IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 September 2012

Before:

MARCUS SMITH QC
(Chairman)
BRIAN LANDERS
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LTD
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

- and -

TELEFONICA UK LIMITED Intervener

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HEARING

APPEARANCES

Mr. Julian Gregory (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. Murray Rosen and Miss Pia Mithani (of Herbert Smith LLP) appeared for Vodafone Limited.

Mr. Michael Bowsher QC and Mr. Nicholas Gibson (instructed by Legal Advisers, Competition Commission) appeared for the Competition Commission.

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THE CHAIRMAN: Mr. Bowsher?

MR. BOWSHER: Good morning.

THE CHAIRMAN: Before you begin, I just want to say thank you to all the parties for their very helpful written submissions which we have all read. It might help if I just set out quickly where we see each of the sides coming from so that you can then tell me how wrong I am later on.

As we see it in broad terms there is no dispute as to the procedure the CAT has adopted hitherto in cases like this of having, as it were, a second round of pleading and of having the Competition Commission before it in cases where there is a s.193(7) dispute. The issue is as to the nature of the Competition Commission's role when it is before the Tribunal. As I understand it, what the Competition Commission is saying is that once a determination has been made by it, it is like any other administrative decision maker whose decision is being challenged on a judicial review, it ceases to be what we termed in our substantive Judgment an "administrative appeal body" and, if I can put it this way, it descends into the ring as a party defending its determination against attack and, just to quote the Competition Commission, it is then a proper contradictor and, as such, is a party. That, Mr. Bowsher, is where I think you are coming from.

On the other hand, as I understand EE and Vodafone's position, the suggestion is that when the Competition Commission appears before the Tribunal after this determination has been made it is continuing in its role as an administrative appeal body and it continues to be part of the "appellate decision making structure" to quote from Vodafone's submissions. On this basis the Competition Commission's role is basically elucidatory, "assisting the CAT in an active but neutral capacity" – again to quote from Vodafone, or, as EE puts it the Competition Commission is "one of the appeal bodies" rather than a party.

I do not require correction now but it would be helpful for you to tell me how far, if at all, I have got that wrong.

Mr. Bowsher, before you start, the question I have for you on which I would be very grateful to have your help is this: suppose a point is made by a challenger to the Competition Commission's determination under s.193(7) which actually, although the contrary can be argued or it can be said it is wrong, the Competition Commission actually considers to be correct. So the Competition Commission could properly contest it, but behind closed doors it looks exactly as though it is right. What should the Competition Commission's approach in such a case be? It seems to me that quite a lot might hang on

that question and the answer may lie in the precise nature of the Competition Commission's position, whether this is as a party or a neutral non-party.

With that rather long introduction, Mr. Bowsher, I will let you begin.

MR. BOWSHER: May I just process that last question, if I may? I will address that question at an appropriate point, and if I forget it please remind me that I have not.

THE CHAIRMAN: I certainly will, Mr. Bowsher.

MR. BOWSHER: Perhaps I should briefly make the introductions as there has been a slight reorganisation since we were last here.

I appear again for the Competition Commission, with Mr. Nicholas Gibson. Mr. Julian Gregory is here today for EE. Mr. Murray Rosen and Miss Pia Mithani for Vodafone.

The Tribunal is well familiar with the factual background to this hearing and I do not suppose it is economic to labour how it is we got here. Maybe I should make this observation which is partly by way of history, but also is a useful litmus test for the reality of the situation and that is this: you will probably be aware that permission to appeal against the Tribunal's Judgment was granted by the Court of Appeal a few days ago, and you will have seen the application and so on. I do not know how far you have studied it, but what is relevant is the nature of that appeal is an appeal against the Judgment and the terms of the Judgment are based in a judicial review context; they are a judicial review analysis of the determination. That is the reality. It is common ground that this is a slightly odd procedure, however it is that we get there but the reality is that your Judgment itself was not an analysis of Ofcom's decision on its merits, it was a judicial review analysis on what we as the Competition Commission had done, and the appeal follows that logic through. That was a rather out of sequence introduction, but it was perhaps just worth making that point.

You have quite a lot of material and various submissions. I do not propose to take you to all of the written submissions that we have made. I may give some references to tab numbers, I hope we are with the same tab numbers, and it might be worth just checking that we have the same contents page because the titles of some of these submissions are a little confusing. I am afraid we perhaps did not apply sufficient rigour as to what we called them. For my own note we have our submissions, which I will call our "tab 3" submissions, which were our first submissions.

THE CHAIRMAN: Yes.

MR. BOWSHER: Then 4 and 5 are Everything Everywhere and Vodafone. BT is 6, and then there are our "tab 7" submissions, which is the reply to that, then there is our tab 9 submissions which was our response to the Tribunal's letter.

THE CHAIRMAN: Yes.

MR. BOWSHER: We could not find a better way of trying label them unambiguously in my own mind anyway.

THE CHAIRMAN: No, and just to clarify, I do not think we have EE's and Vodafone's submissions in the bundles but we have them separately.

MR. BOWSHER: You are absolutely right, and then there is what I think in my own mind are the recent submissions or whatever, the last submissions, as it were.

THE CHAIRMAN: We have those.

MR. BOWSHER: I hope not to take too long, but this does raise an important point so I should just make the Commission's position absolutely clear.

This hearing was fixed, of course, only to consider whether the CC is a party, a jurisdictional question rather than really a discretion question – you have the discretion submissions, but given the way the matter has been argued it does bring with it the wider question as to what the nature of the Competition Commission's participation should be in these proceedings.

In cases such as this it has been the repeatedly stated position of the Competition Commission that it would not be a "shrinking violet" – that was a phrase coined by, I think, Mr. Tom Sharpe in the one other case that actually has gone, as it were, all the way through, the H3G case. We have now provided you with the transcript of the CMC on 2nd February 2009, p. 7, line 27 where he says: "The Competition Commission will obviously rely upon its determination." Perhaps it is worth my taking this a little slowly because it remains certainly what we thought we were doing in this case, if I can put it that way.

> "The Competition Commission will obviously rely upon its determination as its primary evidence in reply. You should not assume, though I do not think you would, that we will be shrinking violets in defence of the determination and we will indeed respond, if necessary in writing but certainly orally, on all the matters which are being challenged. Secondly, as to the oral hearing you need no reminding under Rule 19 that you are masters in your own home and to the extent that this is a necessary step for you, take the further steps in relation to Ofcom. It is a step you have to take whether or not people object to the determination at all. It is arguable that the full panoply of written and especially an oral hearing may not be strictly necessary and you are obviously seised of that. Our view is that this is very familiar material; very familiar indeed and unless the Tribunal is going to be materially assisted in oral argument then there is a very good case, particularly in

the interest of fast tracking this to its final conclusion for there not to be an oral hearing."

To some extent the procedure that then followed was along those lines, although there was a much more written procedure in that case. I think the Tribunal will probably know better than I because in a sense the position was reversed, the Commission had taken a different position, the fact that the outcome had been reversed in the decision and the review was much more focused in writing than it had been in this case. In my submission that does not really make a difference. The position remains we are not shrinking violets, we are, as it were, in the primary position to defend the determination.

We say that the position we are in can be summed-up in a few propositions. What I propose to do is simply note those propositions and then I will expand on them one by one. There are ten of them, I am afraid. The status and role of the Competition Commission in proceedings under s.193(7) is a question of the proper interpretation of the nature of those proceedings. They are unusual. We see the force of EE's contention that s.193(7) challenges do represent an unusual type of procedure, but they do have an obvious parallel. This is the third. The obvious parallel is with judicial review proceedings in which a decision is challenged and which is the decision maker is the respondent to those proceedings.

Fourth, in such proceedings the decision maker is, or is to be treated as, a party, and may be awarded some or all of its costs. In this unusual procedure the Competition Commission should be treated as a party, or as if it were a party to those proceedings. Any other conclusion would do violence to the logic of the procedure. That is the logic which is still being followed through in the ongoing appeal.

Fifth, the Competition Commission is neither an intervening party with an interest in the outcome, nor an *amicus curiae*. It is the party defending its decision. One must look at actual reality of the case, so for instance, just as the reality will sometimes demand that interveners be awarded their costs, in this case one must look at what is really happening here, which is that we are defending our decision. When I say "looking at the reality", where interveners are awarded their costs, if you look at the sorts of cases – we have not put these in the bundle, but things like *Aberdeen Journals*, where it is the leniency applicant or whatever who gets his costs. They are not just interveners, they are engaged in the guts of the matter.

Proposition six, the reality is, and this is a good example of it, there are and may be many cases and a number of reasons why no single party other than the Competition Commission,

whether it be Ofcom or any operator, could provide the most effective defence of a complex decision such as a final determination made under s.193.

Seventh, it is important that this role as party be understood. If not, it is necessary for the Competition Commission to reflect upon how it participates in the future, and I will come back to that.

Eight, the fact that the Competition Commission is a party, or is to be treated as such, affords jurisdiction to make the costs order. It does not, of course, require the Tribunal to make any order in favour of the Competition Commission but, for reasons already stated in writing, we do seek such an order, and I am not going to say any more about that today.

Ninth, even though the Competition Commission is to be treated as a party, it would only be in the most extreme circumstances that any order for costs would or could be made against the Competition Commission. We contend that only in those extreme circumstances would such an order be justified.

THE CHAIRMAN: Just pause there. One of the points which puzzles was the reservation that you had in para.14 of your additional submissions, which suggested an asymmetric costs regime whereby what appeared to be said was that you could get your costs awarded in your favour but costs could not be made against you. As I understand it, what you are saying now is that there is jurisdiction, assuming the Competition Commission is a party, to make costs orders both ways, but you will be saying in the exercise of our discretion an order should not normally be made against the Competition Commission.

MR. BOWSHER: Indeed, and I do not want to spend too much time on this, but it is asymmetric, asymmetric in exactly the same way as you explained, sir, in a case which we have handed up this morning, *BT v. Ofcom* [2011] CAT 35. It was partial private circuits, and it's paras.19 to 25, where you dealt with this point regarding Ofcom's position, so you can have a situation where the jurisdiction applies, but in reality Ofcom can be entitled to have an order in its favour. It is para.19 of that judgment. It is only where, in effect, the decision maker was acting in bad faith, in that sort of extreme situation would an order ever be made against the Competition Commission. The jurisdiction is there.

THE CHAIRMAN: I am very grateful for that clarification. If it simply a question of discretion then that, I think can be parked for another day. What I was troubled about with regard to your para.14 was that you seemed to be suggesting an asymmetric costs jurisdiction and that we actually could not make an order against the Competition Commission on the basis of jurisdiction, but that is not your case.

MR. BOWSHER: No, it is asymmetric discretion not asymmetric jurisdiction.

Sir, that was my ninth point, which I probably do not need to come back to again.

Tenth, it does not follow though that costs order in favour of the Competition Commission should only be exceptional. It should not be assumed that challengers can bring on the expense of these proceedings without any possible sanction of a costs order. Such proceedings place a substantial burden upon the regulatory structure, and the Tribunal should be ready to apply sanctions against unsuccessful attempts to use that procedure. Some responsibility for engaging this process should be applied to those who bring proceedings and are unsuccessful.

It is said by, I think, Vodafone that we have not applied for costs in the past. Firstly, I make the obvious point, the fact that we have not asked in the past is legally irrelevant. There is quite a lot of material in the bundles before you, which I am not going to take you to, about how the Government is looking to develop the law, both in terms of court costs regimes and also the costs regime applying to this jurisdiction. That is reflective obviously of a wider concern about the costs of justice generally. It should not be a surprise that we are asking for our costs now, because that is a general and increasing concern and has been maybe over the last ten or 20 years, but that increasing concern is reflected perhaps in the fact that we are asking for costs now when we were not four or five years ago. There is nothing more to it other than a not surprising change in the overall tone in the public sector.

Can I preface the development of those observations with two points. The Competition Commission is committed to the proper management and disposal of these price control disputes and to support the CAT in the implementation, where proper, of the determinations made by the Competition Commission in those proceedings. Evidently, this application starts out as an application concerned with the proper protection of the public purse, a concern which is probably more acute than it may have been.

The Competition Commission, as with all public bodies, has to be mindful of the deployment of its resources, but that is not its primary concern or interest in the issue, which has evolved and that wider concern is one which it is convenient now to raise in this actual procedure. It is a real issue now to determine what the role of the Competition Commission is. I suppose what I am really getting to is, if there is a shortcoming or lacuna in how the Competition Commission has been placed in these proceedings, we could simply, as it were, forget it now and move on and await until it arises again. It seems to us that now is the time to grapple with it when this Tribunal, for better or worse, has actually had to deal with the realities of this unusual procedure and can work out what the Competition Commission's position is, and ought to be, and the Tribunal and the Competition Commission can then

work from that position in the future, rather than just, as it were, forget about it and leave it to somebody else to worry about later (if I can use the vernacular).

The second point is that in the earlier price control case that I have referred to, and I have already mentioned this but I will just reiterate, we were not shrinking violets, but we did emphasise that the purpose of the proceedings was not to generate satellite litigation. In that case the challenges were focused and although not exclusively limited, they were largely focused on the new matters in the Competition Commission's determination, as the Competition Commission had found that Ofcom had gone wrong and that the Competition Commission devised a new remedy.

The nature of that case was therefore rather different, and for that reason most of that case could be dealt with in writing. That is not how this case developed. That difference is not really relevant for the hard-edged point of principle about whether we are or are not a party.

THE CHAIRMAN: Clearly no one is suggesting there is one way of doing this. The way the post-determination proceedings develop will largely depend on the nature of the challenge being made. I do not think there is any difficulty about that, nor particularly in the Competition Commission not being a shrinking violet. I think the point that Mr. Gregory might make is that you should be a neutral shrinking violet rather than a partisan shrinking violet.

MR. BOWSHER: There is a danger of the metaphor being stretched to its ----

THE CHAIRMAN: I was becoming aware of that as I said it!

MR. BOWSHER: I should pick up this point without engaging with the metaphor, we are partisan in the sense that we defend our decision. We are not partisan in the sense that we are descending into that ring, It is only because we are the decision maker. Just as in any other judicial review, we are the decision maker defending our decision.

Let me develop that a bit further. I think the first two propositions I made are fairly self-evident. This is a question of the proper construction and analysis of the nature of these proceedings and they are unusual proceedings.

The obvious parallel is with judicial review proceedings in which a decision is challenged. Section 193(7) sits within the scheme described by the Tribunal in paras. 55 to 59 of the Tribunal's Judgment (p.20), I do not propose to take you back to it. On the matters covered by the Competition Commission's determination that determination is binding. The Tribunal can have no input into or influence into the decision and once it has ordered the determination it is largely *functus officio* with regard to the subject matter of that determination save, of course, as provided by s.193(7).

