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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1007/2/3/02

New Court  
Carey Street  
London WC2A 2JT

Wednesday 16 April 2003

Before:

The President  
SIR CHRISTOPHER BELLAMY  
(Chairman)  
PROFESSOR JOHN PICKERING  
DR ARTHUR PRYOR CB

B E T W E E N:

FREESERVE.COM PLC

Applicant

v.

DIRECTOR GENERAL OF TELECOMMUNICATIONS Respondent

supported by  
BT GROUP PLC

Intervener

Mr James Flynn (instructed by Messrs Baker & McKenzie)  
appeared for the applicant.

Mr John Turner (instructed by The Director of Legal  
Services  
(Competition) Office of Telecommunications) appeared  
for the respondent.

Ms Kelyn Bacon (instructed by the Head of Competition and  
Public Law, BT Retail) appeared for the Intervener.

Discussion following handed down Judgment

Transcribed from the shorthand notes of  
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1 THE CHAIRMAN: This is the first sitting of the new  
2 Competition Appeal Tribunal.

3 The Tribunal is today handing down judgment in the  
4 case of Freeserve.Com plc v. Director General of  
5 Telecommunications supported by BT Group plc. For the  
6 reasons given in the judgment which has already been  
7 circulated, the Tribunal holds that paragraphs 15 to 17  
8 of the Director's Decision of 21 May 2002 rejecting  
9 Freeserve's complaint of 26 March 2002 be set aside.  
10 Secondly, the remainder of the appeal is dismissed.  
11 The Tribunal will hear argument on any consequential  
12 orders or applications there may be.

13 Yes, Mr Flynn?

14 MR FLYNN: Mr President, Dr Pryor and Professor Pickering,  
15 good morning. If I may, congratulations to the  
16 Competition Appeals Tribunal, which we will look  
17 forward to hearing for many years.

18 Two matters, I think, Sir, are live. One is  
19 consequential orders. The other would be applications  
20 for costs. There is certainly no application on this  
21 side in relation to matters in which you have not found  
22 in our favour.

23 In respect of remitting the matter, we of course  
24 note what the Tribunal has said towards the end of the  
25 judgment and it is not Freeserve's contention that  
26 there is any point in the Director undertaking a  
27 sterile or historical exercise. However, Sir, as you  
28 will appreciate, firstly, Freeserve itself has not been  
29 able to read the judgment until just now, but there is  
30 an uneasiness, if you like, at the matter being left  
31 simply at large when it is a matter of such importance  
32 to Freeserve and to the industry generally. I think Mr  
33 Turner has a proposal to make. Perhaps you should hear  
34 from him and I might react to it. But Freeserve is  
35 obviously concerned that any further consideration that  
36 the Director should give to the matter should be in the  
37 light of all the relevant factors, including all the  
38 movements in the market that the Tribunal has referred

1 to. It may well be that Freeserve will wish to update  
2 and refresh those parts of its complaint to assist the  
3 Director in his determinations. Perhaps I can leave it  
4 there, Sir, and respond to anything that Mr Turner  
5 says.

6 THE CHAIRMAN: Yes. Just as a matter of comment, Mr Flynn,  
7 we have been wondering to ourselves what exactly is  
8 "the matter" for the purposes of Schedule 8, paragraph  
9 329.

10 MR FLYNN: Indeed sir. Certainly, as I have said, we do  
11 not see a great deal of point in simply going back to  
12 the drawing board as it was at the time the complaint  
13 was made and objecting to it.

14 THE CHAIRMAN: Well let us see. We will hear from the  
15 Director in a moment on that point.

16 MR FLYNN: That is part of what the matter must be.

17 In relation to costs, Sir, if it is convenient  
18 that I might address you on that now, there are two  
19 applications. One would be Freeserve's application for  
20 costs against the Director and I believe that there is  
21 also an application by BT for costs against Freeserve.  
22 If I might say a few words in respect of Freeserve's  
23 application.

