Neutral citation [2018] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1260-1261/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

25 January 2018

Before:

MR JUSTICE SNOWDEN
(Chairman)
DR CLIVE ELPHICK
PROFESSOR JOHN CUBBIN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

AND BETWEEN:

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Heard at Victoria House on 4 December 2017

RULING (COSTS)

APPEARANCES

Mr Robert Palmer and Mr David Gregory (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr Aidan Robertson QC and Ms Julianne Kerr Morrison (instructed by Preiskel & Co LLP) appeared on behalf of CityFibre Infrastructure Holdings plc.

Josh Holmes QC, Mr Mark Vinall and Mr Daniel Cashman appeared on behalf of the Office of Communications.

Introduction

1. This ruling is our decision on costs arising from our judgment of 10 November 2017 ([2017] CAT 25) (the "**Judgment**"). The Judgment explained the reasons for our short ruling of 26 July 2017 ([2017 CAT 17]) quashing certain determinations made by Ofcom concerning market definition in its Final Statement of 28 April 2016. This ruling adopts a number of the abbreviations defined in the Judgment, which for convenience are listed in the annex to this ruling. We deal first with the costs in relation to BT's appeal and then in relation to CityFibre's appeal.

2. As explained in Section A(3) of the Judgment, in the hearing which took place in April and May 2017 the Tribunal heard argument concerning BT's market definition challenges only. BT had also challenged Ofcom's proposed remedy but consideration of these grounds of appeal was adjourned to a separate hearing.

3. The decision to split the hearing of these issues occurred only shortly before the hearing in April, as a result of the outcome of another appeal brought by TalkTalk which had been referred to the CMA for determination. The CMA, in its determination of 11 April 2017, (the "**CMA Determination**") upheld TalkTalk's appeal and ruled that Ofcom had miscalculated the appropriate price for the DFA remedy: the price Ofcom had calculated was too high and so the matter was remitted to Ofcom for reconsideration.

4. Because of the impact of the CMA Determination on the remaining remedy issues which had not been referred to the CMA, we considered it most appropriate to consider the remedy matters together, after Ofcom had completed its reconsideration of the remitted issue. That hearing would have taken place in around September 2017, except that our conclusions on the market definition issues rendered it unnecessary.

5. The product market definition, geographic market definition, and competitive core issues (collectively the "**market definition issues**") were treated

distinctly from each other and from the remedy challenge. Product market definition constituted the most weighty matter in the written materials and occupied the most time at the hearing itself; geographic market definition was a significant aspect of the case but occupied only about half as much of the written material and time taken at the hearing; and competitive core was a relatively minor issue on the papers and was discussed only briefly at the hearing.

BT's costs

The rival contentions in outline

6. BT contended that it was the overall winner of the issues determined in the Judgment in the sense that it succeeded in having Ofcom's decision quashed. BT contended that the proper starting point is that costs should follow the event, and that it should therefore be paid all of its costs by Ofcom. BT was, however, prepared not to claim certain items of costs relating to its factual and expert evidence to reflect certain points upon which the Tribunal had been critical of BT in its Judgment.

7. In contrast, Ofcom contended that as a point of principle, the proper starting point in appeals under section 192 of the Communications Act 2003 (the "**2003 Act**") is that no costs order should be made against it where it loses an appeal provided that it has acted reasonably and in good faith. Ofcom submitted that if costs were to be awarded against it on any other basis, this would have a "chilling effect", inhibiting it from properly carrying out its regulatory functions. Ofcom submitted that this meant that there should be no order for costs against it in the instant case.

8. As a fall-back position, Ofcom contended that if an adverse costs order were liable to be made against it, deductions should be made to reflect the fact that BT had lost on a number of its arguments regarding market definition; and that a number of points had not been determined by the Tribunal (in particular in connection with geographic market definition and the entirety of BT's

challenge to the DFA Remedy). Ofcom also contended that greater reductions than those offered by BT should be made to reflect the criticisms of BT in the Judgment and because BT had provided inaccurate evidence upon which Ofcom had relied during the regulatory process.

9. Ofcom further argued that it should, in any event, recover its costs of the hearing of 20 November 2017 which dealt with the form of order giving effect to our ruling of 26 July 2017, and which was necessitated by BT's unsuccessful request to delay the making of the order (see our Ruling [2017] CAT 26).

Summary of the outcome

10. As explained in greater detail below, we have reached the view that our starting point should be that costs follow the event. However, we accept Ofcom's fall-back submissions in part, with the result that we consider that BT should not recover the disbursements connected with Dr. Basalisco's expert reports, and that it should recover only 50% of its remaining recoverable costs of the appeal (except of the hearing on 20 November 2017).

11. We consider that BT should pay Ofcom's costs of and associated with the hearing of 20 November 2017.

12. BT requested that we order Ofcom to make an interim payment to BT on account of costs. We consider it appropriate to do so and order Ofcom to pay BT £500,000 within 28 days of this ruling.

Should the starting point be that costs follow the event?