It is only not bound by the determination if it concludes that if there were a procedure for bringing a judicial review challenge against that determination, and if that determination were brought that a court, deciding that determination, would set aside the decision. The test is whether it would be set aside, not whether it *could* or *might* be set aside, but whether it *would* be set aside. The determination is only set aside if the Tribunal concludes that if there were provisions, such as judicial review, that such a claim would succeed, and the only sensible way in which, so far, this Tribunal has managed to think about how to deal with that is to actually run a procedure as if it were a judicial review. There may be some other clever way of doing it but that seems the obvious way of doing it. It runs a challenge along judicial review lines as if there were a statutory basis for such a procedure. This is not therefore an actual judicial review but it is in all relevant respects run as such. It is a subjunctive judicial review. It is a subjunctive judicial review conducted in all relevant respects equivalent to an actual judicial review. It is only a subjunctive judicial review because it is based on the supposition as to the existence of such a procedure but, in all other respects, this Tribunal functions as if it were applying judicial review principles. I think the answer to your first question you put to me at the outset is it really turns as a matter of discretion as to how a judicial review court would look at the determination.

I am not sure that I have entirely thought through the hypothesis that you are putting to us, but yes, it might be a situation where the Tribunal thinks that the Competition Commission has got something wrong, but that does not mean that the determination would be quashed or set aside.

THE CHAIRMAN: I think the point that I was grasping at was much more whether you are in the position of defending the decision as a judicial review? In a judicial review clearly the public body that is being reviewed is entitled to defend its decision hook line and sinker and take a very aggressive and partisan approach, quite properly, in defending its decision. I understand that is how you are using the phrase "defending the decision". I think the point being made against you is that that is actually not your role, and that your role is still, even after your determination has been handed down, that of a body that is actually neutral and therefore in essence elucidatory.

Now, it may be that in many cases that is not going to make a difference but one instance where it might make a difference is where, although if you were defending the decision you could perfectly properly take a point in resisting an argument being made against the determination, if you take a neutral line you may say that in this particular instance Vodafone have got it right – just to take an example – "they have advanced what seemed to

us to be a cogent JR ground, we could defend it and if we were a party we might", but because we are neutral we are going to have to take a rather more objective approach and say: "Actually, they are right."

MR. BOWSHER: With respect, I do not think that there is in fact any real distinction there for two related reasons. Owing to the unusual nature of this procedure the way in which the Tribunal tests the subjunctive question – would it have been set aside – is it actually runs a proceeding in which we all have to pretend that we are in an actual judicial review. The only way for that test to be run is that we participate as a party to that judicial review as the decision maker. It would not be a real test, a real application of judicial review principles if we were simply to say we are going to act as if we were in a judicial review, but in an unusual judicial review and the decision maker does not turn up and simply allows the challengers to take pot shots at it. That is not how judicial review works and it would actually unnecessarily lower the bar. It would lower the bar from, as I said at the start, whether it *would* be set aside down to whether it *could* or *might* be set aside, because it would simply be there are all these arguments, if this were a real judicial review the decision maker might come along and defend its decision, but because it is neutral it is not going to do that. That is not this case. This is a procedure, in the way it has been structured in all previous cases, in which the decision maker, the Competition Commission comes forward and defends its decision, just as it would in any actual judicial review, because that is the only way in which s.193(7) can actually make any sense and function within its language. Otherwise, you are not testing whether or not it would or would not be satisfied. Let me take your concrete example. As with any responsible public body in judicial review, certainly this is my understanding of the position, we are not a party to private proceedings in which points are taken against us and we think: "that is a good point but I am not going to agree that". If a point is made against a decision maker in judicial review, a responsible decision maker recognises that and takes that on board openly in its case and in its submissions. It may say: "Yes, we now see that point which we did not take into account in our decision, but that we do not think that affects the outcome of our decision", or it may be that it draws stumps and surrenders, but that is how a proper decision maker behaves, at least that is how I was told a proper decision maker behaves in judicial review proceedings. If I am wrong there we are. But that seems to me how the Competition Commission would and should act. That is not being neutral, that is acting properly in a judicial review. If anyone thinks I have got that wrong – no. With respect I do not think that analysis takes the point any further; if anything it emphasises why this is a real judicial review.

I will come on in a moment as to why again, in reality, in order to make this proceeding work as a fully functioning judicial review it is right and appropriate that it be the Competition Commission not anyone else that defends the decision and I will come and give those examples.

If there were some other way of establishing whether the determination would be set aside - *would* be set aside, not *could* be set aside – that could be applied s.193(7) does not tell us what that would be, and the wit of man, or the wit of the British legal system, has not yet come up with that means of doing it. We operate this shadow or subjunctive process because it is the only way which we have come up with doing it. Whether or not the legislator had in mind some other process of answering the question in s.193(7) I do not know.

In those circumstances we have to run this subjunctive judicial review, and in that subjunctive judicial review the Competition Commission is the proper, natural and best placed defendant, even though it is not the defendant to the wider s.192 proceedings. There is a distinction between them and it is the distinction that is at the heart of the costs application that we make.

Even though we are not a defendant to the s.192 proceedings, the 193 proceedings are separate from but nested within the s.192 proceedings. Once we reach s.193(7) the public interest in the goals of the statutory scheme requires that this determination be upheld, and that is why the Tribunal's discretion is limited and the scheme should not be unbalanced by depriving the Competition Commission of its costs of successfully defending its determination. Ofcom maybe in difficulties in some of these cases in defending all of the decision and a defence of that decision which depends upon the wholehearted support of other commercial entities which may have gained in whole or in part from some parts of the determination again is not a proper shadow test of whether or not the decision would be set aside.

This is not the only procedure in which the Tribunal exercises a function which is susceptible to review in judicial review, and we have given a number of examples of that in para.5(2) of our tab 7 submissions, but I think in light of your indication to me already this morning you probably have that point, but if I refer you back to that for later, there are other parallels, para.5(2) of the written submissions where we refer to other examples, and other statutory regimes, but there is no doubt that we are a party there and we should be treated as a party here.

That really probably elided through my fourth proposition which is we should be treated as a party and maybe awarded some or all of our costs. If I can just emphasise and take you back to our earlier submissions in this regard it would be useful just to look at tab 9, paras. 5 to 10, where we set out the appropriate approach to interpretation. Again, I suspect I do not have to turn up all of the authorities, I can just remind you of the references. The Tribunal has expressly stated on many occasions that Rule 55 should be interpreted widely, and then we have given the reference to *Umbro* for that proposition but I think that is not the only such reference. *BCL* - para. 12 of the Judgment is also relevant, we quote that as well actually in the body of the submissions but you have it also at tab 12. The CAT's Rules should be interpreted broadly, and should not be interpreted in a manner which gives rise to injustice or to procedural difficulty. In our submission there would be procedural difficulty if one were to create a situation in which the CC were not treated as a party to these judicial proceedings, to these subjunctive proceedings, or treated as if it were such a party because it obviously is and that is the only way to make s.193(7) work properly.

We refer you back then also to para. 5 and 6 of our tab 7 submissions, where we make the point I think we have already really made, that this is in all respects operating as a judicial review process in which we function as a party.

If there is any analogy it is an analogy with judicial review and we should be treated as a party to a judicial review. EE and Vodafone have looked at other analogies and I will look at those briefly.

The position regarding Magistrates' Courts and lower Tribunals is not, in truth, so different from that which applies here and the correct proposition can be taken from the *Davies* decision of which I think you have two copies – Vodafone have provided you with the proper Weekly Law Report version at tab 14 of our file.

One does not need to engage with the lengthy exegesis of the history of all of this set out by Lord Justice Brooke. He sets out his questions at para.3 of his judgment and he answers them in para.47. I think one can really spare oneself the paragraphs in the middle, interesting though they are. Can I invite the Tribunal to read para.47 because that sets out the position which is not so different from that which we say applies here. (After a pause)

So we are not in situation three, where we are a neutral party providing information, as it were. We are in situation two. We say it is not the normal costs position because we are in the position that is analogous to that that the Tribunal set out for Ofcom. We are resisting an application resisting an application actively by way of argument, and we are therefore an active party to the litigation.

THE CHAIRMAN: That is the question, is it not, really?

MR. BOWSHER: The problem with these analogies, they do not really take one very far and I am not going to spend very long on them because I think one can end up chasing one's tail with analogies. The reality is, rather than analogy, it is judicial review and we are the active party in the judicial review.

THE CHAIRMAN: Let me ask you this then, Mr. Bowsher. Obviously I can see why in this case the Competition Commission is very keen to recover its costs. Might not the draftsman of s.193 have thought that it would be helpful to remove all costs worries from the Competition Commission and effectively, if you are not a party, granted you do not get your costs in cases where you win, but conversely those cases where you, I am sure very rarely, get it wrong you are not exposed to costs, and so that enables you to be much more effectively a neutral party assisting the Tribunal in whether there is or is not a ground for judicial review.

MR. BOWSHER: With respect, I would suggest that is really unreal for two reasons. I do not know if the Tribunal has had the opportunity to read the recent book **Laying down the law** by the former statutory draftsman, Mr. Greenberg, who makes the point that courts are far too anxious to suppose that legislators might have thought things when it is plainly obvious when one has actually worked inside the Office, which I certainly have not, but he has a career of that experience, it is quite obvious that the legislator never thought of it. One can strain the language to think, could he not have thought of it? That is not the way that provision works.

The reality is that it is unreal to suppose that a decision maker is going to say, "Here is my decision, but having made it I am going to provide my further reflections on how it might be set aside totally neutrally, with the following 12 respects in the way it might be aside by way of judicial review". That is the not the reality. The reality of this test is that you make a decision and it stands unless it is set aside in a judicial review. It is tested in the fire of judicial review, in the way that judicial review is run – in other words, that the decision maker defends his or her decision, but quite properly, as a public body, if a good point is made that had not occurred it before, it says, "Gosh, I have now realised I need to alter my position", and either concede or consider what effect it has on the decision. The way that s.193(7) is worded makes it plain that we do participate as a party in judicial review, because that is the only way in which can effectively decide whether or not it *would* be set aside – not *could*.

If it could be, that might be rather different because you might have a situation where you said, "Well, Mr. Bowsher, could this be set aside on judicial review? In your heart of hearts do you think there is anything in these 12 points?" We, neutrally, can say, "We think we are right, but we can see that there are these points and on that basis you can set aside the determination". That is not the test. The test is, would it be set aside in the fire of battle?

THE CHAIRMAN: Can I put another way. Let us take the analogy of appeals of decisions of this Tribunal to the Court of Appeal. We write our judgment. It goes up to the Court of Appeal and the Court of Appeal simply looks at the judgment as it is written and decides whether or not the grounds of appeal should succeed or not. As I understand it, exceptionally, the Court of Appeal may ask a judge whose decision is being appealed for copies of his notebooks, or something like that, for information, because sometimes that is relevant as to what was said. Other than that, the Court of Appeal has the judgment and nothing more from the Tribunal being appealed to it. Could one not make the same point about the Competition Commission's determination, it should stand or fall on what has been written by the Competition Commission, and only in those cases where one really does not understand the technical points being made, or where in other cases one needs assistance – for instance, if there is an allegation of a failure, say, of due process, if you want to have input there – why should that not be the way in which the s.193(7) procedure operates?

MR. BOWSHER: With respect, sir, there is a fundamental distinction between the Tribunal and the Competition Commission. The Tribunal is a court of law, the Competition Commission is not. The nature of its enquiry is different. We can argue about what the precise nature of its enquiry is, but the reason why this is an appeal on the merits that goes to the Competition Commission is that, although it may be acting in a *quasi* judicial manner, it is an inquiry team that operates within its rules but applies technical policy, economic judgments, probably some other categories of judgment it has to apply. Those are not the proper province of any court unless all that evidence were brought before it. This is done not in the course of a court process where all the evidence is brought and a judgment is made on the basis of expert evidence, and so on and so forth, this is a decision maker which, acting, yes, in a *quasi* judicial manner, it takes that decision following its inquiry and defends that decision as any other decision maker does. There are plenty of *quasi* judicial processes where a decision is taken which involves a range of policy and other questions, and that is why, in effect, the deference is shown to that determination by the Tribunal, and is required to be shown by s.193(7). It is only if that inquiry on the merits has gone so wrong that it would be set aside on judicial review, that it should not be given effect to.

A judgment of a court making determinations of law is simply assessed by the Appeal Court in its terms on the basis of what is said. It is not defended because it speaks for itself, that is right, but the way judicial review works is that although the decision maker is confined to the content of his decision – all decision makers are confined to the content of their decision – they are entitled to, and, given the way our administrative law system works, expected to defend their decisions if they are proper decisions, because they would otherwise be shirking in their duties.

THE CHAIRMAN: Save that we know from various cases that you have cited that where it is an inferior Tribunal that is being judicially reviewed the general practice is for that Tribunal not to appear.

MR. BOWSHER: Those are Magistrates' Courts.

THE CHAIRMAN: I quite take your point, and you could perfectly fairly say that what the Competition Commission does is radically different from what these inferior Tribunals are doing. That may mean that the Competition Commission's role in explaining what is going on, because these are, as you say, high technical questions, is greater than it would be in the case of these other inferior Tribunals. The point of principle, namely that you are simply turning up to explain the difficult bits to a Tribunal that needs to understand, that is the limit of your role.

MR. BOWSHER: It is not just explaining the difficult bits, if I can put it that way, to take your phrase – it can be parked to one side whether I accept that as a way of putting it or not – we can think of aspects that have arisen in this case where we had those discussions. A large part of proper judicial review, not necessarily in this case – and I am generalising – will be a procedural challenge, do you follow your procedures or not? The nature of that challenge is a challenge which the decision maker does, typically and usually, defend vigorously if it is right to do so. That is the way in which these things are dealt with. It is the same as, for example, a challenge made to an arbitrator when the arbitrator is served under s.68 of the Arbitration Act and it is said, "There is a serious irregularity because you failed to discharge your general duty under s.33, you failed to hear some part of the case or whatever", in those circumstances you do not defend neutrally by saying, "There are the following interesting points of law which may or may not assist the court", you say, "No, I did this, it is wrong to say that I failed to listen to this argument, it is wrong that I failed to give someone a proper opportunity to put in evidence on this point, they had this, this and this, and that was enough".

THE CHAIRMAN: I quite understand. Your case for procedural irregularity is actually a very good example, because that involves facts which will not appear in the determination at all. There will be facts which will be known to the parties and known to the Competition Commission, whether it is a party or not. One will certainly want the factual input of what actually went on. The question, I suppose, is whether one needs the last phrase of the Competition Commission saying, "And here is why it is not a procedural irregularity". It may be that should be left to the Tribunal to determine without submission from the Competition Commission.

MR. BOWSHER: To do that would do violence to the statute. The statute requires that the Tribunal consider whether or not it would be set aside on a judicial review. What happens in a judicial review, if I may ask the rhetorical question? The decision maker defends his decision. He does not stand back and say, "These are things you might want to think about", he defends his decision.

It is right and proper that in a judicial review the decision maker does exactly that. If it is said that he did something wrong, and the decision maker believes that it has not done something wrong, it does not just set out the facts and say, "This is what we did, it is a matter for you to judge whether we did right or wrong", it says, "These are the facts and the proper conclusion from those facts is that what we did was the right thing to do, we correctly performed our statutory duty", or, "We correctly took account of the statutory goals that we had to meet".

If the legislative draftsperson had intended something different he or she would not have referred to the principles of judicial review. It is just the same principle that has been applied in those other circumstances where the Competition Commission is subject to judicial review. We have given those examples, the Enterprise Act, s.120, s.179. There is no question that in those proceedings the Competition Commission is the defendant and defends its decision in an actual judicial review.