24 Sir, in **Bettercare** a differently constituted  
25 Tribunal awarded costs to the applicant to the date of  
26 the handing down of the admissibility judgment but not  
27 thereafter. In this case I would seek to persuade the  
28 Tribunal that we should do slightly better than that in  
29 that the section 47 request from Freeserve expressly  
30 indicated to the Director that Freeserve would wish to  
31 place further material before him and that course was  
32 closed off, we say, by the complaint closure letter of  
33 8 July, thus necessitating Freeserve to bring these  
34 proceedings. The argument in **Bettercare** that the costs  
35 would have been incurred anyway as a matter of the  
36 administrative procedure before the Director, in our  
37 submission, fall to be distinguished and this is in any  
38 event, unlike **Bettercare**, a case in which the Director

1 did actually go to the merits of the complaint and  
2 reached his conclusions on the four heads of complaint  
3 rather than saying 'I can't look at it for this legal  
4 reason'. On that basis, Sir, we suggest that we should  
5 do somewhat better than **Bettercare**. I recognise, of  
6 course, that Freeserve has not been wholly successful  
7 in its application, but would suggest that perhaps 50  
8 per cent of the costs down to judgment would be an  
9 appropriate division.

10 THE CHAIRMAN: So you are asking for the costs up to the  
11 date of the interim judgment and 50 per cent  
12 thereafter.

13 MR FLYNN: Yes.

14 In relation to BT's application, Sir, I do not  
15 know if you wish to hear that application so that I can  
16 respond to it?

17 THE CHAIRMAN: Yes.

18 MR FLYNN: Thank you, Sir. In that case I have nothing  
19 further to add.

20 THE CHAIRMAN: Well while you are on your feet, Mr Flynn --

21 MR FLYNN: I am sorry, I misunderstood, Sir. I was asking  
22 whether I should respond when it had been made.

23 THE CHAIRMAN: I think I misunderstood. I think it has  
24 been made in writing. You might as well, while you are  
25 on your feet.

26 MR FLYNN: It relates very substantially to the disclosure  
27 application, in respect of which we say - and the  
28 Tribunal may remember this from the Case Management  
29 Conference, that there was a misunderstanding of a  
30 reference in a letter of 9 December from Baker &  
31 McKenzie, Freeserve's solicitors, saying that it was an  
32 issue which should be raised at the hearing.

33 THE CHAIRMAN: There were two letters. There was the 9  
34 December and then there was a rather clearer letter of  
35 11, I think it was, from Freeserve saying that this  
36 document is really disclosable, if I remember rightly.

37 MR FLYNN: That is right, Sir. I have got the 9th and the  
38 11th here, the 9th saying logistically that it seems

1 unlikely that disclosure and review of the business  
2 case could be dealt with adequately in time for the  
3 hearing and the 11th saying that they would be happy to  
4 discuss it at the case management conference.

5 I have it to hand. I can read it in full, if that  
6 would assist the Tribunal.

7 THE CHAIRMAN: Yes.

8 MR FLYNN: It says:

9 "Further to your letter of 10 December [it is a  
10 letter to Mr Gordon of Oftel] Freeserve's position is  
11 that it will be happy to discuss the disclosure of BT  
12 Openworld's business case at the case management  
13 conference scheduled to be held next Tuesday, 17  
14 December 2002. In relation to certain points raised in  
15 your letter, Freeserve notes that BT Openworld's  
16 business case is a document which was referred to and  
17 relied upon by the Director in the case note summary of  
18 21 May 2002. There is no reason why that has not been  
19 disclosed to date. Further, Freeserve appreciates the  
20 confidential nature of the document and has indicated  
21 to the Tribunal that it would put in place or agree to  
22 any suitable confidentiality regime to cater for such  
23 issues. As previously indicated, Freeserve therefore  
24 intends to raise the issue of disclosure with the  
25 Tribunal."

26 The "as previously indicated" was, of course, a  
27 reference back to the 9 December letter, because it was  
28 being said that logistically it was not something that  
29 Freeserve would feel able to comment on in time for the  
30 hearing. That was Freeserve's position. We recognised  
31 in December that that was open to Mr Tate, but  
32 nevertheless we think that BT perhaps over-reacted in  
33 the sense of preparing for a heavy disclosure  
34 application, which it was not Freeserve's intention to  
35 make. That was a matter which could have been sorted  
36 out before the hearing.