13. Pursuant to rule 104(2) of the Competition Appeal Tribunal Rules 2015 the Tribunal has power to make "any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings." Rule 104(4) sets down a non-exhaustive list of factors the Tribunal may take into account when determining the amount of costs, these are:

> "(a) the conduct of all parties in relation to the proceedings;
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> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

14. Although Rule 104 bears some resemblance to rule 44 of the Civil Procedure Rules ("**CPR**"), it is important to note that Rule 104 does not contain any equivalent to CPR r 44.2(2)(a), which provides that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". Rule 104 substantially reproduces Rule 55 of the, now repealed, Competition Appeal Tribunal Rules 2003 ("**Old Rule 55**"). The Court of Appeal recognised that the Old Rule 55 gave the Tribunal a wide and general discretion in relation to costs: *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 ("***Quarmby***") at [12]. The Court of Appeal also noted that the absence of a general rule that the winner recovers its costs is deliberate and reflects the wide variety of proceedings that come before the Tribunal ([21]-[22]).

15. Although there is no express starting point in Rule 104, for certain categories of case the Tribunal now has an established practice in relation to costs. For example, in an appeal against Ofcom's decision resolving a price dispute under section 185 of the 2003 Act, the starting point is that there should be no order for costs against Ofcom if it has acted reasonably and in good faith: see *The Number (UK) Ltd v Ofcom* [2009] CAT 5 at [5]-[6].

16. In other contexts, however, the Tribunal has taken the view that costs should follow the event. This is the case, for example, for appeals of infringement decisions (see, e.g. *Quarmby*) and for applications for judicial review of merger decisions and market investigations under sections 120 and 179 of the

Enterprise Act 2002. With regards to the latter type of case, in *Tesco v Competition Commission* [2009] CAT 26 ("***Tesco***") the Tribunal stated:

> "29. […] It is true, as the Commission has urged, that in a market investigation it is required to bring together and weigh a considerable body of evidence, make factual findings which will often involve complex economic and commercial questions, and apply legal principles to those findings, devising if necessary remedial action to address any AEC identified in the investigation. Typically a report by the Commission following a market investigation will contain a variety of findings and decisions. A market investigation exercise may well have wide and profound effects on the economic and other interests of many citizens and businesses. This can, however, also be the case in a merger assessment. The same can equally be true of many decisions made by Government and other public bodies susceptible to judicial review. Moreover, although the volume and scope of decisions in a single Commission report may render the Commission vulnerable to a legal challenge, neither this nor the existence of wide-ranging powers to investigate possible AECs and devise remedies which can significantly affect many people represents a compelling reason for applying in such cases *as a matter of principle* (as opposed to on the specific facts of a particular case) a distinct and more indulgent approach to the award of costs against the decision-maker. Generally speaking, no question of such an award would arise unless the exercise of such powers had been shown to be impaired in some respect. Where that occurs the rationale for the Tribunal's starting point in section 120 cases, [that costs follow the event], applies just as much in relation to applications under section 179."

17. In *Tesco* at [31]-[32], the Tribunal distinguished the practice on costs in cases involving public authorities such as *City of Bradford v Booth* [2000] EWHC (Admin) 444 ("***City of Bradford***"). *City of Bradford* was an appeal to magistrates from a licensing decision. The Divisional Court decided that in such cases there was no general principle that costs should follow the event. The core principles were explained by Lord Bingham CJ,

> "23. I would accordingly hold that the proper approach to questions of this kind can for convenience be summarised in three propositions:
>
> (1) Section 64(1) confers a discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.
>
> (2) What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.
>
> (3) Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting

> honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

18. We were also referred to the approach to adverse costs which has been applied in relation to public authorities in other jurisdictions including the Law Society in bringing solicitors' disciplinary proceedings to the Solicitors Disciplinary Tribunal (*Baxendale-Walker v The Law Society* [2007] EWCA Civ 233 ("***Baxendale-Walker***")) and applications by the police to the court for forfeiture of cash pursuant to the Proceeds of Crime Act 2002 (*R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 WLR 1508, [2017] EWCA Civ 40 ("***Perinpanathan***")).

19. In *Perinpanathan* at [40], Stanley Burnton LJ endorsed Lord Bingham CJ's reasoning, and in light of the decision in *Baxendale-Walker*, concluded that the principle in *City of Bradford* applied in licensing cases and in disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest. He observed that whether the principle should be applied in other contexts would depend upon the substantive legislative framework and the applicable procedural provisions.

20. Lord Neuberger MR (as he then was) agreed with Stanley Burnton LJ for similar reasons, also endorsing the approach of Lord Bingham CJ in *City of Bradford*. He concluded, at [76] that:

> "In a case where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs."

21. Earlier in his judgment, Lord Neuberger MR also observed more generally:

> "59. The fact that section 64 [of the Magistrates' Court Act 1980] contains no fetter on the Magistrates' discretion as to whether, and if so to what extent, to award costs in favour of a successful party does not mean that a court of record cannot lay down guidance, or indeed rules, which should apply, at

> least in the absence of special circumstances. It is clearly desirable that there are general guidelines, but it is equally important that any such guidelines are not too rigid. There is a difficult, if not unfamiliar, balance to be struck, namely between flexibility, so a court can make the order which is most appropriate to the facts of the particular case and the circumstances and behaviour of the particular parties, and certainty, so that parties can know where they are likely to stand in advance, and inconsistency between different courts is kept to a minimum."