The only difference here is because of the odd way in which this proceeding comes to the Tribunal first, then goes to the Competition Commission, and is then sent back to the Tribunal in a binding form, but with a decision which the Tribunal cannot unpack, except on judicial review grounds. The only test for that is by means of what I call the subjunctive judicial review. It can only make sense if we actually participate as a defendant to judicial review because anything else is not a judicial review. It is not the test as to whether or not the decision would or would not be set aside in judicial review if we simply say, "Here is

the decision, but we are not going to try and defend it", or, "We are simply going to respond to a couple of questions about what did or did not happen".

As the Tribunal is well aware, these are complex matters. They are complex both procedurally and technically. On procedural questions these are detailed and complicated procedures in which a number of events occur and explanations may need to given as to why what was done made sense of the process. They are technically complex because if an argument is made as to whether or not we have appropriately weighed one goal against another, and we have explained what we need to do and they say that explanation is not right, it is right and proper that we say "no, we stand by our explanation, we are not trying to depart from it, but that explanation in the determination is correct; it is a proper discharge of the balance of the statutory goals or whatever. If we were not there to explain it, as I said, who else would?

Let me jump ahead to an easy example of where the system potentially could break down altogether and that would be in the area of remedies. In some cases the Competition Commission decides against Ofcom and then devises a new remedy and, in a price controlled situation, that may be a very complicated remedy. Then there is a judicial review by one party or another against the Competition Commission determination with the new remedy in and the question is: should that determination containing a new remedy be set aside? Who is going realistically to defend that properly? It may well be that one or other commercial party involved adventitiously jumps on the bandwagon and supports that determination or it may not. It may be that none of them have any interest in supporting that price control. But, it will be inherently difficult, if not impossible, for Ofcom to defend all the analysis and inputs into that remedy which was simply not part of and may have been contrary to its own policy thinking. It may be a part of the determination that the Competition Commission simply thought the Ofcom's approach to policy questions was wrong and that is why, on the merits, its remedy has been completely reversed. To expect Ofcom to defend properly that determination is, in our submission, unreal. That is a useful litmus test, it is not what happened here but one has to think of other examples.

THE CHAIRMAN: One has to think of all possible scenarios, I think.

MR. BOWSHER: In that circumstance, to be frank, s.193(7) breaks down, because the point is that we make the determination and it must be upheld, unless it would be set aside in judicial review, but if we are not there to defend it Ofcom is not in a position to fully defend it because it is contrary to its own policy position.

THE CHAIRMAN: Mr. Bowsher, I think you are putting it a little bit too highly. I do not think anyone is suggesting that you not be there. I think the debate is, as you put it very well earlier on, is in the context of Lord Justice Brooke para. 47 and whether you are appearing, as it were, in a category 3 capacity, or whether you are appearing in a category 2 capacity. Are you saying that if we were to rule that actually your role is in a category 3 capacity, i.e. neutrally assisting the court in the way Lord Justice Brooke has described, are you saying that if that were your role a judicial review of your determination would be hindered or not practical. Do you put your case as high as that?

MR. BOWSHER: We are getting hypothetical here, but I can see cases in which it might be, because if it was purely neutral ----

THE CHAIRMAN: It is put quite broadly in category 3:

> "If an inferior court or Tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the standard practice of the court is to treat it as a neutral party."

To my mind that would include all kinds of technical explanations as to how it works, explanation of policy, all these things could be brought under the third head.

MR. BOWSHER: Again, there is a danger that we get into semantics here. Your description as to what might be neutral has, with respect, gone beyond what Lord Justice Brooke said, because you added in the words, for example, "policy".

THE CHAIRMAN: "Policy" yes, I did.

MR. BOWSHER: Which is an important addition.

THE CHAIRMAN: Well, it is, but the policy ought to have been articulated in a determination so all you would be doing is unpacking what that meant, you would not be able to inject a new policy in front of us, you would have to simply explain what the determination said by way of policy, if it did.

MR. BOWSHER: It is ultimately perhaps just a question of language, but that is all we have to work with. What happened here is: what did we do? We did, as we said in our submissions in tab 9, paras. 11 and 12, we did appear, and we did appear so as to resist actively the applications made for judicial review. Would it have been really idle to suppose – I am not really sure whether it would have been different or not. The Competition Commission is anxious to play as full and active a role as is appropriate in this statutory process and it seems to the Competition Commission that part of that is actively to defend its decision, not simply if a criticism is made to the heart of its decision that you got the policy wrong – suppose that were the challenge – you simply failed to understand one of the subsections

that you had to deal with; I am not going to give examples because we will just get stuck into that rut.

What would a neutral defence be? A neutral defence would simply be to write a letter to the Tribunal saying: "That is wrong, para. 23 of the determination amounts to our dealing with that goal, that is it". That might be all there is to be said; that would be the neutral position. It would simply be a response to highlight a proposition in the decision but to do no more. It comes down to what one thinks is the difference between, I suppose, "neutral" and "active". To my way of thinking anyway, I would suggest that "active" involves coming to this Tribunal and saying "No, their argument is wrong". It is not just: "Look, that is where we dealt with it, but their argument is logically misconceived because of this, this and this", they are trying to turn something on its head; they have misunderstood this, that and the other. That is not just neutrally pointing out that there is a relevant case here and that para. so-and-so of the decision deals with this, it is actually making the argument. What happened in this case we made the arguments, we were not the only party making the arguments, but we were the party making the arguments as if we were in a real judicial review, as to why this Tribunal would not have set aside this decision were it conducting a real judicial review. That is what we actually did, and we actively participated in para. 2 terms.

In a sense there may be those two questions: will the Competition Commission always have to be an active participant in *Davies* para. 2? Perhaps not. Was it here? Yes. It was plainly an active participant, that is plainly what happened.

PROFESSOR MAYER: Could I just clarify this in relation to the case the Chairman raised at the beginning, that if some information came along between your submissions and the hearing which led you to have doubt about the validity of the proceedings or the case that you were making, do you think it would be incumbent upon you to draw that to the attention of this court?

MR. BOWSHER: The Bar Code of Conduct, and the position of defending any public decision in administrative law govern that situation. There is obviously a question of fact and degree here. One has to consider sometimes very anxiously one's personal position and what that of the public body. In this subjective judicial review we are subject to the overarching duty of candour, and that must apply. That goes beyond merely candour, it involves also the position that any public body has to consider on an ongoing basis – its position. That is not, I would not have thought, capable of argument. Yes, of course, once public bodies have taken a decision the reality is (and one is not talking at all about the Competition

Commission) you defend it on the basis that you think it is right. You have gone to the trouble to make that decision and you do think it is right. We start getting into internal psychology and so forth, that is the nature of decision making. But, when you reach the point you think: "No, I got it wrong" then there is often quite a serious point for a public body to reach that point within litigation, but it does happen, and at that point you have to come forward and admit as much either in written proceedings or in court.

PROFESSOR MAYER: But in many cases it is not as straight forward as that; it is not a matter of "Yes, we think we got it right", or "Now we think we have got it wrong", but "there is an element of doubt that has crept into our views", do you think that that doubt should be something that should be disclosed to the court?

MR. BOWSHER: The difficulty with that is that in a corporate body like the Competition Commission it is difficult to know what the – it is much easier, I am just thinking of cases one has had, I can think of situations where I have been able to stare the decision maker in the eye and I have had exactly this situation with the court, the decision maker sitting behind me and you say: "Yes, Mr. So-and-so tells me he fairly thinks this, this and this." I am not quite sure how the Competition Commission expresses internal doubt, as it were, rather than change of decision when "itself" is the inquiry team. In general terms, if there is a point which properly concerns the question: would it be set aside? Then the proper approach is: "Yes, this obviously affects our decision but it makes no difference", or "It does make a difference." That is the way one conducts public law litigation. "Doubt" is a difficult word, because again there are sometimes chronological issues as well. Was it right at the time? There are a whole range of issues that might arise. I do not want to engage too far with doubt, because there are a whole series of hypotheticals that might properly arise in litigation. But where there is something which properly ought to be put before the court or conceded then obviously that has to be done.

Can I just quickly check one point? (After a pause) The point is made that in general terms different decisions have a different chronological place. In this case our determination is: do we think that Ofcom at that point got it wrong? There are other circumstances where one's approach to doubt might be different. On the basis that everyone has had their opportunity to put before us all the information they should have done and we have closed their proceeding and we have closed it properly I would have thought the normal situation would be: "If you thought it was relevant, you had our procedure, you should have put it before us before" so that it is quite likely that in many cases the doubt question simply does not arise, because one says procedurally: "That is an interesting point, why did you not make that six

months ago, it is too late now. We have to take our decision on the basis of the material you gave us." To say certainly what the answer to that question is – I do not want to start binding the Competition Commission as to how it deals with those points.

It does boil down to what did the Competition Commission do here, and was that a proper discharge of the Competition Commission's role? We say we were not just an intervening party with an interest pointing out a few interesting points, in para. 3, we were not just an *amicus*, we were playing the active role, and a proper party therefore, and should be treated as such.

THE CHAIRMAN: Mr. Bowsher, so far I think everyone has been proceeding on the basis that this is a question which will determine the Competition Commission's status in all s.193(7) cases, i.e. working out for these purposes is or is not the Competition Commission a party? It occurs to me when you made the point a moment ago, could it be a context-sensitive question? In other words, whether the Competition Commission is or is not a party depends precisely what it does in any given case.

MR. BOWSHER: Or what the Tribunal expects or permits ----

THE CHAIRMAN: Or what the Tribunal permits it to do, yes.

MR. BOWSHER: Yes, that may be right.

THE CHAIRMAN: In other words, let us take a case where the Competition Commission takes the view that its determination is so polluted and the grounds of attack are so readily clear to be wrong, that it simply does not need to appear at all, and so it says: "We are not going to show re the determination, re the challenge, and make your mind up, Tribunal." On that basis one might say, again looking at Lord Justice Brooke's analysis, not a party, and then we go to the other extreme, and one might fairly say this case is that other extreme. One has a long oral hearing in which long and technical submissions are made, and the matter is quite aggressively fought out. In that case one says the Competition Commission is a party.

MR. BOWSHER: I think that must be right. It does raise the tricky question as to when that question is going to be identified. Of course, this case had its own special procedure with preliminary points of challenge and then responses and fuller points of challenge. I am not quite sure when one decides whether it is or is not party, maybe now is the time at which one looks back and all one can say is you look back and see how the case evolves – what was the proper role for the Competition Commission, because it will always be open to the Tribunal to say: "Frankly, we do not think we need hear from the Competition Commission at all."

THE CHAIRMAN: Does Lord Justice Brooke answer this in his para. 47? It seems to me that the distinction between category 2 and category 3 can actually only be determined after the event rather than before because with the best will in the world a party may start off with the intention of being a category 3 party and creep over the line into category 2.

MR. BOWSHER: Certainly I have seen that in arbitration appeals, where an arbitrator thought that it was just an innocent: "I failed to answer such and such a letter" and it turns into something much more inflammatory in the course of the serious irregularity application. One can see how the same sort of thing might arise. I would suggest that it is often going to be clear from the outset of the proceedings what the role of the Competition Commission should be. I would suggest, and I will no doubt be nudged if I have got this wrong, that in most cases it would be helpful both for the Tribunal and for the Competition Commission for the Tribunal, for all the parties to establish at the outset – at one of the early CMCs – as to what the expectation is. One has to decide things like who is going to lead in the case and what the resourcing is going to be and what is the expectation?

THE CHAIRMAN: To be fair, and it may be you are unusually prescient, Mr. Bowsher, I think you said something along the lines of what you saw the Competition Commission's role to be at either the first or second case management conference, and you indicated – I am not sure you used precisely the phrase – that the Competition Commission's role would be not that of a shrinking violet.

MR. BOWSHER: Yes, I think it was fairly clear to us where this particular case was likely to go. I suspect that one can sometimes fix it at the beginning, and it would be helpful to do so when it can be done, but it may very well be that that is a determination that is necessarily provisional, and it would not necessarily be unjust for that to change if the nature of a new allegation being made was that the Competition Commission had to move up a row as the proceeding went forward.

MR. LANDERS: Your argument now is that you are actually a party in this case, but depending on the facts of the case and the way you acted as a defendant, you could not be a party. We will hear later on presumably an argument that you should always be a neutral party. Were we to determine that you should always be a neutral party, would it be open for us to determine that nevertheless on the facts of this case you actually were a defendant by virtue of the way the process operated and that, therefore, in this particular case costs could follow even if, as a general rule, we were saying that we should not have acted like that.

MR. BOWSHER: I think it must be right that the Tribunal could say that we should normally be neutral. That is not a position that the Competition Commission would welcome because I

do not think we would want that to be legislated in any particular way. But, if that were right, one could say that because of the way this particular procedure evolved - and we have made the point in writing so I will not labour it again - but from the very outset where it was expected that we would be responding to the initial challenge in writing, with evidence, it was whether anyone – the Tribunal, the Competition Commission or anyone else – particularly thought about it, in fact we were an active participant from the moment the original order was made on 10th February 2012, which you have in tab 1.

I think I may have covered all my elaborations on other points in answer to questions. If I may just take a moment, although it means I have not recapped various points I may have covered them anyway.

(After a pause) I will deal with the final point which I think is important that we try and get over. The distinction between paras. 2 and 3: it has always been our position in our written submission that the determining factor in this case is that we were actually a party to judicial review proceedings. That is how we started and then we sort of zoomed out into this generalisation about whether we should always be ----

THE CHAIRMAN: No, I think it is fair to say that the parties' submissions and our thinking was on the basis that this was all or nothing – are you a party? Are you not a party? It simply occurred to me that there might be a middle way from the way you were putting the point you finished on.

MR. BOWSHER: The distinction between active and neutral, and this is really for the future rather than about this case because in this case I think it is plain that we were active and defending our determination, but for the future I suspect the decision is not so much between being active and neutral, but about the way in which we participate. We are never going to be neutral in the sense of saying: "We made this decision but we are neutral about whether or not you uphold it", it will always be our decision. We are not neutral in the sense we are indifferent about whether or not it is upheld. A decision maker should not be indifferent or neutral about its own decisions unless it reaches the point it has serious doubt, or thinks it has got it wrong; we have had that discussion.

We might be an active participant, the opposite to that is 'passive', and I am not sure we would be a passive participant, but I think the Tribunal gets what I am driving at. We might be active as we were here, positively arguing our position, or we might be merely responsive, if I can put it that way, simply more like an *amicus* just responding: is there a case on this? Is there an aspect of our policy that we might want to respond to?

That is a case by case discussion to have at the CMCs in each case as it comes along, once one knows what the nature of the challenge is.

PROFESSOR MAYER: Can I clarify that? Are you saying that the question as to whether or not one is a party hinges on whether or not one is an active participant?

MR. BOWSHER: If one is an active participant one is plainly a party. If you are a passive participant you may be a party because, of course, you may be joined as a party, as an intervener, you may be treated as one. It becomes a different question, a more discretionary question as to whether you are or are not a party. As we have already said intervening parties can get costs orders, depending on their actual status. A number of more passive participants may be treated as parties. If you are an active participant you are plainly a party, and that is the situation that applies here. It is not appropriate for me to try and lay down some rule for the future as to how Rule 55 of the CAT Rules would be applied to some other future status, but it is possible that the Competition Commission's role in a future case is so passive that it is evidently not a party.