37 In respect of the remainder, we submit that the  
38 Tribunal's ordinary practice is that interveners should

1 bear their own costs, unless there is some special  
2 reason why not. In this case we have succeeded on the  
3 admissibility and we have succeeded on what was plainly  
4 the main thrust of the case, to which practically all  
5 the hearing was devoted. The emphasis was plainly on  
6 the reasoning and in relation to precisely the section  
7 of the Decision in which we were held to be unsupported  
8 by reason, so on that footing we submit there is no  
9 basis for Freeserve to pay any further costs. The  
10 worst possible scenario, from our point of view, should  
11 be the reasonable costs of preparing for the disclosure  
12 application, but I say that really in a very  
13 subsidiary alternative.

14 Thank you, Sir.

15 THE CHAIRMAN: Thank you, Mr Flynn.

16 Yes, Mr Turner?

17 MR TURNER: Sir, with your permission I will deal first  
18 with the consequentialia and then turn to costs.

19 In relation to consequentialia, the Tribunal has of  
20 course set aside paragraphs 15 to 17 of the contested  
21 decision, addressing two topics, predatory pricing, as  
22 far as the setting aside is concerned, and the issue of  
23 the special offer announced in February 2002.

24 It is important that no issue arises on the  
25 correctness, or the merits of the Director's Decision  
26 and the Tribunal specifically stated that in the  
27 Decision at paragraph 224.

28 The Director has carefully considered what should  
29 be the consequences of the setting aside. In our  
30 submission the matter which may be remitted is the  
31 reasoning in the Decision at the relevant parts and  
32 although we, for our part, are conscious that the  
33 events concerned, and they are water under the bridge,  
34 and in particular the special offer, the Director's  
35 feeling is that the Tribunal having made those  
36 findings, good administration may require us to offer  
37 to correct the reasoning and to produce a fuller  
38 statement in accordance with the points that were made

1 by the Tribunal in the relevant sections of the  
2 judgment.

3 We are mindful that there are, particularly in  
4 relation to predatory pricing, some points which may be  
5 of more general significance and we feel that it would  
6 be useful - or could be useful - for the Director to  
7 produce a better reasoned document of the kind that the  
8 Tribunal had in mind, taking into account the  
9 Tribunal's points and then to publish it in the usual  
10 way.

11 THE CHAIRMAN: As a decision?

12 MR TURNER: As a decision. We would propose to do that,  
13 bearing in mind the constraints of Easter and other  
14 work. I will come on to the possibility of appeal  
15 within a period of two months.

16 THE CHAIRMAN: In doing that, what would you propose to do  
17 about what has happened in the meantime?

18 MR TURNER: We do not feel that there is a basis for  
19 reinvestigating the market on the basis of any aspect  
20 of the Tribunal's judgment. The Tribunal was very  
21 careful to make that point. Therefore, there is no  
22 basis for specifically diverting resources from other  
23 tasks in order to address that. We feel that that,  
24 therefore, is not called for as a result of anything in  
25 the judgment.

26 THE CHAIRMAN: I do not know whether you are able to tell  
27 us whether you are dealing with any other issues or  
28 complaints relating to this market or this issue, or  
29 associated with this issue?

30 MR TURNER: Sir, I am instructed that there are complaints  
31 of margin squeeze against BT. However, the most  
32 significant point that has been drawn to my attention  
33 is that, particularly in relation to the broadband  
34 market some of the work that is being done is in  
35 relation to the mandatory European market review that  
36 needs to be carried out under the Directives. It is in  
37 relation to that area that resources are currently  
38 quite heavily focused.

1 THE CHAIRMAN: Is that something that has to be completed  
2 by July?

3 MR TURNER: Yes, it is. It is expected to be notified to  
4 the Commission by July of this year.

5 THE CHAIRMAN: What is that all about? Can you fill us in  
6 to help with the background.

7 MR TURNER: Under the relevant directives it is necessary  
8 for the Director to consider in particular the  
9 broadband market and to consider whether BT has  
10 significant market power within it. That is the burden  
11 of the review which is being undertaken in that area.  
12 Mr Gordon adds that a consultation document setting out  
13 provisional views for consultation is due shortly to be  
14 published.