22. Against this background, Mr Holmes QC, for Ofcom, argued that appeals under section 192 of the 2003 Act were of a different nature to applications for judicial review of merger and market investigation decisions, and he invoked the line of reasoning originating from Lord Bingham CJ's decision in *City of Bradford* and as applied in *Perinpanathan*. He argued that until 2013 the Tribunal had established a consistent practice whereby it would not order adverse costs against Ofcom absent unreasonable conduct. This practice existed, he submitted, because there is a risk of a "chilling effect" on Ofcom's role as regulator if it were to face the risk of substantial adverse costs orders if were to make decisions in the public interest which were unfavourable to key industry players.

23. These arguments were considered in 2013 by the Tribunal in *British Sky Broadcasting Ltd v Office of Communications* [2013] CAT 9 ("***PayTV***"). *PayTV* concerned costs following an appeal under section 317(6) of the 2003 Act to which the provisions of section 192(3)-(8) of the 2003 Act applied by virtue of section 317(7).

24. The Tribunal, chaired by Barling J (the Tribunal's then President), undertook a survey of the relevant authorities on costs, including *Perinpanathan* and *Tesco*. Whilst the Tribunal accepted that in dispute resolution appeals costs would not follow the event, it concluded that the authorities established no such consistent starting point in relation to section 192 appeals in general. At [15] the Tribunal specifically rejected Ofcom's "chilling effect" argument and at [38] it adopted the comments in *Tesco* distinguishing the licensing decision cases on the basis that appeals under section 192 are "emphatically not" appeals by way of re-hearing. The Tribunal pointed out that the Tribunal on an appeal under section 192 does not allow an appeal under section 192

without finding that the decision was unlawful or otherwise in error in a material respect. We note that this hurdle for an appellant to clear on an appeal under section 192 was a point which had been urged upon us by Ofcom at the substantive hearing of these appeals and which we accepted in [71] – [79] of the Judgment.

25. The Tribunal in *PayTV* then held that the starting point under section 192 should be that costs follow the event, and explained its conclusion as follows:

> "50. In our judgment the considerations contained in the passage from *Tesco* […] are also applicable to a case such as the present, and the position and duties of Ofcom as a sectoral regulator, although clearly a relevant factor, do not justify "applying … *as a matter of principle* (as opposed to on the specific facts of a particular case) a distinct and more indulgent approach to the award of costs against the decision-maker." In order to provide the balance, referred to by Lord Neuberger [in *Perinpanathan*], between sufficient flexibility to enable the Tribunal to do what is just in a particular case, and an appropriate degree of predictability, we consider that the starting point in cases such as the present should be that costs follow the event, even where Ofcom is the loser in the appeal. This approach aligns the present case with the starting point adopted by the Tribunal in most categories of case with which it deals, is consistent with the approach generally found in civil litigation, including, in particular, other public law cases, and provides ample flexibility to reach a just conclusion in each case. Using this starting point is justified in such cases as the present given that regulatory decisions of this kind often have very significant effects on the commercial interests of the regulated entity and sometimes also on the vital interests of other parties (as, for example, claimed by FAPL in the present case). The appeal route is the only recourse available to those affected by a decision which they consider to be erroneous or invalid."

26. Mr Holmes accepted frankly that in *PayTV* the Tribunal had considered and rejected the same arguments that he raised again in these proceedings before us. However, he argued that *PayTV* was wrongly decided and that the Tribunal was not bound to follow it and, indeed, should not follow it. Mr Holmes also indicated in his oral submissions that Ofcom considered that this was point of principle of considerable importance. He noted that Ofcom had applied to the Court of Appeal for permission to appeal the Tribunal's *PayTV* costs judgment on various grounds, including its alleged "chilling effect", and told us that permission to appeal had been granted by Lewison LJ on 16 September 2013. However, on 17 February 2014 the Court of Appeal allowed BT's appeal against the relevant substantive judgment, as a result of which the

Tribunal's costs order was set aside. Ofcom's costs appeal was then withdrawn by consent as it had become academic.

27. Mr Holmes is obviously correct to say that this Tribunal is not bound to follow the Tribunal's ruling in *PayTV*. Nevertheless, it is clearly undesirable for differently constituted Tribunals to take different views on identical arguments where the surrounding circumstances are materially the same, and he accepted that the same approach in this respect should be adopted by the Tribunal as in the High Court.

28. This issue arose in the High Court in *Lornamead Acquisitions Ltd v Kaupthing Bank HF* [2011] EWHC 2611 (Comm) ("***Lornamead***"). In *Lornamead* counsel for Kaupthing sought to persuade Gloster J (as she then was) that she ought not follow the judgment of Burton J on an identical point which he had determined in parallel proceedings a week earlier (see *Rawlinson and Hunter Trustees SA v Kaupthing Bank HF* [2011] EWHC 566 (Comm)). At [53] of her judgment Gloster J referred to Volume 11, paragraph 98 of Halsbury's Laws, which states:

> "98. Decisions of co-ordinate Courts.
>
> There is no statute or common law rule by which one Court is bound to abide by the decision of another Court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong …"
>
> (Gloster J's emphasis)

Gloster J went on at [54] to [57] of her judgment to conclude that, although doubts had been raised in her mind about the correctness of Burton J's judgment, the appropriate course for her to take – in the interests of judicial comity and deployment of judicial resources – was to follow Burton J's judgment as she had not been convinced that that decision was incorrect. She did, however, grant permission to appeal in order that the matter could be tested in the Court of Appeal.