THE CHAIRMAN: Yes, I think, Mr. Bowsher, it is important to be clear. I think when you started your submissions the point you were making was that although this was not a judicial review, it was a deemed judicial review, the same test was applied. Because it is essential in judicial review that the decision be both properly tested by those attacking it, and then properly defended by the decision maker, for that reason the Competition Commission was a party. I did not understand you to be making any distinction between types of case. You were saying in every such challenge the Competition Commission is a party. It may be that there is a variant on this and it is, as I say, context dependent. Are you putting your case both ways?

MR. BOWSHER: No, in reality I would be surprised if there are any cases in which we end up not being a party. But let us take the Tribunal's example. One of the oddities about this judicial review analogy is, of course, there is no permission stage which rather makes the whole analogy slightly hard to operate. Let us suppose the judicial review is of a type which would never get permission. It might be that it is so obvious that it would never get permission, and the decision maker would not even have to put any summary grounds. The decision maker would take the view that there is no way an Administrative Court judge is going to give permission for that, and I am not sure how, procedurally, the Tribunal would deal with that situation, but in those circumstances we would need to play no more active a role than would the decision maker at that stage when it would not expect to get costs in the Administrative Court either, they would just be dealt with at the permission stage.

In that situation it may very well be that our role can be purely passive. This is not the case that I have been contemplating in my submissions I have to say because in any real case that I can imagine we are dealing with a case which I suppose one imagines one has got way past the permission stage, and once one is past the permission stage in this judicial review analogy we – I hesitate to say – 'always' because I am trying not to make generalisations which will bind the Competition Commission, but it is hard to imagine a case such as this which gets beyond the hypothetical permission stage, in which we would not want to be an active participant, and in which the Tribunal would not want us to be an active participant, for all the practical reasons about how the Competition Commission's position is different from all the other parties in the room. I can give an illustration as to why it is not going to be easy for Ofcom necessarily just to step into our shoes and defend the determination. Once one is into that main part of the judicial review I suspect we always are active; I suspect we always are para.2, and that has certainly been the assumption on which I have made my submissions, that we are likely always to be para.2 rather than para.3, but that does not undermine the point that the Tribunal has made that it is context specific and we may sometimes be para.3.

This is, perhaps, not a semantic discussion because there is a danger that we get bogged down, but it is a real discussion about what really happened in this case.

THE CHAIRMAN: I think Mr. Landers has a question.

MR. LANDERS: Just a question because I missed something right at the beginning when you skimmed your ten commandments or ten principles. On the fifth principle, which was the critical one about you being a party to the defence, I think you mentioned a case that you did not refer to later, was it *Aberdeen Journals*. Could you just remind me of the significance of that?

MR. BOWSHER: Yes, *Aberdeen Journals* is a Competition Act case and the point there was that the intervener in *Aberdeen Journals* was either the victim or the leniency applicant, I cannot remember. They were not the recipient of the decision. The decision was appealed to this Tribunal, but they had an obvious interest in the decision. Somebody in the room was probably in that case and will remind me what they were. They were not just an intervening party with a casual interest in the case, they were either the leniency applicant or the participant. I am confused, because there were two or three of them. It is not a practice of the Tribunal, but those are cases in which such interveners have benefited from costs orders from this Tribunal. I do not think there is any particular rule about what has happened, but in those sorts of cases interveners have often had at least some of their costs paid pursuant

to the Tribunal's orders. The point I was making was simply to say, "You are an intervening party" is not an answer to the question, because interveners can get costs orders. It is all a question of characterisation. That I think was all I wanted to say about that point. There is a danger, of course, that we have zoomed out so far in our lens to look at all possible s.193(7) cases that we forget what actually happened here, what the reality of our role was in this case. While it is very important to get it right for the future, and the Competition Commission is anxious to get it right as much for the future as for this case, in this case it is about how we actually conducted ourselves and how the Tribunal brought us into the case.

Unless there is anything else I can assist with, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Bowsher, that was very helpful. Is it Mr. Gregory or Mr. Rosen?

MR. GREGORY: I think it is me first on behalf of EE, and Mr. Rosen will follow on behalf of Vodafone. You will be pleased to know that I think we will be finished by lunchtime. After some introductory comments, I will largely talk to EE's most recent written submissions dated 12th September, which I will refer to as our skeleton. Those submissions focus on whether the Competition Commission should be regarded as a party for the purpose of Rule 55, and therefore whether the Tribunal has the power to award the Competition Commission its costs.

Accompanying the skeleton was a slim authorities bundle containing three cases, and I shall also refer to some of the cases in the authorities bundles supplied by the Competition Commission and Vodafone. In addition, although I do not propose to take you to them today, EE's first set of written submissions is at tab 4 of the Competition Commission's bundle. Those submissions raised the party issue, but they also cover whether, if you conclude that the Competition Commission is a party, the Tribunal should exercise its discretion to award the Competition Commission its costs. They also discuss the appropriate level or recovery and whether any order as to costs should be stayed pending the outcome of EE's appeal.

I am not going to develop those discretionary and other points today, save in respect of one point of information which was raised by Mr. Bowsher. As he said, Everything Everywhere was last week granted permission to appeal by the Court of Appeal on all three of the points set out in its grounds of appeal in addition to the point in respect of which permission had already been granted by the Tribunal. The Court of Appeal has granted expedition and we have a hearing listed for late January.

Those developments may be relevant to at least two of the other issues. First, one of the reasons why the Competition Commission argues that it should get its costs is that the grounds of the s.193(7) applications were unarguable. Well, the fact that we have been given permission is potentially relevant to that point.

Second, we say that there is now an ongoing appeal covering several grounds that has been expedited, and that supports our contention that the Tribunal should not press on to make a costs order pending the outcome of the proceedings in the Court of Appeal.

The Tribunal has identified that the party issue is currently uncertain. I think it is common ground that the answer is not provided by the statutory provisions or the Rules, and it is an issue that could usefully be clarified for future cases. We agree. In addition, by the end of today, lunchtime, the Tribunal and those of us who have been involved will have spent a fair amount of time addressing ourselves to this issue. So we think a judgment from the Tribunal on the party issue would very much be appropriate.

If the Tribunal decides that the Competition Commission is not a party then that is the end of the Competition Commission's costs application. If the Tribunal agrees with the Competition Commission, a number of further steps would need to be taken to finalise a costs award. The Tribunal would need to consider the other issues as to discretion, and so on, and produce a judgment, and the Competition Commission's costs would probably need to be subject to detailed assessment. Some or all aspects of that exercise may be rendered academic depending on the outcome in the Court of Appeal. We say that if the Tribunal concludes that the Competition Commission is a party, then the rest of the Competition Commission's costs application should be stayed pending the outcome of the Court of Appeal proceedings.

I now turn to the party issue and I propose to develop EE's case as follows: first, I will begin by summarising the approach that we say should be adopted in telecoms appeals in relation to whether and under what circumstances the Competition Commission should be a party in s.193(7) applications. I will broadly be confirming the Tribunal's understanding as set out in its opening comments.

Second, I will explain why the approach advocated by Everything Everywhere will promote efficiency and legal certainty without leading to any unfairness or restricting the ability of the Tribunal to be sensitive to the facts of future cases.

Third, I will then develop the legal basis for our argument, largely along the lines set out in our skeleton.

Fourth, I will respond briefly to a couple of points which have been raised by the Commission.

In terms of our proposed approach, which is referred to in para.19 of our skeleton, our approach is that, absent any order from the Tribunal to the contrary, participation by the Competition Commission in s.193(7) proceedings would not be as a party for the purposes of Rule 55. Rather the Competition Commission will participate as one of the appeal bodies. Its role will be to clarify factual matters and elaborate on any aspect of a determination that is relevant to the s.193(7) application that is not clear from the document itself.

In addition, if the Tribunal considers that it would be assisted by the Competition Commission providing submissions on a specific issue or issues, then it would be able to ask the Competition Commission to respond on those points, but the Competition Commission will not defend the determination in a partisan manner as if it were the respondent, such as it does when one of its merger reports or market investigation reports is judicially reviewed under the Enterprise Act.

THE CHAIRMAN: Mr. Gregory, that raises the interesting question of what is the difference between, as it were, neutrally assisting the Tribunal and actively defending? Is there not some force in what Mr. Bowsher says, that the way we work in the courts of this country is that we have an adversarial way of testing propositions, and it is actually very difficult to defend a decision neutrally? In effect, you have got to stand up and simply make your points, and this distinction that you have very helpfully articulated is one that actually is unhelpful rather than helpful. Can you assist us in drawing a line between what you say the Competition Commission can properly do without being made a party, and what the Competition Commission should not do by way of active defence?

MR. GREGORY: I hope that that will become clear as I make my submissions. In short, we will say that the position is likely to vary from case to case. In some cases, and perhaps in respect of some issues it may be helpful for the issue to be debated along adversarial lines. In other instances it may not. Where it will be helpful to have an adversarial discussion, in some instances the Commission may be the best party to do that, but in other instances it may not. What I am going to submit is that essentially the Tribunal has the power to govern or direct the role of the Competition Commission accordingly, so that if wishes the Competition Commission to make adversarial type submissions on an issue then it can bring that about.

THE CHAIRMAN: So your answer to my next question, what should the Tribunal do if the Competition Commission formally applies to be a party, is it depends?

MR. GREGORY: Quite so.

THE CHAIRMAN: Yes, I thought it might be. What happens then in this case? Let us suppose the Competition Commission does make an application and it says, "I want to be an active party", and the Tribunal on that occasion says, "No, we do not need you to be an active party, we are not going to make the order", but the Competition Commission nevertheless manages to overstep its bounds before the Tribunal – I am sure Mr. Bowsher would never do that, but let us imagine – are you saying that in that situation there would be no jurisdiction in the Tribunal to make an order for costs against the Competition Commission?

MR. GREGORY: I think that may be right, that in that situation the only ability of the Tribunal to control the Commission is through talking to it face to face and telling it to sit down and be quiet.

THE CHAIRMAN: Yes, it rather implies a spineless Chairman example, I agree.

MR. GREGORY: Sir, I have been talking about what we say is the standard situation absent such an application and order. In that case, the Competition Commission's costs would be funded from the Competition Commission's usual sources and will not be recoverable from the parties, but nor, as one of the appeal bodies, will it be exposed to potential costs liabilities.

If, however, the Competition Commission does wish to play a more partisan role, as you suggest, akin to that of a respondent in traditional judicial review proceedings, then it can apply to the Tribunal to intervene and be formally admitted as a party. In determining such an application, the Tribunal will be able to take into account the nature of the 193(7) grounds that have been lodged and the determination, and, just as it does when considering applications to intervene made by private parties, the Tribunal will be able to consider what type of involvement on the part of the Competition Commission would be most appropriate. Would the Tribunal be assisted by the Competition Commission playing a relatively directed role, focused, for example, on providing submissions on specific issues identified by the Tribunal, or would the Tribunal prefer the Competition Commission to play a more partisan and less constrained role, being allowed a reasonable amount of leeway to take whatever points the Competition Commission thinks fit in order to defend its determination akin to how private parties and respondents are generally allowed a reasonable amount of leeway in deciding how to defend their own private and public interest in other cases?

Either way the Tribunal can form a view, and if it considers it appropriate for the Competition Commission to be joined it could specify in the relevant order the extent and the nature of the involvement that it anticipates that the Competition Commission will have. In addition, it will also be open to the Tribunal to specify at that stage at the outset of the s.193(7) proceedings the extent to which the Competition Commission will be subject to potential costs entitlements and liabilities.

PROFESSOR MAYER: Can I be clear, are you saying there should be no costs in this case because the Competition Commission did not apply in that way?

MR. GREGORY: We say there should be no costs in this case for a number of reasons. One is that the Competition Commission was not joined as a party. One can obviously see some unfairness about that because none of us knew what the legal position was the outset. That, frankly, is what happens in some legal cases. The law is not clear. The reality is that parties do not know what the correct answer is and they only find out at the end of the day. The outcome in some cases may be that one of the parties gets the rough end of the stick in that particular case, and that is just how some legal decisions work.

In addition though, we also say that the Competition Commission should not get its costs in any event because of the nature of the issues which are raised in this case, which I will come on to.

THE CHAIRMAN: Let us suppose for one moment that we consider that the Competition Commission's intervention in this case was (a) active, and (b), justifiably so, so that had it stood up and asked to be formally joined the Tribunal would have acceded to that. Given that we had two CMCs at which the Competition Commission appeared by counsel, and that it was certainly adverted to that the Competition Commission would be playing a significant role, you were saying that is not enough simply because no formal order was made to constitute the Competition Commission being a party for the purposes of costs?

MR. GREGORY: Yes, that is right. My understanding was that essentially it was common ground that the party issue is an issue of construing the statute and the Rules, and that it is determinative of the power of the Tribunal to make a costs award.

The other point I would make – it is a discretionary point but it is a response to your question – is that the Competition Commission has not previously sought to recover its costs in these cases. I accept the point that the Competition Commission makes, that that cannot be determinative of the legal position, but in terms of the assumptions on which the parties were acting, I do not think it was envisaged, at least by us, that the Competition Commission would try to recover its costs at the end of the day.

Just pausing to answer the question that the Tribunal put to the Commission about what the Competition Commission should do if it realises that there has been some sort of error or it sees the wisdom of the submission and the application, we say that it should note as well that there are a number of different ways in which the Competition Commission might have come to realise that it was wrong. It could be a pure point of law that it has not spotted, or it is just persuaded by the strength of the arguments. It could be, as Mr. Bowsher referred to, an issue of economic assessment, or it could be a calculation error in deciding what the remedy is, potentially a spreadsheet error.

We say that in that position the appropriate approach for the Competition Commission as one of the appeal bodies is to be up-front and honest about what it thinks. So if it has changed its mind, then it should say so. To the extent that it might not accept that the issue is a "slam dunk" in the opposite direction, but it sees the point as being relatively evenly balanced, then the Competition Commission should say that as well.

It would, of course, be open to the other parties to the appeal to advance a positive case that the determination should not be overturned in any respect.

The context for this is, we submit, that the statutory regime requires Ofcom and both the appeal bodies to strive to achieve a charge control which is appropriate in the light of the statutory objectives, at least so far as practicable within the confines of the appeal process. So if the Competition Commission can see, having been involved in all the issues for several months before that actually there is real merit in some of the points that have been made then we say it should very much be up-front about that before the Tribunal. Otherwise there is a risk that the wrong charge control will be put in place when that could have been avoided.

My second point is that we say this proposed approach is attractive by reference to the sort of high level principles that should be applied in costs cases. It is fair and it likely to create efficiency and legal certainty.

The Tribunal's case law on costs suggests that it should try to avoid costs principles hardening into rules that will limit the Tribunal's discretion to be sensitive to the facts of future cases. In our submission, our proposed approach does not do that. First, it will have no application outside the context of s.193(7) applications in telecoms appeals as the statutory context here, and in particular the role of the Competition Commission as a secondary appeal body, is, so far as we are aware, unique.