15 THE CHAIRMAN: But that will be on significant market  
16 power. It won't be on conduct?

17 MR TURNER: It won't be on conduct. Nevertheless one of  
18 the main points arising from that is that significant  
19 work is currently being done by the Office, including  
20 in that, that area of the market. Any complaints that  
21 do arise which cover the same ground will need to be  
22 dealt with. It is felt that the main purpose of  
23 expanding the reasoning and clarifying the points that  
24 the Tribunal felt were obscure will be to provide  
25 guidance for future cases. That could be valuable.

26 THE CHAIRMAN: In the context of that, do you anticipate  
27 Freeserve and BT having opportunities to make  
28 representations to the Director? I suppose you cannot  
29 stop them if they do so.

30 MR TURNER: We cannot stop them if they do so or any  
31 action that they may seek to take in consequence, but  
32 we, for our part, intended to produce as full a  
33 statement of the reasoning and to explain how the issue  
34 of predatory pricing was addressed and to publish that.

35 THE CHAIRMAN: I am just thinking it through, Mr Turner.  
36 That is a helpful and positive response by the  
37 Director. I appreciate that. But what would the final  
38 decision be? It would still be a decision that would

1 be an appealable decision?

2 MR TURNER: Yes, it would be relating to the complaint  
3 that was originally made, that is true, but it would be  
4 explaining how the Director reached his conclusion more  
5 fully on the points at issue.

6 THE CHAIRMAN: Yes.

7 MR TURNER: I would apprehend that the question of appeal  
8 could be somewhat difficult in the light of the  
9 exhaustive review of the facts that was conducted in  
10 the context of this appeal, but that is another matter.

11 THE CHAIRMAN: Strictly speaking, if the Director is going  
12 to reconsider the matter afresh, it is not possible at  
13 this stage to anticipate the conclusion that he is  
14 likely to reach, is it?

15 MR TURNER: Well he does not anticipate considering the  
16 matter afresh. What he intends to do is to amplify his  
17 reasoning in relation to the points that were obscure  
18 and were found to be at fault because of an inadequacy  
19 of reasoning.

20 THE CHAIRMAN: So what order, if any, are you inviting the  
21 Tribunal to make?

22 MR TURNER: We would propose that the Tribunal makes no  
23 order, upon our undertaking to carry out an exercise of  
24 the kind that I have described and within the period  
25 which I have indicated.

26 THE CHAIRMAN: That is within two months?

27 MR TURNER: Within two months.

28 THE CHAIRMAN: We would need some wording, I think, for  
29 this undertaking.

30 MR TURNER: Yes.

31 THE CHAIRMAN: Perhaps we can come back to that in a  
32 moment.

33 MR TURNER: If I may turn to the issue of costs. It is  
34 necessary to begin by recalling, first, that the  
35 Tribunal has a very wide discretion in relation to  
36 making any order for costs that it thinks fit but that  
37 Rule 26(2) does provide some guidance in that it says  
38 that "In determining how much a party is required to

1 pay, the Tribunal may take account of the conduct of  
2 all parties in relation to the proceedings". So the  
3 issue of conduct is a matter that should feature in the  
4 weighing up of the considerations.

5 The result of these proceedings is that the  
6 Director was unsuccessful at the initial admissibility  
7 stage. However, in our submission, we have been  
8 substantially successful in the main hearing and  
9 looking at the case in the round, as the Tribunal must  
10 now do, including the conduct of all the parties, the  
11 right solution which does justice is to leave costs  
12 where they fall. I would mention six considerations in  
13 that regard.

14 First is the point that until a very late stage  
15 indeed the Tribunal will recall that Freeserve's  
16 application contained a request that the Tribunal  
17 itself should proceed to make original findings and an  
18 infringement decision against BT. That was never  
19 possible, on the basis of the annexed material.  
20 However, it was persisted in.