29. We have carefully considered Ofcom's arguments and, in particular, Ofcom's criticism of the Tribunal's analysis of the relevant authorities in *PayTV*. Ofcom has not convinced us that the Tribunal erred in the analysis of the authorities it undertook in the *PayTV* case. Nor are we persuaded that the Tribunal erred in taking the view that the appropriate starting point in section 192 appeals is that costs should follow the event. In the light of those considerations and in the interests of judicial comity and the deployment of judicial resources, we consider the appropriate course is to follow the Tribunal's ruling in *PayTV* and to proceed on the basis that the starting point is that costs follow the event.

30. The fact that the starting point is that costs follow the event by no means precludes the consideration of other relevant factors in deciding how to exercise the discretion under Rule 104. Rule 104 itself identifies some of the relevant factors that can be taken into account, and in *Pay TV* at [51] the Tribunal referred to the following passage in *Merger Action Group v BERR* [2009] CAT 19 which identifies the breadth of the discretion,

> "It is axiomatic that all such starting points are just that – the point at which the court begins the process of taking account of the specific factors arising in the individual case before it – and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly. The Tribunal's decision in relation to costs/expenses can be affected by any one or more of an almost infinite variety of factors, whose weight may well vary depending upon the particular facts. Beyond recognising that success or failure overall or on particular issues, the parties' conduct in relation to the proceedings, the nature, purpose and subject-matter of the proceedings, and any offers of settlement are always likely to be candidates for consideration, the factors are too many and too varied to render it sensible to attempt to identify them exhaustively."

31. In this regard, and given the manifest similarities between Rule 104 and CPR 44, we consider that the approach of the courts under CPR 44 may provide some guidance to our exercise of discretion under Rule 104. The approach of the courts under CPR 44 is discussed at some length in Volume 1 of the White Book. We refer, in particular, to paragraphs 44.2.6, 44.2.7 and 44.2.10.1. From that analysis, we extract the following points which, with appropriate modification, we consider are relevant to this case.

32. In any complex litigation the winning party is likely to fail to succeed on every one of the issues in the case. This is not usually seen as a sufficient reason to depart from the general rule that costs follow the event. However, where there have been a number of identifiable issues raised in the proceedings and the party which has been successful overall has been unsuccessful on one or more of those issues, the court frequently considers whether, in all the circumstances, justice requires it to make a different order, and in particular to have regard to the success or failure of the parties on the individual issues.

33. An approach to costs which has regard to the result on individual issues may involve depriving the successful litigant of its costs of those issues upon which it failed, or even ordering it to pay the costs of the otherwise unsuccessful party of those issues. When deciding which of these two measures to adopt, an important consideration is the reasonableness or unreasonableness of the party taking the failed point, how the point was run, and the amount of the extra costs and disruption caused to the opponent in dealing with it.

34. One of the main purposes of adopting an approach which has regard to the outcome on particular issues, is to encourage parties to be selective in the points that they take in litigation. Even in high-stakes litigation, parties should be discouraged from proceeding on the basis that if they are successful overall, they will be able to recover their costs on all issues, including those on which they fail. Put shortly, the policy objective is to discourage a "kitchen sink" approach to litigation.

35. We think that such a policy applies with equal or even greater force to appeals challenging regulatory decisions before this Tribunal as it does to commercial litigation. Appeals such as the instant case tend to involve the appellants mounting wide-ranging challenges to a regulatory decision, and the potential for adverse costs orders to have a chilling effect upon regulators would be significantly greater if appellants could proceed on the basis that if they were successful overall they could recover all of their costs, even on issues upon which they had failed. Accordingly, whilst we do not think that the chilling effect argument should displace the starting point that costs follow the event,

we do think that it can be a relevant factor in persuading the Tribunal, in an appropriate case, to depart from the starting point and have regard to the success or failure of the parties on individual issues.

36. For reasons of practicality to facilitate the detailed assessment of costs, if the court decides to make an order having regard to the outcome on different issues, it should, if possible, seek to reflect the relative success of the parties on those issues by making an overall proportionate costs order (i.e. an order that one party pays a proportion of the costs of the other). This will avoid the need for the assessing judge to have to assess the costs of more than one party and to have to allocate each item of costs to one or more issues.

37. In principle, it is not wrong to allow a party who wins on his first line of attack to recover not only the costs of his first line of attack, but also the costs of his secondary lines of attack, even if the court has not been required to rule upon those secondary points. On the other hand, the court should be alive to the risk of injustice if a party can recover substantial costs on points which might not have succeeded if the court had determined them. Whether it is appropriate that the costs of the secondary lines of attack which were not determined should follow success on the first line of attack will depend upon all the circumstances of the case.

