the Tribunal may want to go into the factual position on the
6 definitive basis. I think for that reason the Tribunal said:

7 "It would also be its case, we believe, that if OFCOM had done so it would have
8 found sufficient CBP to prevent SMP arising, but before us it did not seek to make
9 a positive case to that extent and contented itself with demonstrating that OFCOM
10 did not carry out a sufficient analysis."

11 That was the Tribunal's formulation of our case. Mr. Roth has read to you from our amended
12 pleading in which we made it clear that we did not consider that it was necessary for the
13 Tribunal to make a finding and we reserved our position. We reserved our position for the
14 reason that I explained earlier, namely, that at the first CMC, and I will simply give you the
15 references to this, that even at the point at which we had said that we did not want this matter
16 to be pursued the President had stated that the evidence should remain on the file by way of
17 background "… until we have seen a little bit further how matters develop." We understood
18 that to be the Tribunal saying "We obviously are the masters of our own procedure, we will
19 ourselves decide whether or not this is relevant once we have seen how the evidence comes
20 out" and that was the second CMC (November 2004). In the light of that, we were not really in
21 a position to simply say we are not going to pursue it because the Tribunal may then have said
22 well it is an issue we wish to be addressed on. Now, we down played it as much as we
23 possibly could in those circumstances, which explains why in the amended pleading we said
24 that we do not invite the Tribunal to decide this, it is not necessary unless you were against us
25 on (a) and (b) which was the principal way in which we put our case. We did not advance
26 anything else at the hearing, and we prevailed upon that point.

27 Mr. Barling said he effectively won on that, but you will recollect, I am sure, that 90
28 per cent. of his skeleton was dedicated to the conclusion which he arrived at in para.71, last
29 sentence: "The effect of such constraint …" and he was talking about end to end connectivity
30 "… is necessarily to neutralise any bargaining power BT might otherwise have been in a
31 position to exercise." That was BT's position at the hearing and, with respect to Mr. Barling,
32 they lost on that. End to end connectivity does not neutralise any CBP it becomes a question of
33 fact, and they made the same point in relation to all of the range of facts at para.52 – no
34 possibility of CBP, it neutralises absolutely everything. So as far as CBP was concerned, we

1 simply left open the definitive position, as it were, because we felt we had to, but we did not
2 advance it to the Tribunal and the Tribunal did not feel it necessary to decide the point.
3 The reference at para.81 that Mr. Barling was just referring to a moment ago to the
4 Tribunal's findings and to our observation at para.12 of our first skeleton that we did not put in
5 material, is this: we had prepared a much more detailed rebuttal of BT's evidence, which we
6 did not give to the Tribunal, not least because the Tribunal during the hearing was making it
7 clear to Mr. Barling that it would listen to the information but it was not going to come to
8 a conclusion on it, and we did not put in the document we had prepared. The document was
9 a very detailed document dealing with the evidence, but we did not trouble the Tribunal with it.
10 That was the position because we did not believe the Tribunal was going to make an express
11 finding either way and we had not invited the Tribunal so to do. If the Tribunal had said to us
12 "We are going to make findings" we would have put in the document, and we would have
13 expected there to be cross-examination, but we did not get to that stage. That is the reference
14 to the information that we did not put in fact before the Tribunal.
15 THE CHAIRMAN: Just a moment, Mr. Green, as a matter of chronology, deciding not to
16 cross-examine came before, I think, we gave any indication at all. So you had all decided that
17 you did not want to cross-examine anybody else and that decision was taken at the beginning
18 of the hearing, not as the result of anything we said during the hearing.
19 MR. GREEN: Absolutely, and that is why we never thought that the Tribunal was going to come to
20 a definitive view on the countervailing buyer power position.
21 THE CHAIRMAN: I do not see how you can have thought that arising from your collective decision
22 not to call anybody for cross-examination, as I think I made my own position clear, I thought at
23 one stage that was a slightly surprising position, but I was told ----
24 MR. GREEN: It was our witness, Miss Laurent, that we put up for cross-examination and it was BT
25 and Ofcom ----
26 THE CHAIRMAN: Yes, I am sorry, you are quite right, my observation was in relation to that, but
27 my strong recollection is that between you you had all decided that there was not going to be
28 any cross-examination of any witnesses.
29 MR. GREEN: I will come to Mickel/Myers in a moment, but at that point I think Mickel/Myers had
30 in a sense lost its relevance, but the principal witness was Miss Laurent. The only point I am
31 making is that Mr. Barling is saying that in some way he was forced to put in a great deal of
32 evidence from Mr. Lockyer. We were simply arguing, as we made it clear in our skeleton
33 argument, and we tried to make it clear throughout a number of CMCs that the principal point