21 Secondly, Freeserve's application contained from  
22 the start and until the eleventh hour the application  
23 for the Tribunal to order disclosure of highly  
24 sensitive documents in the hands of the Director. That  
25 is not a point which affects only BT. The Director's  
26 ability to carry out his public functions, if he is at  
27 risk of having to disclose documents of that nature, is  
28 a very serious matter and considerable effort was  
29 expended by the Director as well in preparing to meet  
30 that request, which of course was only abandoned at the  
31 hearing just before Christmas last year.

32 Mr Flynn has read out the terms of one of the  
33 letters in relation to that, and I am afraid I omitted  
34 to bring the relevant correspondence.

35 THE CHAIRMAN: We have it in mind.

36 MR TURNER: But I would make two points.

37 The first is that what he read out was a letter  
38 responding to the Director's request asking whether

1 that application was going to be persisted in. In  
2 context it did not deny or give any indication that  
3 that request was not going to be made.

4 Perhaps of greater significance, and the point  
5 which certainly impressed us, was that the Tribunal  
6 itself, the Registrar, produced a case management  
7 agenda for the hearing in relation to which that issue  
8 was tabled. Freeserve had the opportunity to say that  
9 the point raised in the agenda was not in fact an issue  
10 that was going to be live, but did not. We found out  
11 at the hearing.

12 Third, the application itself, in my submission,  
13 which extended over 44 closely typed pages, was  
14 diffuse, if not strictly prolix, and it took a  
15 considerable number of low level and manifestly poor  
16 points, all of which require to be addressed. I give  
17 as one example, where there was a point at paragraph  
18 7.296 of the application, that BTs third quarter  
19 results had not trailed any significant wholesale price  
20 reductions, as the Director had found, whereas in fact  
21 inspection of the Director's Decision revealed  
22 immediately that there was no such error.

23 Fourth, a major feature of this case was that in  
24 the letter of June last year, the section 47 letter  
25 from Baker & MacKenzie, which asked the Director to  
26 vary and withdraw the Decision, Freeserve promised  
27 repeatedly that further material would be provided and  
28 further evidence would be forthcoming on numerous  
29 points. None was ever submitted - a point made in the  
30 judgment at paragraph 63.

31 Fifth, although Mr Flynn says that he has been  
32 substantially successful, the point is that Freeserve  
33 lost on four of the points against which it appealed in  
34 relation to the contested decision and on every one of  
35 those points the Tribunal specifically notes in the  
36 judgment that Freeserve failed to support its case with  
37 any specific or concrete evidence.

38 THE CHAIRMAN: When you say four points, I have got three

1 in my head?

2 MR TURNER: Cross marketing. The references are  
3 paragraphs 144 and 148. The advance notice allegations  
4 - 165 and 166. The telephone census issue - 255 and  
5 also cross-subsidy at paragraphs 206 - 207. The  
6 Tribunal will recall that paragraphs 15 and 16  
7 straddled cross subsidy and predatory pricing and it  
8 was only in relation to predatory pricing that the  
9 Tribunal found the Director's reasoning to be at fault.

10 Even on predatory pricing, the Tribunal pointed  
11 out that Freeserve could have been expected even there  
12 to have put in a better argued complaint. That is at  
13 paragraph 222 of the judgment.

14 Finally, and a point which is of subsidiary  
15 weight, the Tribunal ought, in my submission,  
16 nevertheless to bear in mind that at the earlier stages  
17 of the proceeding, for his part the Director chose to  
18 engage in voluntary disclosure and made every effort to  
19 ensure that all necessary material was placed before  
20 the Tribunal. Secondly, again looking at the  
21 Director's conduct, for the purpose of deciding the  
22 admissibility issue, the Director's approach was not to  
23 insist grimly upon any bad points but properly to make  
24 crucial concessions that were found by the Tribunal to  
25 be significant.

26 To conclude, although in our submission there may  
27 even be grounds for saying that in the round there is a  
28 case for the Director to claim a proportion of his  
29 costs, we consider that there is little point in  
30 skirmishing or taking up disproportionate time and that  
31 the right order, if the Tribunal stands back and looks  
32 at this entire case in the round, is to make no order  
33 as to costs.

34 There was one point that Mr Flynn made upon which  
35 I should add a further comment. He says that the  
36 ability to put forward further evidence was closed off  
37 by the actions of the Director in closing the case on 8  
38 July.