The rival contentions

38. BT contended that, as the overall winner of the appeal, it should be entitled to its entire costs for both the market definition and remedy challenges. BT recognised, however, that its evidence had been the subject of criticism by the Tribunal in the Judgment and therefore it volunteered that it would not seek to recover its disbursements in relation to Dr. Basalisco's expert evidence and it offered that its recoverable costs in relation to its internal costs for preparing the factual evidence should be reduced by 10%.

39. Ofcom contended that even if the Tribunal was minded to adopt a starting point that costs follow the event, there were a number of reasons to justify a

departure from that starting point. In particular, Ofcom highlighted that BT had lost on a number of the specific grounds of its appeal. In its skeleton argument Ofcom produced the following table of the "wins vs losses" which (slightly modified to include lines indicating the overall results of Issues 2-3 and 6) we consider to be a helpful summary of the result of the case on the specific issues:

Issue	**Result for BT**
Product market definition	
Issue 1 – quantitative SSNIP	Lost
Issues 2 and 3 (Overall)	Won
• Issues 2.6 and 3.6 Internal documents / CP pricing	Won
• Issues 2.5 and 3.5 Price sensitivity	Lost
• Issues 2.3 and 3.3 Price differentials	Won*
• Significant numbers of users with 2G demand	Won*
• Issues 2.2 and 3.2 Migration trends	Lost
• Issues 2.4 and 3.4 Switching costs	Lost
Issues 4 and 5	Not decided
Geographic market definition	
Issue 6 (Overall)	Won
• CBDs	Won
• Issue 6.1 Boundary test formulation	Not decided
• Issue 6.2 Buffer distance	Not decided
• Issue 6.3 Fibre flex points	Not decided
• Issue 6.4 Large business sites	Lost
• Issue 6.5(i) Microwave	Lost
• Issue 6.5(ii) EFM	Won
• Issue 6.6 Postcode sectors	Lost
Issue 7 Cumulative sensitivity analysis	Lost
Competitive Core	
Issue 8 Competitive core	Won

The insertion of * in relation to two of the issues upon which BT succeeded in relation to the product market definition indicate issues in relation to which some of the material evidence supplied to Ofcom by BT during the administrative phase was later found to have been inaccurate.

40. Ofcom also emphasised that although the Tribunal quashed Ofcom's finding in relation to geographic market definition in relation to its treatment of the CBDs, this had been primarily the result of the intervention of Gamma and

VM in support of BT's appeal rather than the main thrust of the argument or evidence adduced by BT itself, which had focussed on other issues. Ofcom also pointed out that the Tribunal had not determined certain of the other issues raised by BT, notably in relation to geographic market definition and remedy, and hence could not take a view on the merits of those arguments.

41. In relation to other factors, Ofcom relied upon the fact that BT had provided inaccurate evidence to Ofcom concerning the proportion of its customers who had multiple leased lines, and that certain aspects of BT's conduct of the litigation in relation to the preparation of its expert and factual evidence had been criticised by the Tribunal.

42. Finally, and in support of its argument on the specific "chilling effect" of an award of costs in this case, Ofcom produced a witness statement from its General Counsel, Ms. Frances Weitzman, dealing with how Ofcom is funded and giving her views as to the potentially damaging effect a high award of costs would have on Ofcom's work. In particular, Ms. Weitzman described how Ofcom operates within a budget subject to an overall expenditure cap set by the Treasury, and that whilst budgeting for the costs of its in-house legal team and the cost of engaging external counsel for litigation, Ofcom does not have a separate contingency for litigation costs in its budget. Ms. Weitzman suggested that any significant costs award against Ofcom would mean that Ofcom would have to cut back on non-mandatory work, such as consumer protection work, and/or would have to approach the Government for additional funding by way of an increase to its spending cap. She commented that the risk of future adverse costs orders would be liable to lead to Ofcom needing to minimise the risk of litigation in the future and, for example, to avoid making difficult decisions that may be contentious with stakeholders who are well financed, or not to defend litigation or only do so on a highly restricted budget.

43. Whilst we accept Ms. Weitzman's evidence as a true statement of her belief as to the consequences of an adverse costs order against Ofcom, we are bound to observe that operating within a budgetary cap is a restraint shared by most public authorities, and that (as Ms. Weitzman fairly acknowledged) the

reaction of Government to a request for an increase in Ofcom's spending cap to be funded from an increased industry levy cannot be predicted. Moreover, we would also observe that since the *PayTV* decision in 2013 Ofcom can have had no assurance that it would not be subject to adverse costs orders. In that respect, the consequences of Ofcom's decision not to make a separate contingency for adverse litigation costs are of its own making: and it is also important to appreciate that Ofcom routinely seeks to recover its own costs from other parties if it is successful in litigation.

Analysis

The market definition issue costs

44. Having regard to the policy considerations described above, we have no hesitation in concluding that it would be appropriate to depart from the starting point that costs follow the event and to have regard to the outcome on the individual issues in this case. We consider it appropriate to make a significant reduction to the amount of BT's recoverable costs, thereby reflecting the fact that although BT was the overall winner, it lost or did not succeed on a significant number of the points raised in its appeal. In particular, and for the reasons mentioned above, we consider that this approach is justified because BT took what might fairly be described as a "kitchen sink" approach and raised a large number of points of challenge to Ofcom's reasoning and decision, many of which were the subject of extensive evidence and submissions, and only some of which succeeded.