1 was a more Judicial Review point, a failure to address. BT did oppose us on that, and it is clear
2 from the skeleton in the paragraph I have recited that BT said that end to end connectivity is
3 a complete answer. So Mr. Barling is simply wrong to say he did not lose on what Mr. Roth
4 accepts is a major point.
5 MR. SCOTT: Mr. Green, my recollection is that fairly early on – and I am not sure what the
6 reference in the CMC is – the President made it clear that this was an Appeal on the merits,
7 despite your reference to Judicial Review which I seem to recall you described as a "loose"
8 reference.
9 MR. GREEN: Yes, of course it is an Appeal on the merits, but you have had experience of a number
10 of cases in which merit Appeals the argument tends to focus on the logical consistency of
11 reasoning rather than on the factual underpinning – I think that is all I meant in terms of a
12 "loose" Judicial Review. The only point here concerns whether or not there were excess costs
13 incurred by BT as a result of a point on which it says it won, but it did not.
14 Briefly, confidentiality – I know it is a point Mr. Barling has not raised because
15 following the second CMC we resolved the issue. Assume for the sake of argument that
16 a great deal of my client's material, which was put in front of the Tribunal, was not
17 confidential – make that assumption. Then we say what are the consequences of that? It did
18 not impact upon the conduct of the hearing because we agreed rapidly with BT that there was
19 a ring in which they would see everything and if they had problems they would come back to
20 us. That worked very well in this case and as a result the Tribunal was not troubled. We then
21 took the Tribunal's views, which were expressed to us during CMCs, to heart and we resolved
22 the matter. That should be the long and short of it. Confidentiality is an issue which primarily
23 goes to the conduct of the hearing. It caused no problems and it did not in any material sense
24 add the costs. If we had to argue the points in front of the Tribunal there were some quite
25 serious points which you did not hear. No doubt we would have lost on some points, I accept
26 that. There were some things which, no doubt, we would have abandoned. We never had to
27 get to that stage, but there were some serious issues. Mickel/Myers was an illustration. It
28 concerned the way that Ofcom might regulate H3G in the future and, insofar as it was H3G fact
29 specific, it would have given BT as a future counterparty – or could have given them important
30 and sensitive information about the way H3G's costs operated, which would have benefited it
31 in a negotiation. We did not air these things in front of the Tribunal but, with respect, they were
32 serious issues which the Tribunal might have had to rule on, but we did not trouble the
33 Tribunal because we found a very easy *modus operandi* with BT which in the event actually
34 worked.

1 For Mr. Roth to say that our case is thin – Mr. Roth and I have done a number of
2 cases in which confidentiality has been an issue and my experience is in this case it has caused
3 less of a problem than in almost any other that I have been involved in.
4 So far as the refinement of pleadings is concerned, Mr. Roth did not deal with an
5 issue which – I was going to give you the reference which I should have done actually to the
6 transcript in relation to CBP, it is tab 20, p.28 lines 16-28, and then the President's statement,
7 which I readily remember left us in a certain amount of disquiet, at the bottom of p.29, line 33
8 and 34. But so far as costs were concerned, in that same transcript, and the President was
9 making a number of observations in a small Judgment at that point (tab 20, p.30), the President
10 aired the question of costs and said that quite a lot of information and evidence has been served
11 about it arising out of the fact that Ofcom have stated in its Decision that costs cannot be
12 reduced as a result of the Agreement, and that does come back squarely to Ofcom's court.
13 Ofcom only made it clear to us almost in the days before the hearing started, that this was an en
14 passant comment. In other words, that everything that we had all been engaged in was a waste
15 of time because it was never part of Ofcom's own thinking, it was simply not a relevant issue.
16 Two very final points. Mr. Roth says that one alternative approach to costs is costs
17 from each side. Well if one actually said the major issue, as Mr. Roth accepts it is a major
18 issue, CBP, and we won on that and we lost on *Tetra Laval*, there would be a netting off if
19 there were costs going either way, and I would strongly submit that we would be in balance,
20 and that would not be an inappropriate way to address matters.
21 Finally, so far as BT is concerned the short point is that regardless of what
22 Mr. Barling says we did win on the CBP point, he did oppose us, and he did lose, and for that
23 reason, that being a major issue of importance to both parties, there is some justification for
24 a portion of costs flowing from BT to us.
25 Unless I can assist you further, those are my submissions.
26 THE CHAIRMAN: Thank you.
27 (The Tribunal confer)
28 THE CHAIRMAN: In light of the time at which we have finished we are not going to attempt to
29 give an oral Judgment on costs now. A written Judgment on costs will come out in the normal
30 way, we would hope fairly shortly. Thank you all very much for your helpful and time limited
31 submissions.
32 (The hearing concluded at 12.40 p.m.)