1           In my submission, that cannot seriously be  
2 advanced, given that at no stage, and even in the  
3 appeal itself, did Freeserve even attempt to put  
4 forward the further evidence and further material that  
5 was promised.

6           Sir, those are my submissions in relation to  
7 costs.

8           On the question of appeal, as I have touched on  
9 it, I should just say that the Director formally  
10 reserves his position for the moment in relation to the  
11 setting aside of those paragraphs of the contested  
12 decision, but makes the offer in relation to the  
13 amplification of those paragraphs in any event.

14          Sir, those are my submissions.

15 THE CHAIRMAN: Thank you very much.

16          Ms Bacon?

17 MS BACON: If I could consider, first, the issue of  
18 consequential orders, as Mr Flynn and Mr Turner have  
19 done?

20 THE CHAIRMAN: Yes, of course.

21 MS BACON: BT would be entirely happy with the proposal of  
22 Mr Turner that the Director should issue more detailed  
23 reasoning on those points. That is obviously the  
24 sensible course. I am mindful also of the market  
25 review and if I could point out that in that, the  
26 definition of SMP has now been equated to the European  
27 concept of dominance, so many of the issues of  
28 dominance are going to be covered in that market review  
29 anyway. If Freeserve wants to submit an extra  
30 complaint, it can do so now.

31 THE CHAIRMAN: I am not completely clear in my head. How  
32 do you see the relationship between the Directors work  
33 under the directive and his amplification of his  
34 reasons in the present Decision? Is there a connection  
35 between those two or are they parallel activities?

36 MS BACON: They are parallel activities obviously. Under  
37 the new directives, the Framework Directive, the Access  
38 Directive and so on, the Director is going to have to

1 consider whether there is dominance in a market and  
2 will have to impose relevant obligations where  
3 appropriate. Obviously that does not cover Freeserve's  
4 specific allegations of abuse, but as I have said,  
5 Freeserve is free to make a specific complaint if it  
6 wants to do so again and BT submits that that would be  
7 the appropriate course in the present circumstances  
8 when, as the Tribunal has noted, this market has moved  
9 on and is developing rapidly.

10 THE CHAIRMAN: So where we are likely to finish up, one way  
11 or the other, is a view from the Director on  
12 significant market power and a view from the Director  
13 on the principles to be applied in allegations of  
14 predatory pricing in the broadband sense?

15 MS BACON: Exactly. In the round, Freeserve's main  
16 objectives will have been satisfied.

17 THE CHAIRMAN: So we will have a ruling on the way the  
18 Director sees it and then if somebody wants to appeal  
19 that, they can appeal it.

20 MS BACON: Yes, exactly.

21 If I could then turn to the issue of costs. Mr  
22 Flynn, when he observed that the normal rule is that  
23 costs should not be awarded in favour of an intervener,  
24 may have had in mind the **GISC** case.

25 THE CHAIRMAN: I do not think we have got any normal rules  
26 at all at the moment, Ms Bacon, but go ahead. What do  
27 we say in **GISC**?

28 MS BACON: I have reproduced copies. I have sent copies  
29 of that to the Bench for your assistance.

30 THE CHAIRMAN: If they happen to be handy we will just  
31 remind ourselves what we said in **GISC**.

32 MS BACON: The relevant part of the judgment in that is at  
33 page 157 of the report. That is paragraph 75 and  
34 following. The Tribunal notes at 77:

35 "The practice in the Court of First Instance under  
36 Art 87 of the CFI Rules is that a party who  
37 intervenes in support of the losing party is  
38 ordered to pay the winning party the additional