45. So, for example, on product market definition, BT won on the key issue of the interpretation of its internal documents and on the relevance of Ofcom's pricing discussions with other CPs. These points had been described by Ofcom as "compelling evidence" but we concluded that they were not. But BT lost on several of the other issues which it had raised (e.g. price sensitivity, switching costs and migration trends) which took up a considerable volume of the evidence and time at the hearing.

46. Likewise on geographic market definition, whilst BT was successful on the EFM issue which was of itself of some importance, we agree with Ofcom that the geographic market definition issue was largely won as a result of the interveners' exertions rather than the efforts of BT, and that a significant number of the other issues raised by BT were not resolved in its favour.

47. With regards to competitive core, BT was the clear winner; but as indicated at the start of this ruling, this occupied a relatively small part of the evidence and time at the hearing.

48. As regards the problems caused by the prolixity and argumentative nature of BT's expert evidence (Dr. Basalisco) and some of its factual evidence, we welcome BT's acceptance that it should not seek to recover the disbursements in relation to Dr. Basalisco's evidence and 10% of its internal costs of preparing the factual evidence, but we do not think that these concessions go far enough.

49. We agree that the disbursements in relation to Dr. Basalisco's evidence should not be recoverable, but we think that there should be a larger reduction in relation to the other costs to reflect the fact that there would inevitably have been further legal costs incurred by BT's legal team in reviewing that expert evidence and significant unnecessary costs incurred by Ofcom in having to deal with it. By way of illustration, Dr. Basalisco's four expert reports took up a total of 195 (closely typed) pages. He was also cross-examined by Ofcom for about 2½ of the 16 sitting days of the hearing (i.e. 15% of the hearing). The same applies, though to a lesser extent, to the legal costs of preparation of BT's factual evidence and the resultant costs of Ofcom in having to deal with it. In making these observations, we do not lose sight of the fact that Ofcom's own factual and expert evidence from Ms. Curry was not beyond reproach for the reasons we set out in the Judgment.

50. The provision of inaccurate information by BT to Ofcom during the administrative phase was accepted in argument by BT as a matter which could legitimately be taken into account by the Tribunal on the issue of costs. BT

did, however, suggest that this should have little or no effect, essentially for two reasons: first, that the inaccuracy of the data was identified at a relatively early stage, but rather than seeking to reconcile with BT the new information before the hearing, Ofcom chose instead to seek to defend its decision at trial on the basis of its own understanding of the new information, and did not succeed in doing so; and secondly, that the inaccuracy in the information only related to the profitability of a SSNIP at 1G, and it had no bearing upon Ofcom's failure properly to analyse the effect of a SSNIP at 10G.

51. Whilst BT is correct that the erroneous information did not affect the analysis in relation to a SSNIP at 10G, we do not consider that is really the point if we are not simply applying the "costs follow the event" rule. The provision of the erroneous information undoubtedly contributed to the inadequacy of Ofcom's analysis of the SSNIP at 1G, which was an issue that attracted a significant amount of evidence and analysis at trial. In that respect, it also does not easily sit in BT's mouth to criticise Ofcom for the manner in which Ofcom sought to defend its decision on the 1G SSNIP and thereby extract itself from the difficult position in which it had been put by BT. To the contrary, there is an obvious policy imperative to encourage parties to ensure that the information that they provide to regulators during the administrative phase is entirely accurate and complete so that this situation does not arise.

The remedy issue costs

52. BT's remedy challenge was to a great extent distinct from its market definition challenge. For example:

(1) a portion of BT's expert and factual evidence, specifically the expert evidence of Dr Daniel Maldoom and the factual evidence of Mr Alan McGuire, dealt exclusively with the remedy elements of BT's appeal.

(2) BT's notice of appeal, reply and skeleton argument dealt separately with the market definition issues and the remedy issues under different section headings.

53. It is also clear to us that the remedy challenge constituted a major plank of BT's attack on the Final Statement: nearly half of the substantive text of BT's notice of appeal was addressed to the remedy challenge. No doubt the challenge, had it proceeded, would have taken up several days' (most likely more than a week) of sitting time.

54. If we were simply applying a "costs follow the event" approach, Ofcom would be forced to pay for the costs of BT's arguments on remedy notwithstanding that they were not determined and hence there is no way of knowing whether the points raised by BT were good, bad or indifferent. That would carry an obvious risk of injustice in circumstances in which we do know that BT failed on a significant number of the issues that were litigated, and that as a consequence we have decided to depart from the starting point and to have regard to the outcome on individual issues in exercising our discretion on costs. However, to deprive BT of all its costs in relation to the remedies issues by simply making no order for costs also risks injustice: BT was required to raise in its notice of appeal and to prepare evidence on all of its challenges at the same time, the points may have been well taken, and the decision to split the trial was not of BT's making but was the product of a successful challenge to Ofcom's decision on specified price control matters.