Second, even within this particular context the Tribunal's hands will not be tied for future cases. Our approach only says what the standard default position should be. To the extent

that in any particular case the Competition Commission considers that it wishes to play a more partisan and expansive role it can apply to be joined as a party, and in determining any such application the Tribunal can specify the role that it wishes the Competition Commission to play. We say this is likely to be more efficient. If the Competition Commission is given free rein it may try to take every opportunity to defend its determination, potentially at some length. That is a very natural human response when your reasoning is criticised, but it may not be appropriate in all cases. The appropriate role for the Competition Commission in s.193(7) applications is, in fact, likely to vary from case to case. The standard approach may well be, given that the Competition Commission typically produces a very lengthy determination setting out its reasoning fully, that there is no need for the Competition Commission to make expansive submissions. The Competition Commission's reasoning and the logic to it should be evident from the document itself, and the standard approach in judicial review cases is that the decision maker should not try to gloss the original decision in the legal challenge.

In that situation the position is similar to the one that the Tribunal put to Mr. Bowsher, what if the Tribunal's judgment is appealed to the Court of Appeal and the Tribunal itself will not typically appear there to explain its reasoning? Its reasoning will be apparent from the face of the Tribunal's judgment, and the Court of Appeal will be able to make up its mind about whether the judgment contains any points of law by reference to the arguments of the other parties.

We accept, I think, that in certain cases it may be necessary or appropriate for the Competition Commission to elucidate some aspect of its reasoning. For example, let us say that there is a piece of reasoning which is relatively peripheral to the determination but one of the parties brings it right to the centre of its s.193(7) application, and it may be that there is not enough reasoning from the Competition Commission on that particular point in the determination to allow the Tribunal properly to resolve the issues which are raised by the grounds.

Another example where it may well be appropriate for the Competition Commission – in fact it almost would be – to have an active role is if one of the parties alleged that the Competition Commission had been biased in reaching its decision. One can see that in that situation the Competition Commission is almost certainly going to want to get stuck in. Also, if it is successful, it will probably very much want to recover its costs for doing so.

There may be some situations where the Tribunal feels, rightly, that the grounds that have been raised in the application are straightforward to resolve, and it does not require to hear lengthy submissions from the Competition Commission to decide the issue.

The position here, we say, is one in which it would have been more appropriate for the Competition Commission to play – I think it is a type two case in terms of the *Davies* judgment – a more neutral limited role of an inferior Tribunal.

THE CHAIRMAN: I think it is type three.

MR. GREGORY: The issue, and I do not want to get into all the arguments that we had in the application or are going to be had before the Court of Appeal, we say was essentially about the implications of the statutory regime, how the Competition Commission should answer the reference questions when, as we have said, the answer is unclear, having read the substance of the Competition Commission's reasoning. We say that on that type of issue Ofcom and the parties, who are the ones that are primarily affected by the outcomes of these appeals, are in a perfectly good position to advance before the Tribunal the arguments which should point to the correct outcome, and there is no need for the Competition Commission itself to play a partisan role in arguing that its role should be one thing or another.

Stepping back again, if the Tribunal manages any more expansive participation by the Competition Commission beyond the standard default approach of a neutral appeal body then that stated appeal process will potentially be shorter, cheaper and more efficient. There is no unfairness.

If the Tribunal considers that it would be helpful for the Competition Commission to play a particularly expansive role akin to that of a party, and it does not wish the Competition Commission to be deterred from playing such a role by costs considerations, then it is open to the Tribunal to specify in advance, when admitting the Competition Commission as a party, what the costs entitlements and liabilities of the Competition Commission will be, assuming of course it sticks to the intended role that it has been given.

THE CHAIRMAN: The trouble, Mr. Gregory, with this is that I anticipate most cases where one has a s.193 challenge is that that challenge will need to be heard because of the nature of price controls within a fairly short timeframe. If we take this case as an example, we had a CMC the day after the determination was handed down, and another one shortly after that. The only indication of the nature of the challenge was, I think, some ten days afterwards when Vodafone and EE very helpfully set out in letter form what their likely lines of attack would be. Is it not then in this sort of case going to be quite hard to determine in advance

what the Competition Commission's role ought to be because one simply does not really know the shape of the points and the shape of the challenges that will emerge?

MR. GREGORY: One does as soon as s.193(7) application is lodged.

THE CHAIRMAN: One does then, but is the Competition Commission not entitled to be able to make its dispositions – getting its legal team together – before that, given the fact that one is going to have a hearing scheduled in fairly short notice terms?

MR. GREGORY: I think we would say that the standard position is that the Competition Commission should play a relatively limited neutral role as one of the appeal bodies, and there is nothing wrong, if it plays that role, in its costs being funded in the usual way from its usual sources. It is simply one of the Competition Commission's statutory functions and there is no unfairness in it not being funded by the parties. I think in the cases where the Competition Commission is going to be put to a large amount of additional work, then the majority of that additional work will take place once the grounds have been lodged.

THE CHAIRMAN: Yes, I see. I suppose that what I am getting at is that there does seem to be some attraction in the Lord Justice Brooke approach, if I can call it that, where one looks to see what happens, and one determines after the event whether a particular body has or has not been a party. At least, that is the way I read para.47 of *Davies*. Could you articulate why that is a course that the Tribunal should not take in this case – in other words, you let the proceedings unspool, and then you look after the event and say, "Yes, in this case the Competition Commission fell within category three, it was neutral, not a party, no costs". In another case it was active – whether that was planned or not it was active – it is a party and the costs' jurisdiction applies for that reason?

MR. GREGORY: We say our approach is preferred because it provides greater legal certainty because the parties know in advance. We say it is much better than a situation where either the Competition Commission effectively gets to decide for itself whether it is going to be a party, and whether it is going to impose potential costs liabilities on the other parties by deciding how actively it wants to be involved in the case. In our situation the Tribunal takes the decisions about that at the outset, and it is also better for those decisions to be taken at the outset rather than at the end of the day so the parties can make appropriate resource decisions.

I think Mr. Bowsher himself said in this sort of situation the Commission would quite like to know what its cost liabilities potentially are.

THE CHAIRMAN: Certainly I think no one would need much persuading that to deal with these things in advance if one can is a good idea, and clearly I do not think anyone on the

Competition Commission's side is suggesting it would not have been possible to say the Competition Commission may appear, but it may only deal with a certain number of points because frankly their input is not required on other matters and if the Tribunal made such an order that would be part of its ordinary case management jurisdiction.

What I am getting at is where, as was the case here, it was both urgent and not particularly clear from the outset what the ground challenged would be, why one cannot, in addition to this ability to lay down rules in advance, nevertheless have an after the event jurisdiction in those cases where it is appropriate.

MR. GREGORY: I suppose one point we are making is that the Competition Commission should not be a party in the absence of an order from the Tribunal. We are saying that the usual course should be that that decision about the Competition Commission's role should be taken at the outset so that people know what the result is.

I suppose there would be no legal bar on the Tribunal deciding to admit the Commission as a party at a later stage of the proceedings. In that situation, the wording of Rule 55.2 would not appear to preclude a costs order to the Competition Commission which covered a period of time before the Competition Commission was admitted as a party. I think we would say that any such approach should very much be the exception rather than the rule because it is much, much better for everyone to know what the cost entitlements and liabilities are at the outset.

THE CHAIRMAN: So are you suggesting there is an inability to make, as it were, a retrospective order regarding ----

MR. GREGORY: Well I am just reading the language of Rule 55.2:

> "The Tribunal may at any stage of the proceedings make an order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or the part of the proceedings and in determining how much the parties are required to pay the Tribunal may take account of the conduct of all the parties in relation to the proceedings."

The question of construction turns on whether a costs award to the Competition Commission would be an award of costs by one party to another. As and when the Competition Commission has been made a party by the Tribunal it will be a party. So I can see an argument that once it is in it satisfies the requirements of Rule 55.2 you would then have the issue of whether any sort of retrospective cost award could be made. I could see that one could adopt two approaches. One is that you could say that this is a matter of

principle, any sort of retrospective award should be prohibited, because it infringes legal certainty. The other is that actually that retrospectivity issue goes to the issue of discretion. I reiterate that we say one of the major benefits of our approach is that these sorts of decisions are taken at the outset, and that in the vast majority of cases it would be perfectly possible to take this sort of decision at the outset so that everyone knows what the position is.

I turn now to the legal basis for our approach. There are two main points. First, the mere fact that a person may have appeared in legal proceedings does not necessarily mean that he ought to be entitled to recover costs if his submissions are accepted or his position upheld by the court. Secondly, the role played by the Competition Commission in s.193(7) applications is not in parallel with or analogous to the role of a respondent in traditional judicial review proceedings. I will take each point in turn.

The Competition Commission did participate in these proceedings, but in a number of contexts a person may participate in litigation without getting any entitlement to recover costs. In our skeleton we refer to four examples of this type of situation and they run from para.5 of the skeleton. I am in the Tribunal's hands as to whether to take you to the underlying materials, or the statutory materials in the Judgment underlying these points. It may be that the fact that these public bodies play these sorts of roles in these cases is uncontested and so I do not need to. On the other hand, if the Tribunal wants to see some of the detail of what is going on in these situations then I will be very happy to take you to the Judgments and the Statutes.

The first instance is that the Tribunal often allows parties to intervene in cases to protect their own private interests. The general approach is "there is no general expectation that a successful intervener is necessarily entitled to recover its costs" and that is a quote from the Tribunal's Judgment in the *Freeserve* case is set out at para.5 of that skeleton.

THE CHAIRMAN: That is going to the question of discretion, there are no debates there that the intervener is a party, it is simply a question of whether, the intervener being a party, the Tribunal should exercise its discretion whether or not to award costs.

MR. GREGORY: Yes.

THE CHAIRMAN: I completely understand all your points on discretion and that we would be perfectly prepared to deal with on paper. It is the jurisdictional question that was really the nub because if, as you say, they are not - they can be a party if we order it, you say – if they are not a party then these discretionary points simply do not arise.

MR. GREGORY: The next example is a situation where there is an express provision which states that the public body who is participating cannot recover its costs. It is from a European context, and it is that Member States frequently intervene in cases before the general courts, and the general courts rules provide expressly they must bear their own costs. I do not know whether you want me to take you to the relevant provision in the rules that says that.

THE CHAIRMAN: No, I am not sure, Mr. Gregory, whether it would assist, because in a sense here the problem is we have no assertion one way or the other in either the Statute or in the Tribunal's rules to assist us.

MR. GREGORY: I am very much with you on the proposition that the Statutes and the rules do not determine the question and also that none of the cases that I am going to refer you to are exactly on points.

THE CHAIRMAN: No, quite.

MR. GREGORY: In that case perhaps I should take these examples relatively quickly. In domestic competition cases the European Commission and domestic competition authorities are entitled to submit observations to national courts on issues relating to the application of the competition rules. Although experience of this jurisdiction is so far limited and although there are no express costs rules, as in the General Court situation, when they participate in this way we say it may be expected that these authorities will generally be cost neutral. So there is a provision in Regulation 1 of 2003 which provides that the Commission is entitled to make written submissions to national courts considering competition issues, and also that it may apply to make oral submissions as well. There has been a recent case where that was done.

In addition, the Competition Law Practice Direction provides that national competition authorities can play the same sort of role in domestic competition cases, so the national authority turns up in a case between private parties essentially playing the role of an *amicus curiae*. Those cases are referred to, for reference, at para.8 of our skeleton.

Turning to a slightly different context, public authorities sometimes make submissions in judicial review cases in order to assist the court to make a decision and, in general, they appear to do so without generating costs, liabilities or entitlements. Indeed, in some cases an intervention may be permitted only on that basis.

The Tribunal pointed out in its letter to the parties, the basis for such submissions is under CPR Rule 54.17: "Any person may apply for permission to file evidence or make representations in judicial review proceedings", and in para. 9 of our skeleton there is a

reference to one of the cases referred to by the Tribunal as an example of that, *R v Department of Health ex parte Source Informatics*, the Judgment is at tab 14 of Vodafone's authorities' bundle. This case concerned whether it was lawful for GPs and Pharmacists to sell anonymised data relating to prescriptions. Source acted as a middleman which purchased the data and sold it on to pharmaceutical companies. The Court of Appeal allowed a number of medical associations to intervene, including the Medical Research Council and General Medical Council. The court referred in the Judgment to the terms on which those interventions had been permitted. The relevant extract is quoted in para.9 of our skeleton. He said they had been allowed to intervene on stringent terms as to the length of oral argument and costs. So this is just an example from a different context of where a court is allowing a public body to intervene but is regulating in advance the cost entitlements and liabilities that it will incur, and also the nature of its submissions.

There is also case law relating to the role of inferior Tribunals in appeals, and in particular the case of *Davies* and I will return to *Davies* shortly.

However, as the Tribunal has noted, these authorities from very different areas are of limited assistance. There is another on point. We agree that the Tribunal should construe Rule 55 by reference to the particular statutory context in this case, and therefore I am going to turn to the second of the two points that I flagged at the outset.

The reality is that the Statutory context here, and in particular the role of the Competition Commission in s.193(7) applications. The Tribunal is well aware of how the telecoms appeal process operates. The Commission is one of two appeal bodies. The Tribunal is involved in, and ultimately determines, all appeals under s.192. It is the primary appeal body. The Competition Commission may be regarded as a secondary appeal body. When an appeal raises price control matters it has a specified role. We have not in fact seen the relevant provisions in the Communication Act. They are not in the bundles, but I trust that the Tribunal has a copy of the provisions to hand.

THE CHAIRMAN: Yes.

MR. GREGORY: It may be helpful just to look briefly at what s.193 says. The duties of the Commission, what they have to do is set out in subsections 2, 4 and 5. The central duty of the Competition Commission is that set out in 193(2):

> "Where a price control matter is referred in accordance with Tribunal Rules to the Competition Commission for determination the Commission is to determine that matter in accordance with the provision made by the Rules in accordance with directions given to them by the Tribunal in exercise of the powers conferred by the

Rules, and subject to the Rules and any such directions using such procedure as the Commission consider appropriate."

In carrying out that central function therefore, the Commission acts under the direction of the Tribunal at that stage. Then subsections 4 and 5: the Commission has to notify its determination to the Tribunal and it must do so as soon as practicable after the determination has been made. Once the Commission has provided that notification duties under s.193 are then imposed only on the Tribunal, the appeal body, which has responsibility for determining the appeal. After the determination and before the conclusion of the appeal the Communications Act does not impose any powers or duties, at least expressly on the Commission.

So we say any participation that the Competition Commission has in the appeal proceedings after its determination, including in relation to a s.193(7) application, is ancillary to its statutory function of one of the two appeal bodies of determining the reference question.

What is the status of the Commission in the period before it gives its determination, because prior to that it is common, as the Tribunal has noted, for the Competition Commission to participate in case management conferences, and conceivably it might also be involved in hearings on discrete issues such as relating to disclosure.

In relation to that stage of the proceedings I would ask the Tribunal to turn up a letter which it received from BT which is at tab 6 of the Commission's bundle.

Although it is not here today, BT agrees with the arguments of Everything Everywhere and Vodafone that the Tribunal is not a party and it is an appeal body, and you can see that from the letter just below the heading: "Jurisdiction". The point that I want to go to now is just over on the second page: "The distinction between the CC and the 'parties'".

THE CHAIRMAN: Yes.

MR. GREGORY: BT is there drawing the attention of the Tribunal to the language of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004. They unfortunately were also not in the bundle, could I ask if a copy could be handed up beforehand.

THE CHAIRMAN: We have them.