1 costs occasioned to the latter by reason of the  
2 intervention, and vice-versa."  
3 So an intervener, if successful, would be awarded  
4 costs. The citation is to the **Kish Glass** case.  
5 The next point is I think Mr Flynn's point:  
6 "We see force in the argument that it would be in  
7 accordance with the objectives of the Act if the  
8 rule as to interveners were broadly cost-neutral."  
9 Then the Tribunal sets out its reasons for that. "...  
10 the prospect of having to pay an interveners costs if  
11 unsuccessful ... could deter some appellants".  
12 But then the next point, which I would wish to  
13 rely on, is:  
14 "That said, however, we would not wish to fetter  
15 our general discretion under Rule 26(2) to the  
16 effect that there may never be circumstances where  
17 costs orders will be made in favour of, or  
18 against, interveners."  
19 Then the following paragraphs make clear that in this  
20 case the Tribunal did order **GISC** to pay a proportion of  
21 the costs of its intervention. I would rely on that,  
22 not particularly in support of the fact that in the  
23 present case the interveners should get their costs,  
24 but in support of the broad proposition that there is  
25 no general rule and that in an appropriate case costs  
26 may be awarded both against the interveners and in  
27 favour of the interveners.  
28 That takes me to the question of why in the  
29 present case the interveners should be awarded their  
30 costs. The closest I have managed to find of this is a  
31 judgment of Mr Justice Munby in the High Court, Queen's  
32 Bench Division, in the case of **Smeaton**. This Tribunal  
33 may recall that that was a case where the SPUC sought  
34 to bring a judicial review in relation to the sales of  
35 the morning-after pill. That was defended, both by the  
36 Secretary of State obviously, because it was a judicial  
37 review application, but also there was an intervention  
38 made by Schering, among others. Schering sought to

1 recover its costs of the intervention, because it was  
2 ultimately successful. Schering is the manufacturer of  
3 the morning-after pill, so its commercial interests  
4 were directly affected by the judicial review  
5 application.

6 The relevant part of the judgment is at paragraph  
7 430. If you will forgive me, I have only reproduced  
8 the part of the judgment relating to costs.

9 THE CHAIRMAN: Of course.

10 MS BACON:

11 "Mr Gordon submits that SPUC should not be ordered  
12 to pay any part of Schering's costs. I do not  
13 agree."

14 Then Mr Justice Munby sets out the **Bolton Metropolitan**  
15 **District Council** case and the principles set out by  
16 Lord Lloyd in that case.

17 Sir, if I could point you to in particular  
18 paragraph 436:

19 "Mr Anderson points in particular to four matters  
20 as together justifying the order for costs which  
21 he seeks.

22 (i) In the first place he says, Schering's  
23 interests were directly affected."

24 That is exactly the case in the present case. BT's  
25 interests were directly affected in several ways.

26 First, BT was being asked to --

27 THE CHAIRMAN: Yes. I think we can assume their interests  
28 were directly affected.

29 MS BACON: Thank you.

30 "Secondly, [Mr Anderson] submits that Schering  
31 required separate representation."

32 That is again the case here. BT is a commercial  
33 undertaking and the Director is a regulator. In fact,  
34 this is the first time that I have actually appeared on  
35 the same side as the Director in many cases acting for  
36 BT. I think that goes without saying that that also  
37 applies here.

38 Next, Mr Anderson submits that "Schering's

1 evidence was distinctive and useful to the court". I  
2 would submit that that is also the case here. This  
3 Tribunal asked several questions of BT in the course of  
4 the proceedings and referred to BT's answers and the  
5 evidence provided by BT on those points. One  
6 particular example, although it is not the only one,  
7 where BT was able to provide evidence which the  
8 Director could not provide was the issue of the advance  
9 notification. This Tribunal noted, in its judgment,  
10 that BT had assured the Tribunal that its procedures  
11 were such that the relevant employees in BT Openworld  
12 had not had advance notification. That was one of the  
13 issues on which BT was able to supply evidence. It  
14 also provided evidence of its own internal procedures  
15 and BT's points were not identical to those of the  
16 Director. It was making a number of points that the  
17 Director was not himself making.

18 That brings me to Mr Anderson's fourth point in  
19 **Smeaton** (at (iv)):

20 "Finally he submits that Schering's evidence and  
21 submissions were not duplicative."

22 I have just addressed that point. Then Mr Justice  
23 Munby goes on to point out (at 437):

24 "These are powerful arguments. But there is, as  
25 it seems to me, another and wider point. As I  
26 commented in paragraph [70], the 2000 Order was  
27 merely a convenient peg upon which SPUC sought to  
28 hang a claim which could have been brought at any  
29 time ..."