55. In these circumstances, there is no perfect solution, but we think that justice is best served by applying the same proportional reduction to BT's costs of the remedy challenges as we apply to the costs of the market definition matters which were litigated. This approach also has the merit of simplicity because it avoids further arguments as to the division of costs in relation to items of work dealing with both the market definition issues and the remedies issues (such as the preparation of a number of BT's witness statements).

The hearing on 20 November 2017

56. The costs relating to the hearing on 20 November 2017 are clearly distinct and easily separable from the other costs of these proceedings. BT failed in its application to achieve a deferral of the making of the final order giving effect

to our Judgment, and accordingly it should pay Ofcom's costs relating to that hearing. Such costs should be agreed or assessed on the standard basis and set-off against the general costs order in relation to the appeal.

Quantum

57. In taking these various factors into account so as to arrive at an appropriate costs order, we are to some extent handicapped in making an assessment of the relative time and costs expended by BT on the individual issues, because BT only produced a very skeletal summary of its costs, simply listing the sources of those costs (e.g. in-house lawyers, leading and junior counsel, Analysis Mason etc). That summary also did not identify or give any breakdown of the tasks or issues to which those costs related – even as between the market definition issues and the remedies issues. Nor did BT provide us with any detail of the amount of the fees of Dr. Basalisco or the costs of the in-house lawyers relating to factual evidence which it was not claiming. Whilst this is obviously not a detailed assessment, parties seeking orders for costs from the Tribunal in the future might be well-advised to prepare more detailed costs summaries.

58. Having made that observation, we nonetheless consider that we can fairly determine the reductions to be made to BT's costs to take account of the factors which we have identified above. We consider that BT should not recover the costs of Dr. Basalisco, or any costs relating to the hearing that took place on 20 November 2017, but subject to that, we shall order Ofcom to pay 50% of BT's recoverable costs of the appeal. We consider that this fairly reflects the fact that although it was successful overall, BT lost on about as many points as it won, and also takes into account the consequences of its approach to the expert and factual evidence, and the supply of inaccurate information to Ofcom during the administrative phase.

59. For the avoidance of doubt the base figure from which that amount payable should be calculated should exclude the disbursements associated with Dr Basalisco's evidence, but should include the 10% of internal legal costs of

preparation of factual evidence that BT offered to forgo. BT should then recover 50% of those of its costs which are agreed or assessed on the standard basis to be reasonable and proportionate, not 50% of the total amount claimed.

Interim payment

60. It was not disputed that if a costs order were to be made in favour of BT, Ofcom should be ordered to make an interim payment on account of those costs.

61. BT's overall claim for the costs of the proceedings came to £2,664,619.93 (excluding disbursements for Dr. Basalisco's evidence and an unspecified amount in respect of the 10% reduction offered for internal legal costs) and BT sought an interim payment of £500,000.

62. Even proceeding upon a conservative basis as to the reduction in that headline figure that might be arrived at upon an assessment, applying the 50% discount which we have indicated, and allowing for some set off for the costs relating to the hearing on 20 November 2017, we are confident that BT will recover in excess of £500,000. Accordingly, we shall order Ofcom to pay BT £500,000 within 28 days of receipt of this ruling.

CityFibre's costs

Summary

63. CityFibre argued that we should:

(1) order Ofcom to pay its costs of the challenges to the remedy elements of Ofcom's Final Statement which were non-specified price control matters (these points, as with BT's remedy challenges, were not determined by us in light of the Judgment); and

(2) revisit an order we made on 29 June 2017 ordering CityFibre to pay Ofcom's costs of defending grounds 3 and 4(b) of its notice of appeal

(these grounds were referred to the CMA for determination by our order of 29 November 2016 and were determined against CityFibre by the CMA on 11 April 2017).

Costs of the remedy challenge

64. As explained in [13] to [22] of the Judgment, CityFibre did not appear in the April and May hearing which led to the Judgment. Shortly before that hearing took place, CityFibre applied to the Tribunal for permission to amend its notice of appeal so as to remove its challenges to Ofcom's market definition determinations. The Tribunal granted permission by its order of 6 September 2017, pursuant to which CityFibre agreed to pay Ofcom's reasonable costs incurred in respect of the removed passages of its notice of appeal (and corresponding portions of its statement of intervention in BT's appeal). CityFibre does not seek to disturb that order but, like BT, it seeks to recover its costs in relation to its grounds of appeal concerning remedy which have not been determined.

65. As we explained above, BT was the overall winner of its appeal against Ofcom and was entitled to recover its costs of the appeal including the arguments that were not determined, but subject to a significant reduction to take account of its failure on a number of issues and its conduct of certain aspects of the proceedings.

66. The situation with CityFibre is, however, very different. There is an unchallenged order for costs *against* CityFibre in relation to the market definition issues, it having withdrawn its appeal on those points; and the remedies points have not been determined. CityFibre has therefore not been the successful party in any of the points which have been determined on its appeal, and there is accordingly no "event" in favour of CityFibre in its own appeal which an order for costs could follow. The fact that BT succeeded in BT's appeal on similar grounds to those that CityFibre chose to abandon does not change that position.