MR. GREGORY: The relevant provision is para. 5, headed: "Determination by Competition Commission of Price Control Matters" ,subparagraph 2 says:

"The Tribunal may give directions as to the procedure in accordance with which the Commission can make their determination."

Subparagraph 3 says:

"The Tribunal may give directions under this rule of its own motion or upon the application of the Commission, or of any party."

So the point being made by BT is just to draw the Tribunal's attention to the fact that that wording contrasts the position of the Commission, with the position of the parties, which suggests that the Competition Commission is not a party when it participates in Tribunal proceedings relating to the appeal before the determination.

The Competition Commission in writing say that that is not determinative of whether the Competition Commission may be a party after the determination once the challenge to its determination has been lodged.

We would accept that it is not determinative but, in our view, the fact that Rule 5 suggests that the Commission is not a party before the determination, in the period when the Competition Commission is carrying out the only statutory duty conferred on it by s.193 – the primary duty conferred on it by s.193 – is at least consistent with the proposition that the Competition Commission does not become a party if it participates after the determination.

PROFESSOR MAYER: If I may say, I can understand it may not follow, is it necessarily the case that it will not then be the case that it is a party?

MR. GREGORY: Sorry, I did not quite ----

PROFESSOR MAYER: I can understand that it may not follow but does it definitively establish that it does not follow?

MR. GREGORY: The Competition Commission has pointed out that this provision governs the position before the determination is published, which it does. So I am not saying that this provision is determinative of the issue after determination, but I am saying that it is consistent and persuasive in support of the submissions that we have made as to the position after determination.

PROFESSOR MAYER: But does it rule out the possibility that there is a distinct difference between the position before and after the determination?

MR. GREGORY: Do you mean is this provision conclusive as to the position of the Competition Commission before determination? We would say that it reflects the position which is that before the determination the Commission is carrying out statutory functions which are allocated to it which like when it is carrying out lots of its other statutory functions, like carrying out market investigations and so on, are to be funded in the usual way. The way that the Rules are written simply reflects that that is how things have tended to operate when the Competition Commission has been carrying out its functions. It has not been the norm for it to try to recover its costs.

THE CHAIRMAN: Let me put it this way, Mr. Gregory, if the words "on the application of the Commission or" were deleted one could see Mr. Bowsher making this point in his favour, and because those words are there I can see there is ----

MR. GREGORY: It seems quite a strong indication that the Rules envisage the Commission not being a party, at least at that stage

THE CHAIRMAN: Yes. There is a distinction being drawn between "party" and "Commission", how far it takes us is obviously something we have to think about, but I am grateful that you took us to this.

MR. LANDERS: You do not think that it could just mean that the Commission or, indeed, of any party?

MR. GREGORY: I think the Commission ----

MR. LANDERS: It depends on the inflection which you ----

MR. GREGORY: -- in one of the Tribunal's orders in the case the Tribunal had referred to the "Commission or any other party" so the Commission said that that shows we are a party. I think it is common ground now that no one had in mind this particular issue, so the wording of the order was …not determinative, but clearly if the wording of the section was "Commission or any other party" then the implication to be drawn from the wording would be different.

We say the Commission participates in 193(7) proceedings as an appeal body. The Competition Commission maintains it does so as a respondent, and that its position is analogous, or in parallel with the position when one of its merger or market investigation reports are challenged under the Enterprise Act. We say that is not correct, the reasons are summarised at paras. 11 and 12 of our skeleton, and in considering these points it is helpful to bear in mind that the issue is not whether the Competition Commission should be able to participate in these proceedings at all, but how it should participate. In particular we say the Competition Commission should generally participate in a way that is both neutral and limited and under the direction of the Tribunal. Or, should the Competition Commission generally be allowed to participate in a way that is more partisan and expansive with the leeway which is normally given to respondents in private parties to decide how best to put their case when they are defending their own private or public interests.

In judicial review proceedings the respondent public body will often have taken the challenged decision in order to promote the public interest, or specific statutory objectives that it has been given the responsibility to promote by Parliament.

In this case the Common Regulatory Framework, the European Directives, and the Communications Act prohibit Ofcom from imposing a charge control unless it considers it is appropriate in order to promote certain specified objectives – competition, efficiency, maximising the benefits for consumers and so on, and the Communications Act also requires Ofcom to promote these and the lengthy objectives in carrying out its duties more generally – those are the ones in the beginning of the Act, in sections 3 and 4. So Ofcom is in that typical respondent position in these sorts of cases.

The respondent public body may very well feel that if a legal challenge to its decision succeeded then its statutory objectives will not be achieved. For example, Ofcom may feel if one of these appeals succeeded it would be responsible for implementing a charge control, which would be very inefficient or would harm competition. So in those sorts of situations it is perfectly understandable that the public body may want vigorously to contest the legal challenge. Although it does not have a private interest at stake, there is a public interest at stake, which the body has been given the responsibility by Statute to promote. In that situation, we say, it is understandable if the body is given a reasonable amount of leeway as to how it presents its case.

In an application under s.193(7), however, that is not the position of the Competition Commission. Ofcom, and not the Commission, is the respondent whose decision is being appealed. Section 193(7) as we have seen imposes limited powers and duties on the Commission which are, as we have seen, to determine the reference question and to notify the conclusions to the Tribunal. In reaching the determination the Commission is not seeking to promote statutory objectives for which Parliament has made it, the Commission, responsible for promoting. It simply sets out its view on the referred questions. In statutory terms the Commission is neutral as to the outcome of the appeal, including as to the outcome of the application under s.193(7).

The Competition Commission's statutory powers and duties provide no reason to prefer a Tribunal decision fully consistent with its own determination as opposed to one that departs from it in one or more ways.

I quite see that that is not the reaction of the individuals in the Commission who have written the determination because it is a very human response to become upset about that and want to justify the reasoning to which you have contributed. But in statutory terms the Commission, as a statutory body, is neutral. If and when an application is made under s.193(7) we say that the role of the Commission is therefore appropriately neutral and its

primary objective as a secondary appeal body is to assist the Tribunal to decide the appeal, including the issues raised under the s.193(7) application.

We have seen in carrying out its statutory functions and determining the reference question the Tribunal acts under the direction of the Tribunal and, to the extent that the Competition Commission participates in the s.193(7) proceedings, the same should be true. The default position should not be that the Commission is given free rein subject to control *in extremis* by the Tribunal, to decide how it presents its case. The Tribunal should tell the Commission what it thinks would be helpful .

As I discussed at the outset, what will be helpful or appropriate will vary from case to case depending on the length of the determination, whether bias is alleged, the nature of the grounds which have been raised.

Finally, I would like to address a few points which were raised by the Competition Commission. One relates to the case of *Davies*, which is at tab 14 of the Commission's bundle. Mr. Bowsher took you to the conclusions which set out the type 2 and type 3 participation. He saved you from the joys of the rest of the Judgment, which I thought was a little bit of a shame. Lord Justice Brooke has apparently had the pleasure of appearing in a number of these cases and conveyed the experience to us. I am not suggesting you read the Judgment for pleasure. We actually take a point on what it said earlier on.

We say if you read the Judgment as a whole, it is apparent the appeal courts have developed the costs rules, which you see summarised at the end. So it is generally to encourage lower courts and Tribunals to the extent they are involved in appeal proceedings at all, to play a more limited and neutral role rather than a more partisan role.

Lord Justice Brooke referred with approval to the fact that certain highly specialist lower Tribunals, such as the Central Arbitration Committee and the Special Education Needs Tribunal has participated in appeal proceedings in that role. The relevant passage starts at para.22 of the Judgment, at p.8 using the internal numbering:

> "Some tribunals exercise a highly specialist jurisdiction, and it often happened that such a tribunal might wish to be represented before the court to explain matters relating to its jurisdiction or procedure, or to draw the court's attention to relevant decisions overlooked by the parties without in any way involving itself in the lis or contesting the application that was being made. A study of frequent occasions in the late 1970s when counsel appeared before Lord Widgery CJ's Divisional Court on behalf of the Central Arbitration Committee, in litigation … will show that the committee never applied for costs and was never ordered to pay costs. Its role was

> a neutral one. It was there to assist the court with its expertise, conscious that if the court made an incorrect ruling through pardonable ignorance of some of the complexities of the legislative scheme, this might have a serious effect on the smooth handling of the many future cases that would be referred to the committee."

Then there is a reference to another case in which the body had appeared, and the quotation says:

> " 'But the court has ample power to permit the tribunal to appear and be heard in appropriate matters. Where, as in the present appeal, issues of general principle as to jurisdiction and procedure are raised and the tribunal has relevant material to put before the court, it is obviously appropriate for the tribunal to appear and be heard'."
>
> 24. If the tribunal did appear for this limited purpose, it would not be making itself a party to the lis or be concerned to contest the appeal. It would simply be making its expertise available to the court, and the very fact of its appearance would not make it any more susceptible to an adverse costs order than if it had not appeared."

So that rule, that if you appear in a neutral capacity you do not generate costs entitlements, or liabilities, is designed actually to encourage Tribunals to appear in that sort of capacity to help the court reach its Judgment.

PROFESSOR MAYER: There are two criteria that are being presented by various parties, one of which is the notion of neutrality versus a partisan participation, and the other is an active versus passive. Can I just clarify, are you saying that if you are neutral, or can I put it this way, if you are neutral and active, can you still be deemed to be a party, or should you be deemed to be a party?

MR. GREGORY: Well, it is possible, yes. So the point, the way that we say it should work is that when you get the application the Competition Commission will decide how it thinks it should respond appropriately. If it wishes to play an active role, which will incur a significant amount of costs then it should apply to the Tribunal to be joined as a party so that it may have entitlement to claim them later on. The issue would then be for the Tribunal and the Tribunal would have to form a view as to how expansive it would like the Commission's role to be in the proceedings, and then it is a matter for the Tribunal. So the Tribunal may think actually, given the nature of the grounds and the determination, it would be quite helpful to have the Commission play quite an expansive, neutral role and we do not want the Commission to be deterred from playing such a role by cost considerations so we

are going to say at the outset that if the Commission plays this sort of role then it may be entitled to keep some of its costs. It will be joined as a party and it will potentially have a costs entitlement.

PROFESSOR MAYER: Actually there was a third dimension which you have helpfully pointed out that I should have mentioned as well, and that is *ex post* and *ex ante*, but let us leave aside the *ex post*. I think you are then agreeing that if a participant is neutral but active it can still be deemed to be a party, either *ex ante* or *ex post*.

MR. GREGORY: I am not saying that ought to be the standard approach because of the point that what the Tribunal will be doing in these sorts of proceedings is ancillary to its statutory role of determining the reference questions which, at least at the moment, is just regarded as being one of its standard statutory roles funded in the usual way and, on that basis, there will be an argument that there was no reason to give the Competition Commission a costs entitlement if that sort of neutral appeal body role is to be carried forward into the proceedings, but there will be no bar to the Tribunal in joining the Competition Commission as a party and in making it clear at the outset of the proceedings that it thinks that the Tribunal could potentially apply for its costs depending on how things go. It is a matter of judgment for the Tribunal to manage both the nature and extent of the Commission's involvement, and also the extent to which it will generate costs entitlements and liabilities. Sir, we were just seeing from the judgment that the Appeal Courts are developing the costs rules to encourage neutral participation. At the same time they have sought to check the tendency of lower tribunals to instruct counsel actively to oppose appeals and we can see this from the discussion which is a couple of pages back in the judgment at paras.12 to 14. Lord Justice Brooke has just quoted from a previous case. He says at para.12:

> "By this time Lord Goddard CJ was concerned to check the tendency of justices to appear in his court when they could say all they needed to say in an affidavit."

Then towards the bottom:

> "The report in the All England Law Reports, however, shows that the court refused an application made on behalf of the justices for their costs to be paid by the solicitor who acted for the applicant. Lord Good CJ said that the Review of the Justices' Decisions Act 1872 gave the justices the right to file an affidavit in reply to the evidence of the applicant, and as there was no allegation of misconduct against the justices there was no need for them to have been represented by counsel."

Over the page there is a quotation from another case by Lord Goddard:

> "If the justices appear in the Divisional Court they make themselves parties to the *lis*. They take the risk of being ordered to pay costs, and they are entitled to receive costs if they succeed in defeating the application. I have been trying to remind justices all over the country, not only in court, but in addresses I have given to them, of their rights under the Review of Justices Decisions Act 1872. That Act was passed for the very purpose of allowing justices, against whom *certiori* or *mandamus* was moved, to put in affidavits (…) giving their reasons, so that the court could decide the case on the affidavits, but if justices insist on instructing counsel to come before the court and argue the case, they are making themselves to a *lis* and will have to pay costs … and if they are not content with exercising the power Parliament has given them, but insist on appearing and arguing the case, they will have to pay costs if they lose."

The only point I am making is that that rule, if you are actively engaged in a case and you generate costs entitlement and liabilities, seems to have been developed primarily because of the liabilities bit of the rule to try and point out that if tribunals do want to come along and play a very partisan and expansive role they are taking a costs risk on, so maybe they should not.

Consistent with that, we have pointed out that nowhere in the very long judgment are there any examples of lower court tribunals or justices successfully recovering their costs after having actively intervened in a case.

Finally, and this is returning to the point the Tribunal raised earlier, we say *Davies* is not in any way binding on the Tribunal because it is a very different context, and the Rules here can and should be interpreted by reference to the specific statutory scheme. We say there are benefits in our proposed approach over the *Davies* type Brooke approach, which is that the parties know at the outset what the position is and all say that if the Tribunal is trying to make a judgment at the end of the case about whether the Competition Commission is a party and whether it has been actively or passively engaged or neutrally, and so on, those are not necessarily entirely straightforward judgments to make, and it is better and more efficient for those sorts of decisions to be taken at the start and the Tribunal can specify the nature and extent of the Commission's involvement, as well as the costs consequences.

Finally, I should just say that I agree with the comments made by the Tribunal about the distinction between the *vires* issue and the discretionary issue. Initially, I also read the Competition Commission's skeleton as suggesting that the *vires* issue could be determined

asymmetrically so that the Competition Commission was a party for receiving but not giving, and clearly that is not right. That does not necessarily mean that the fact that the Competition Commission is a public body would not be taken into account when the Tribunal is exercising its discretion as to whether to require the Competition Commission to pay its costs.

Unless the Tribunal has anything further, those are my submissions.

THE CHAIRMAN: Yes, I think Mr. Landers has a question.

MR. LANDERS: Just one thing, I am still not entirely clear how you're responding to Mr. Bowsher's point that the very nature of what he called a "subjunctive judicial review" requires there to be a defendant. Are you saying that that does not apply, we did not in this case need somebody in that capacity, or are you saying it is possible to be an inactive neutral defendant?

MR. GREGORY: Well, I think we say these proceedings are unique, they are the same as standard judicial review proceedings in the Administrative Courts. The respondent in this case is Ofcom. The real issue is what role the Tribunal wants the Commission to play. If it wants it to play an argumentative, partisan role because the Tribunal thinks that that sort of role will best help it to reach its determination then it can ask it to do that, whether generally or in specific issues, but I do not see how it can be said that these proceedings cannot sensibly operate without the Competition Commission playing a partisan expansive role in all cases because, as I have described earlier, there is quite a wide variety of challenges which could arise, and that sort of role may be appropriate in some cases, but in other cases it may be much quicker and more efficient for the Tribunal to determine the s.193(7) challenge without hearing very much from the Commission at all.