67. We also cannot form any view as to whether or not CityFibre would have succeeded on its challenge on remedies, because those issues have not been determined. Moreover, the risk that they might never be determined must have been apparent to CityFibre when it chose to discontinue the market definition part of its appeal.

68. In these circumstances we do not consider that there is any basis for ordering Ofcom to pay any part of CityFibre's costs of the remedies issues that have not been determined.

The June 2017 Order

69. Separately, CityFibre also argued that the Judgment has given rise to a "change of circumstances" which justifies the Tribunal revisiting our order of 29 June 2017 pursuant to which we ordered CityFibre to pay Ofcom's costs of defending grounds 3 and 4(b) of its notice of appeal.

70. As explained at paras 13-22 of the Judgment, grounds 3 and 4(b) were "specified price control matters" which were referred to the CMA for determination by an order of the Tribunal dated 17 November 2016. The CMA Determination (which also addressed TalkTalk's appeal) determined these grounds against CityFibre. By our order of 29 June 2017 we ordered CityFibre to pay Ofcom's costs of defending these grounds of CityFibre's appeal. TalkTalk's appeal was disposed of by way of a separate order (also dated 29 June 2017) which contained no *inter partes* costs award.

71. CityFibre argued that the costs relating to the CMA reference had now been overtaken by the Judgment, and that the Judgment constituted a material change of circumstance which meant that it would not be just or fair to maintain the June Order. CityFibre drew attention to the fact that from the outset of the proceedings it had espoused the view in its Notice of Appeal that the findings of SMP in respect of BT should be determined <u>before</u> the challenges to remedies and in particular that they should be determined <u>before</u> the specified price control matters were referred to the CMA. CityFibre

contended that given the Tribunal's decision against Ofcom on the market definition issues, the entire costs of the reference process in respect of CityFibre's appeals have been effectively wasted and that CityFibre should therefore be entitled to its costs against Ofcom, or at least that there should be no order as to costs in respect of that process.

72. For its part, Ofcom's primary contention was that there was no material change of circumstance justifying a variation of the June Order. If we were against Ofcom on its first argument, its secondary argument was that if CityFibre's appeal had been successful, this would have served CityFibre's commercial ends through an immediate impact on the price control (which had come into effect on April 2017) and through the setting of a relevant precedent for future price controls. Ofcom submitted that it was therefore appropriate to treat these grounds as a standalone appeal and make an order for costs accordingly.

73. With regards to its primary case, Ofcom referred us to the Court of Appeal's judgment in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 ("***Tibbles***") where Rix LJ conducted a survey of the relevant case law on the power of a court to vary or revoke one of its own orders under CPR r 3.1(7). Rix LJ set out the relevant principles at [39]:

> 39. In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) [… CPR 3.1(7)] is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> […]

> (v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.
>
> […]"

74. As we have indicated, CityFibre was initially an advocate of having the market definition issues determined first. However, it subsequently agreed with the other parties in September 2016 that due to the desirability of having a determination of the proceedings before the October 2017 start-date for the remedies imposed under the Final Statement, it was practically necessary to have the specified price control matters determined first. Given its initial stance, CityFibre must have been alive to the point (to quote its skeleton argument for this hearing):

> "This meant that there was a risk that the entire CMA process would be overtaken by events."

75. Against this background, Mr Holmes, for Ofcom, submitted – correctly in our view – that CityFibre could easily have asked the Tribunal to reserve a decision on the costs of the reference to the CMA at the time that the June Order was made. However, it did not do so, and when we put the point to Mr. Robertson QC (who did not appear at the earlier hearings) he was unable to explain why that had not been done.

76. We therefore cannot agree that the outcome of the Judgment was an unknown possibility or an unforeseeable event which could amount to a material change of circumstances within the scope of the *Tibbles* approach which would justify revisiting of our order of 29 June 2017.

77. For completeness, we note that in *Tibbles*, Rix LJ went on to describe certain further circumstances in which it might be just to revisit an order:

> "41. … it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt

> with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time. On the basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.
>
> 42. I emphasise however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR 3.9(1)(b)). Indeed, the checklist within CPR 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order."

78. In our view, even if the decision not to ask the Tribunal to reserve costs in June was a genuine oversight at the time on CityFibre's part, CityFibre did not draw this error to our attention sufficiently promptly for it to be appropriate for us to revisit the June Order now. Many months have passed since the June Order was made and indeed since the Tribunal handed down its ruling in July which announced that BT's appeal had succeeded.

79. We therefore decline to revisit the June Order in respect of the costs of the reference of CityFibre's specified price control matters to the CMA.

Mr Justice Snowden
Chairman

Dr Clive Elphick

Professor John Cubbin

Charles Dhanowa O.B.E.,
Q.C. (*Hon*)
Registrar

Date: 25 January 2018

Annex – Abbreviations defined in the Judgment

Abbreviation	Paragraph of Judgment
Entities	
BT	2
CityFibre / CF	14(2)
CMA	16
Gamma	3
Ofcom	3
TalkTalk	3
VM	2
Other terms	
10G SSNIP	174
1G SSNIP	174
CBD	126
CP	1
DFA	10
EFM	31
Final Statement	3
Leased line	26
SMP	5
SSNIP	116