MR. LANDERS: So does that imply that what we should have done is limit the Competition Commission's interventions and expect Ofcom to have defended the decision?

MR. GREGORY: Because of the nature of the issues that arose in this case then we do say that, yes. There were a number of issues raised, and I am not saying that there was only one legal issue. At the heart of the challenge there was a question about the implications of the statutory regime for how the Commission should answer the reference questions if the answer is actually unclear in the light of its reasoning, and it is obvious there should be a yes or no answer. We say the nature of that question is such that Ofcom and the parties, who were the bodies who are constantly involved in these regulatory process and will bear the consequences of the outcome of the appeal, are perfectly able to advance the arguments on that point.

THE CHAIRMAN: Thank you very much. Yes, Mr. Rosen?

MR. ROSEN: Sir, the application for costs before you has raised some very important issues regarding the role of the Commission in appeals under ss.192 and 193, and we are very grateful for the opportunity to make our submissions in relation to that important question. In my brief submissions today by way of summary and addition to our written submissions I propose to maintain the distinction in argument between this legislative framework, with which I will deal briefly first, and other costs regimes. So forgive me if I keep to that order, subject of course to any further questions or elucidation I can offer.

The starting point is Rule 55 itself, which gives you jurisdiction to order as you think fit the payment of costs by one party to another in respect of the whole or any part of the proceedings. It is common ground that for the Commission to invoke that jurisdiction, they must establish that they are a party and that they are seeking costs in respect of the whole or any part of the proceedings from another party. As you know well, we respectfully submit that the Commission's role in relation to this appeal is entirely different from that of a party in any meaningful sense of the word. The structure of Chapter 3 of the Communications Act provides for disputes to be referred to Ofcom, and any one or more of the parties to the dispute may make that reference under s.185. Ofcom, for present purposes, is the decision maker, and one sees towards the end of the Chapter, for example at s.195, references to directions as to action by the decision maker.

One then gets to what happens on the appeal in the heart of this Chapter, s.192 and s.193. The appeal body is this Tribunal. The Commission is not the appeal body. The Commission's role is dealt with in s.193 which provides in sub-sections (6) and (7) that, as regards certain matters, price control matters, the Competition Commission takes a reference and the Tribunal must decide that matter in accordance with its determination, save under sub-section (7) to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the Commission is a determination that would fall to be set aside on an application. We respectfully suggest that there is a distinction in terms of procedures and in terms of costs regimes which can be properly drawn between the process which is adumbrated in these sub-sections and a judicial review application in the Administrative Court against the decision maker. I will come back to that, if I may, when I have gone through some of the technical points.

Where that, in our respectful submission, must leave the Competition Commission in normal circumstances is as a party that takes part in the appeal decision making process in the way prescribed, so it is taking part in that way but not as a party to the proceedings in

any other sense. When I come to some other regimes, one can draw comparisons with tax tribunals, with arbitrators, and so on and so forth, as one thinks fit, but before one gets to the analogies, in my respectful submission, it follows that they have a part, as defined, and that is not the role of a party in any normal sense – a party to proceedings – in the same way as the appeal body itself is not a party to the proceedings.

Some of the questions raised from this are of great interest and, if I may, I will make some observations in the hope that they assist. The first question was, can they be made a party? I do not submit that they cannot, it would be a very odd course. One could imagine that it would require some consideration of fairness as to its purpose, what it would serve, whether it would only go to a question of costs. I do not submit to you that they cannot be made a party.

The second question is, does their role change when ----

THE CHAIRMAN: Mr. Rosen, I am sorry, it is a very good question, is it not, what criteria the Tribunal would bear in mind on such an application. Suppose in this case an application by the Competition Commission had been made, "Please, we want to be made a party". What factors ought to have a bearing on what you are saying is an unusual application? What would make it proper for the Tribunal to say, "Yes in this case as opposed to any other, "you should be made a party"?

MR. ROSEN: It is difficult to hypothesise, but suppose they want to do something which goes beyond a function which the Tribunal has asked them to carry out because they are under the direction of the Tribunal, at least to some extent? Suppose they wanted to do that, or suppose they had reached the stage where they wanted a descent into the arena not merely to respond as regards their determination in the way invited by the Tribunal but perhaps to respond to allegations of impropriety, and they wanted to mark that, and it might be because of costs considerations. It might be that someone was saying they should be bearing the costs. It might be that they were saying, "We are going to have to act in a way which is exceptional in order to defend the reputation of a particular individual in the commission of some other step they have taken". I am not sure this is an answer to your question, but it would have to be something carefully considered and it would have to be exceptional. That is a bit of a fudge.

THE CHAIRMAN: That is fair enough, but your position is that the default answer of the Tribunal ought to be no to an application for the Competition Commission to be joined, and there would have to be some special circumstance adumbrated.

MR. ROSEN: It would have to be very special. Sir, I think you postulated an example, suppose that the Tribunal considered that the Commission had gone beyond its normal remit. Suppose it had applied to become a party, or there had been a CMC at which the extent of its submissions had been discussed and the Tribunal had ruled on it, but then the Commission went beyond it, it went beyond the remit that the Tribunal had already indicated, and you asked, sir, could one of the parties at that stage get an order for costs against it and the answer was no. That has to be right unless it is made a party, because the jurisdiction is only in respect of parties.

I will come in a moment to the question of making it a party with a view to dealing retrospectively with costs which everyone has incurred on the basis that it is not a party. The second question that was put in your opening remarks, sir, was, well, does its role change after it has submitted its determination, after it has made and notified its determination? In our respectful submission, its role does not change from the person to whom a determination has been referred under this scheme, it does not change from being that into being a party unless the Tribunal says, or someone applies, and the Tribunal says, "You are to be a party, which carries with it all sorts of consequences". It is still doing a role under the direction of the Tribunal. You can call that role defending its determination or explaining its determination. It can be active in doing that. The distinction between being active and being neutral is not one for present purposes which we would endorse. It can be very active in explaining its determination, and one could call defending it or being a contradictor. None of that matters, it is still fulfilling its role. It has its various statutory objectives, it has its place in the appeal decision making process, and it does not change into being a party once it has submitted its determination, because the Tribunal considers that it would be assisted by it explaining matters, especially if there is a judicial review principle based challenge where it may be very important for the Tribunal to have those explanations. When we come to *Davies* in the second part of my submissions I will say something about the way Lord Justice Brooke put it in the context of judicial review, but I am not going to do that now.

THE CHAIRMAN: I appreciate, of course, that you were not here for our very enjoyable three days hearing the appeal or the challenge to the determination. I infer from what you are saying that even though the Competition Commission played a very active and very helpful role, nevertheless it was still doing so not as a party, but simply as what we have termed in the judgment an "administrative appeal body".

MR. ROSEN: The "administrative body", and I have read your judgment very carefully, sir, in which you in two passages around paras.55 and 118 actually set out what the structure of this and what the role is, and of course we do not seek to depart from that at all as regards the way the structure unfolded in this case.

Sir, those are some preliminary remarks in relation to the legislative framework which, in our respectful submission, do not depart at all from Everything Everywhere or from British Telecom's position, and we do not need to rely on any other principle in support of that submission.

We do not seek to suggest that the Tribunal cannot make the Commission a party. We do submit that in the normal way of fairness and prescription in advance, this would be a very odd case – and I am not going to address you on discretionary considerations, I am only addressing you on jurisdiction – to say in retrospect that either they are or they should be a party, because there was nothing exceptional in this case that would lead to that conclusion. We do not submit to you that you cannot do it, but they would have to be a party before you could do it, and there would be a very real unfairness in making them a party retrospectively.

I entirely accept that with speedy procedures deciding that someone should be a party at the outset may not always be easy, especially when the Tribunal has not yet had the opportunity to elucidate its jurisdiction in the way that you now have. What one would expect is that at the earliest opportunity that the Commission is going to become a party for the purpose of costs or otherwise, that be notified, and the parties should know, especially if it is a two way street, but if it is only a one way street against the parties to the proceedings, that they are at risk as to costs.

One would suggest that in future cases where someone is going to seek costs, or ask for costs, because we do submit it is a two way street under Rule 55, even though it may not be under proposed new legislation, in fairness that should be done at the earliest opportunity. If someone can see that the role has changed from the normal role into an exceptional role one way or the other, at least that is notified.

Moving on to the other costs regimes, we say a little bit about the Senior Courts Act and the provisions as to that. Of course, I know from your letter of 10th August that you have had that in mind, and *Aiden Shipping* in particular. That is a very different costs regime because, of course, there, as held in *Aiden Shipping*, there was no implied limitation on the jurisdiction to order costs only against the parties. There were cases in which that had been held, and what Lord Goff was, well, the question of who is a party can be a very technical

question, depending on the particular context, but as far as the Supreme Court, as it was then called, is concerned there is no such limitation in s.51. That, of course, is to be contrasted with Rule 55.

So far as concerns judicial review cases, we would urge some caution in adopting a dichotomy between the neutral decision maker and treating that as one analogy versus the active decision maker. The concept is very good, and the way Lord Justice Brooke put in category two was as "someone being active in such a way as made itself party to the litigation as if it was such a party". So that is one category that he has, and the contrasting category is the neutral party. Of course, in the present context that does not mean that a neutral party would just be restricted to explaining the statutory context. Policy considerations could also be explained in a neutral way.

The acid test, if I may respectfully adopt one of the very first questions that you put, sir, is what would you expect, and what would the parties expect from the Commission if, having rendered its determination, it heard something, it learnt something or in argument thoughts developed which, in fulfilment of its statutory objectives and its duty to the Tribunal acting under its Rules, made it change its mind or something, or it discovered a fact that was going to be relevant on something? One would be very shocked if it behaved in the way that one knows some decision makers against whom there is a judicial review might behave, which is to say, "We fight on, we oppose judicial review and we will take it on board and it may be that we, ourselves, will choose to review our decision, or it may be that we will lose and we will have to review our decision anyway, in which case we can take on board what we now think and what we know". That is so different from what one would expect to be the role of the Commission in its place in these proceedings as to elucidate, in my respectful submission, the question.

What one would expect from them in the role they have not being a decision maker susceptible to judicial review who can go away and then do the whole thing again on the basis of what it now believes or it now knows, what would one expect is that it would tell the Tribunal what the change in its position was.

That is not a matter of Bar Code of Conduct, which I think was the answer given by my learned friend, it is a matter of what one ----

MR. BOWSHER: It was not the answer, it was a part of the answer. I said it was a duty of candour and an obligation as a public body.

MR. ROSEN: Thank you very much. I think that makes the point clear.

THE CHAIRMAN: Mr. Bowsher's point was that the answer to my question was that any public body would make this clear to the court – in other words, I was drawing a distinction without a difference.

MR. ROSEN: Exactly. That makes my good my point, in my respectful submission.

We mention in our written submissions some references to these proceedings themselves. Just to pick them up, in para.6, we give the reference to the case management conference of which we have extracts in our tab 3, in which it appeared to be accepted by both the Chairman and the Commission that its role was to assist the CAT with understanding and explaining technical issues relating to the appeal. In the bifurcated categories of Lord Justice Brooke's judgment two and three, in our respectful submission, that is bang in three. We do not urge the way he puts it as necessarily applicable to you, but it is bang in three. Being a contradicter in the sense of being there in order to make sure that the Tribunal has answers to the grounds of challenge or the grounds of appeal does not put it in the position where it has become an active adversarial party in the sense that it has made itself a party at all, and that cannot be what would have been expected in this case.

Another reference which is quite helpful is the final paragraph of the Commission's submissions which has been clarified this morning. The final paragraph, you will recall, emphasises at para.18 what my learned friend called his "tab 9 submissions", that:

> "The Commission does not accept that it should meet any other party's costs in cases in which a challenge to its determination is successful. Its role is an appropriate contradictor without which the challenge under s.193(7) could not be fully and properly met. The Competition Commission has no choice however as to the matters it must decide. This is the consequence of the decisions of Ofcom and the terms of any challenge."

That precisely makes the point that it is not putting itself into the position of being an active party in the sense of Lord Justice Brooke's category two, if one is going to use those distinctions.

It is for the challenging party to make that judgment. The Commission does not have any corresponding choice of its own. Of course, the Commission can choose how to act as contradictor and how to make sure that matters are explained and to what extent that involves being a staunch defender of the determination. It will not affect its underlying role in the appeal decision process. What will affect is when it goes beyond that or it is made to go beyond it by attacks upon it.

Sir, at the end of the day, although other costs regimes provide analogies including the judicial review categorisation of Lord Justice Brooke, in our respectful submission, the question of jurisdiction is decided very simply on this legislative framework. In that regard, as a matter of construction, of course there are decisions and expectations that Rule 55 will be construed widely in the sense of being there to do justice and to ensure procedural regularity and procedural fairness. That does not mean that the threshold question of whether or not the Commission is a party should simply be answered if at all possible yes. What is suggested is, is construing the Rule to the effect that it is a party an impossible construction? We say it is impossible, it is wrong, but what is said against us is, if it is at all possible then construe it because it will do justice, but that is to aggregate the threshold question of jurisdiction with the width of the jurisdiction, if there is jurisdiction, to do justice between the parties, not to do justice between the party and someone who is not a party who would like its costs for having been involved in the process.

We do not press the analogies very hard upon you, but we do mention the arbitration analogy, for what it is worth, which is an arbitrator can apply to be joined as a party, or can be made a party, and one knows of occasions where that has happened, not simply because the arbitrator has been served with an Arbitration Act challenge to the Commercial Court because serving them is not enough, but because they have a particular role which they have to play – for example, to defend them against allegations of bias or because a party has drawn to their attention an argument which has been made and the court or the parties have invited them to actually take a role.

The other analogy we have drawn is with the tax tribunal system, but it does not really help because it is a tribunal appeal system, and so one would not expect the first tier to be a party in an appeal in front of the upper tier.

Before I sit down, perhaps I could just hand up for elucidation but not submission what Lord Justice Jackson had to say about costs shifting generally in tribunals. I do not rely on it as a submission. Of course, sir, if you have got too much to do and you do not want to look at it or you are already familiar with it, then I do not ask that the Tribunal has to read it, but you may find it of some interest.

THE CHAIRMAN: By all means hand it up.

MR. ROSEN: It is simply talking about the difference between the costs shifting more traditionally in our adversarial courts and the usual absence of costs shifting rules in tribunals. Each tribunal has its own rules and its own culture, and what you will see in the extracts which we have handed up, the first report, at p.470 is no more than a discussion as

to the lack of costs shifting in tribunals. It does not touch on the Competition Appeal Tribunal, although it does talk about statutory appeals at para.3.9. Ultimately, to characteristic the Commission's role in s.193(7) appeals as adversarial, in our respectful submission, does not tell you anything about whether it is a party or whether it should be a party in relation to the appeals which those sections cover. There are many tribunals in which those with adversarial or contradictor rules have not entitlement to costs and cannot be made liable costs, and it all turns on the particular rules and context in question.

Unless I can assist you any further, sir, those are my submissions.

THE CHAIRMAN: Mr. Rosen, thank you very much.

MR. BOWSHER: I am in the Tribunal's hands. I will go past one o'clock, maybe 15 minutes past one. I do not know how the Tribunal wishes to deal with the matter. Do you want to break for five minutes and come back?

THE CHAIRMAN: I think you should go on now, Mr. Bowsher.

MR. BOWSHER: I am sure you all have other things you would like to be doing this afternoon.

THE CHAIRMAN: I know it is a question of discretion, Mr. Gregory made a few points about staying any costs order that we might or might not make given the appeal to the Court of Appeal. It would be helpful just to have ----

MR. BOWSHER: It is on my list of things to cover. I will start with the last point first. I think we have all dug up lots of analogies. They turn out not really to be analogies because, as my learned friend Mr. Rosen put it, they end up turning on the culture and history of particular tribunals and how they have operated. We have focused on this regime, which is its own particular regime, and perhaps, if we are getting a little sociological, it is developing its own culture and practice. There are two points to be made out of it

First, the CAT in general is a Tribunal which does exercise a cost shifting regime, albeit a discretionary one. It is not a 'winner takes all' rule, it is a more nuanced rule than the old-fashioned pre-CPR High Court approach perhaps, but it is still very much a cost shifting culture. It is important for the purposes of today's argument not to get things the wrong way around. The question is: are we a party or not? The fact that some Tribunal's have evolved non-cost shifting cultures for all sorts of reasons which may be interesting but frankly I am not going to go there, does not tell you, necessarily, anything about whether they are or are not parties.

Regarding the position of the Court of Appeal, can I deal with two points there. First, the Court of Appeal's position is a useful illustration of our role, and our role as a party, and it is of course a real illustration because we now have an appeal date fixed in January. In that

appeal we intend to respond. That is not surprising, the true nature of the Judgment of this Tribunal is a finding in judicial review terms that our decision, or determination is to be upheld and, just as in any other appeal from a first instance judicial review decision, the decision maker would expect to be the person making the argument in the Court of Appeal.

THE CHAIRMAN: Well, fair enough, but if you look at s.196 of the Communications Act, which describes who can make an appeal, it indicates that a party can make an appeal, or any other person who has sufficient interest in the matter. I was seeking some assistance from the Act when I was preparing for this hearing, I wondered whether that might provide the answer but, of course, it does not because -----

MR. BOWSHER: We are the party. That tells you who can appeal. We would appeal as a party. It perhaps also tells you that, even if we were not a party, we could appeal. It is not decisive one way or the other but it is important. The fact that we are going to be and, in our submission, should be the primary respondent, because that is the way this case has evolved in the Court of Appeal, tells you about the nature of our actual involvement in this case, because this entire case has been about the way in which we took that decision and the judicial review challenge to it. That is the true nature of the s.197 proceedings. We are not merely someone who had a sufficient interest, we are the decision maker. We are not some other interested party.

One has to look at the reality – the oddity,of course, is that the order that is appealed against it says that the order should be read with the Judgment; the Judgment is a Judgment in judicial review terms about our decision. It is not that we have an interest in it. We are the party against whom numerous criticisms were levelled and who it would be expected we would be responding to those criticisms both here and again in the Court of Appeal, and I think the Tribunal would be quite surprised if we were not to respond in that way, given the way particularly in which the order is actually made, and the order incorporates the Judgment with it because if it did not do that, in fact, there would be almost nothing for the appeal to bite against. If it did not bite against the judicial review criticism of our Judgment, there is nothing else to appeal against. It is only the criticisms of us as the decision maker. I will come back and look at that a little bit further.

In general terms, we say that it would be inappropriate to delay this order pending the conclusion of the Court of Appeal. It would be really quite an odd situation. It is normal at the end of a first instance disposal of any matter for that Tribunal to deal with costs for a number of reasons. The Court of Appeal will want to know what the Tribunal thought about costs when it comes to reach any cost decision itself and it may very well be that one

or other party wants to appeal the decision on costs made by this Tribunal and it would be inappropriate and inefficient use of everyone's time if that appeal had to be dealt with at some other time by the Court of Appeal, other than at the hearing of the main substantive appeal. In our submission the right answer is to make the findings of principle now, and if necessary we will be before the Court of Appeal to be dealt with, or appealed against, or whatever at that point. That does not mean necessarily that assessment has to be dealt with. My own personal experience is that generally assessment in those circumstances is postponed because there are sometimes arguments. You would have to get a special order to get an early assessment anyway, would you not in the High Court probably. Whether you do or you do not frankly does not really matter, the practicalities is you postpone assessment until you know whether it is worth incurring that expenditure or not, that is a different point. I think I can deal with the points raised fairly swiftly though because in a sense in the course of the morning we have narrowed the point down to a position where, as far as I can tell, we seem all to be agreed that the Competition Commission may be able to have its costs of defending its decision if it is defending its decision actively. We say that is this case, because we are defending it actively as a party and that is, in fact, what happened.

MR ROSEN: That is not the case; we are not of that view.

THE CHAIRMAN: I think Mr. Rosen's point was that it is perfectly possible to be an administrative appeal tribunal assisting the tribunal, and be extremely active in that role. I think I have got that right, have I not? I think Mr. Rosen, at least, was suggesting that the amount of activity and the amount of assistance that the Competition Commission provides to the Tribunal is not, on his case at least, determinative.

MR. BOWSHER: Certainly for Everything Everywhere it seems to me that we have reached a point where if we are in fact a party we may be treated as such, and that is good commonsense. I am now repeating myself, but it is the same point, we have been from 10th February the proper contradictor to the contention that we failed in judicial review terms to take a proper decision. It is irrelevant that we are not under the same statutory obligations that Ofcom is with regards to the operation of the telecoms' market in this country, etc., because for any public decision maker, allegations in judicial review terms are equivalent to or m ore serious than those obligations. The suggestion was made that a decision maker might respond to an allegation of bias in a particular way, but a decision maker such as the Competition Commission has to take bias seriously but it must also take just as seriously a contention that it is irrational, it has failed to take account of proper material. These are all equivalent allegations for a body whose purpose exists to take decisions of exactly this type.

It is no more or less serious. Some of these other allegations are harder to meet because one needs to unpack the decision to show why that just is not true. We actually have dealt with it, we have dealt with it in this way, whereas an allegation of some improper relationship or whatever might well be able to be dealt with in exchange of letters and say "It just is not true" or whatever. Some of the most serious allegations you can deal with very simply. But these sorts of allegations are very serious and very complex, and particularly, as I have said, once they start to engage with the consequences, the remedies, it is very difficult for anyone other than the decision maker to fully test with the Tribunal and the other parties, whether or not the decision on remedies should in fact be set aside on judicial review grounds.

As matters have evolved, it seems to us that one should start from the position of saying that we are a party: we plainly are and plainly have been in this case. There might, one supposes, be the exceptional case, what I would have characterised as the "no permission" cases, where the context indicates that we are not a party. The equivalent, where they would not have got things off the ground, so we never had to become a party because if we had been in the Administrative Court they just would not have got permission and the Tribunal just does not need help. Once we get to that stage in general terms it is likely that we will always be a party and certainly in this case we were a party.

It is not necessary or appropriate to shackle these proceedings by having to fix in advance whether we are or are not a party because in our submission the sensible approach is to say that Rule 55 gives this Tribunal the appropriate flexibility, just as in other areas it takes that flexibility from Rule 55, to look at what has actually happened in a case and consider did it act as a party? In this case it did. It was a party, it always was a party, that was the way in which it participated and was required by the Competition Commission to participate.

THE CHAIRMAN: Well, is that right, Mr. Bowsher? Rule 55 gives a very wide discretion in terms of how costs should be awarded but I am not sure it gives a discretion as to what "party" means. Surely we have to ----

MR. BOWSHER: The Competition Commission acts pursuant to the orders and directions of the CAT, and if it is ordered to participate as a party, which it was here, that is the substance of what it did, then in retrospect it is a party. One does not have to get into an unduly fine-tuned analysis as to what did or did not happen, but as I have already taken you to our written submissions on this, paras. 5 and 6 of the tab 9 submissions gives you the authority, that Rule 55 should be interpreted widely, and that includes the definition of who is or is not a party, and the characterisation of the Competition Commission as a party or otherwise is a consequence of the way in which the Competition Commission is engaged in the process by

the Tribunal and it was engaged from the outset, from 10th February in this process as a party. In my submission that is clear. It could have been told: "We do not need you to participate further" and it may be that on the second CMC, when the outlines have been produced, the Tribunal could have said: "We do not need a participation from the Competition Commission" or "This is all that is required, we do not need any active participation, the passive participation will do as a non-party", but what in fact was required and the Competition Commission was engaged upon as part of the proceeding was participation as a party, and as a party in a proceeding in which this Tribunal sought to test the proposition would it have set aside this decision on judicial review grounds, and the way it did that was by setting us up as the respondent to those proceedings as the decision maker.

THE CHAIRMAN: The trouble is simply turning up is not enough, because of course in this case when the reference questions were decided I think the Competition Commission was represented, so either you have to say that the role post handing down the determination is such that in every case the Competition Commission is a party, or you say you look at the proceedings in any given case and decide effectively after the event whether the engagement of the Competition Commission in this particular case was sufficiently "active", to use your word, so as to render the Competition Commission a party.

MR. BOWSHER: You have to look at the timetable, but there is nothing inherently wrong in an *ex post* test as to whether or not what the Competition Commission does is active. There are some inconsistencies in that proposition. We are not a party at the time the reference question is drawn up because that is before s.193(7).

THE CHAIRMAN: No, that is common ground, I know.

MR. BOWSHER: That is sometimes an elision that has crept into the other parties' submissions. Of course, the way these things develop, with great haste, we know, it is not always clear at the outset how the proceedings are going to be developed, but once it is clear how the Competition Commission is going to be brought into the proceedings, pursuant to the CAT's directions, its role becomes, in effect, a consequence of those directions. It is perfectly possible at the end of the process to see what has happened. Here what happened, pursuant to what the Tribunal directed, is that the Competition Commission has had to conduct itself as the defending decision maker, the responding decision maker. That is how it conducted itself pursuant to directions and it should therefore be treated as a party under Rule 55.

If you remember at the first CMC you asked for the outline grounds. When you saw the outline grounds we had the second CMC. You, the Tribunal, could perfectly well have said:

"This is nonsense", or you could have said: "We have looked at this, the effective way of dealing with this is we will deal with it in writing, except a two hour hearing on the question as to whether or not such and such happened on Wednesday or Tuesday. All we will want from the Competition Commission is a copy of its transcript of a meeting", or something like that. One can imagine a situation where it would have been plain from the way in which we were brought into that process where we were being, if not neutral, at least passive, we were simply responding to a question. That is not how this case proceeded a t all.

THE CHAIRMAN: No, I agree.

MR. BOWSHER: Certainly, if not at the first CMC, at the second CMC once we were engaged in that process and we were engaged in a process which involved the three day hearing, fully argued out, albeit timetabled analysis of detailed judicial review grounds involving serious technical matters, we became at that point the responding party defending our decision. It was clear either at that second CMC or when we got the full grounds that we were at that point responding in those terms. One does not then have to weigh up how many minutes was I on my feet or not. It was the substantive nature of what we did which you can judge best at the end. Yes, in an ideal world you could determine at the beginning, but the problem is with these s.193(7) proceedings because of the haste with which they are started they are started before we actually know what the subject matter of the challenge is really going to be – we may have a substantial hint but we do not know. But once you do know, and they are fixed in those grounds you do then know what the status is. It is then established at that point and our level of activity, as the proper contradictor is then established, and our status as party should be fixed at that stage.

THE CHAIRMAN: Right, you can look at the time line and at some point ----

MR. BOWSHER: At some point.

THE CHAIRMAN: -- at the time line you morph from a non-party to a party?

MR. BOWSHER: You are not a party in s.192 in the determination.

THE CHAIRMAN: No, I agree it has to be post the handing down of the determination, so obviously we know that up to s.193(5) where you are notifying your determination you are not a party.

MR. BOWSHER: We are not a party then. Once the determination is made it is intimated that a challenge is going to be made and we probably have a CMC in this case the following day. At that point, the nearest analogy in the judicial review procedure, and that is the only

relevant analogy is we are at the permission stage, we do not know at that stage whether we are going to be actively involved as a party or not, at that first stage.

THE CHAIRMAN: So you are not a party at the first CMC?

MR. BOWSHER: I hesitate to put down a rule, but it is difficult for us to say that we are actively responding when we do not yet know what the challenge is, but certainly when we get an indication of the grounds, that we know what the challenge is, either then or when we are next before this Tribunal to establish the procedure for dealing with that we become a party because we are then past the permission stage in effect. Well, that probably is the permission stage, when we are at that CMC the Tribunal either says: "This is ludicrous, we are going to give you 20 minutes to deal with this absurd application that you are making, we do not need the Competition Commission to help us", or it says something different, and it engages the Competition Commission as part of this subjunctive process to go through the full test of s.193(7). Focusing on this case that probably happened when we received the first outline grounds, which was on 21st February, and from that point we become a party – or a prospective party – and of course costs can often be ordered before, you get pre-proceedings costs as well, but from that point we are engaged effectively as a party. That is the nature of this subjunctive test which we are in because it is the only way in which the Statute makes any sense.

I am just reminded that the precise date does not perhaps matter, but it is the trigger, the trigger is the important point.

THE CHAIRMAN: I entirely agree, the precise date does not matter, but your articulation of what the trigger is which causes the Competition Commission to transit from non-party to party is helpful I think in trying to understand ----

MR. BOWSHER: If I had stood up at the hearing and just tried to filibuster – or maybe some people thing I did filibuster my way through it – through many hours, that would not in and of itself constitute active participation if, for some strange reason we had just gone on regardless. It is that we are part of a process, which is what is ordered, and we are engaging with the process that is ordered.

It might be, taking on board the questions about what happens if you the decision maker has a moment of enlightenment, it might be that at that point the proceedings come to a halt because it says: "Actually we have now seen the light" but that is a different issue altogether. You were a party at that point when you got the grounds. It might be that we would have to come before the Tribunal and say "Can we take this decision again?" or whatever. But that does not really change our level of activity. It might happen at an earlier

stage in which case we would never have become a party. In our submission, given the accelerated way in which these proceedings work, that is a perfectly sensible way of dealing with the matter, to say once one reaches that point we should be treated as a party. I suppose, and this is why it is useful to thrash this out now – and "thrash" is probably the word we are getting to – maybe in future one should simply establish a point at which will be decided: is the Competition Commission a party or not? And one should simply decide at one or other CMC that this should go on the agenda. In our submission we do not need to be joined, we plainly are a party by virtue of the role that we play; it would only be as a matter of clarity rather than as a matter of necessity.

I have gone on longer than I expected in reply, but let me just take you to the "BT point" – if I can put it that way – that was raised, we have dealt with that in our submissions and I am not going to turn it up now, but if you look at our tab 7 submissions, paras. 3 and 5(3) we deal with it there.

THE CHAIRMAN: Yes.

MR. BOWSHER: Unless there is anything else I can assist with, I think I have probably said as much as can really be said. It is ultimately a fairly simple question; what is the reality of the situation in this case, albeit that it raises a number of broader questions for other cases.

THE CHAIRMAN: Apart from disagreeing with you completely about it being a fairly simple question! Can I thank all the parties for really what have been extremely helpful submissions? We will obviously be reserving our Judgment on this, and will hand one down as soon as we can. Thank you all very much.

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