30 Then a few lines down:

31 "The real defendant, surely, was Schering."

32 That really applies in the present case. In this case  
33 the real and ultimate defendant was BT. What was in  
34 issue was BT's practice and from the start Freeserve  
35 were essentially, as Mr Turner has pointed out, seeking  
36 a decision on infringement against BT. BT had to  
37 participate in these proceedings in order to protect  
38 its own interests.

1           In the **Smeaton** case those points led Mr Justice  
2 Munby to conclude that in that case Schering was  
3 entitled to recover a proportion of its costs and I  
4 would submit that exactly the same applies in the  
5 present case in relation to BT's intervention.

6           That addresses the point as to whether in  
7 principle BT should be entitled to its costs of  
8 intervention.

9           The next question is, to what extent should it  
10 recover those costs. In my skeleton argument I have  
11 identified three areas. The first is the issue of  
12 disclosure.

13           Mr Flynn has said that this is all a  
14 misunderstanding and BT over-reacted and did not have  
15 to put in the submissions that it did.

16           Mr Turner has already made several points in  
17 relation to that, which I respectfully adopt. The  
18 point was made that on 13 December there was an agenda  
19 for the case management conference and that said in  
20 item 2, "to consider the applicant's request for  
21 disclosure of certain documents by the respondent", so  
22 it was clearly a request.

23           On the same day BT sent to the Tribunal a letter  
24 in which BT said, "BT vigorously opposes any disclosure  
25 of the business case for three main reasons", and then  
26 set out over several pages the reasons why it opposed  
27 the disclosure of its business case.

28 THE CHAIRMAN: That is the letter of what date?

29 MS BACON: That is the letter of 13 December. That was  
30 four days before the hearing of 17 December. If  
31 Freeserve at that stage had simply indicated to BT or  
32 the Tribunal, 'well in fact Freeserve is not pursuing  
33 its request for disclosure', much of the work,  
34 including production of this extensive bundle, most of  
35 which I take no credit for - it is the work of Mr  
36 Barling - a note on disclosure annexing a number of  
37 documents setting out the European case law and the  
38 seriousness of the consequences --

1 THE CHAIRMAN: Just remind me. Did that bundle ever reach  
2 the Tribunal?

3 MS BACON: I believe it did. I have made enquiries. I  
4 believe it was sent by Brick Court rather than by BT.  
5 Certainly Mr Turner received a copy of it. From  
6 recollection this went out on 16 December in the  
7 evening. Certainly the note for Mr Barling is dated 17  
8 December. From recollection this was written the day  
9 before the hearing. Much of the work was done in the  
10 period between 13 December - that is the letter from BT  
11 - and the date of the hearing. So if at some stage  
12 after the 13 December Freeserve had simply said 'we are  
13 not pursuing this request', much of the cost of BT  
14 would have been avoided in that respect. It is simply  
15 not correct for Mr Flynn to say this is all a  
16 misunderstanding and BT over-reacted. Up until the  
17 17th it was basing its submissions on an assumption  
18 that we were going to have to meet a disclosure request  
19 of our business case.

20 Then there is the issue of the remainder of the  
21 appeal. In paragraph 9 of my skeleton argument I have  
22 divided this into the infringement application and the  
23 case closure decision itself. I think this can be  
24 taken in the round.

25 BT has succeeded in respect of the vast majority  
26 of Freeserve's appeal. There has been no infringement  
27 decision taken against it and in relation to the  
28 procedural issue of whether the case closure decision  
29 should be set aside, it succeeded in about three  
30 quarters, and Mr Turner would put it slightly higher,  
31 but even being generous to Freeserve about three  
32 quarters of the appeal in that respect. In the round  
33 BT submits that specifically in relation to its  
34 intervention generally and its submissions at the  
35 hearing on the substantive issue, it should be awarded  
36 about 75 per cent of its costs. That is a separate  
37 issue to the costs of the disclosure application, which  
38 BT submits it should be entitled to in any event.

1 THE CHAIRMAN: Thank you very much, Ms Bacon.  
2 Yes, Mr Flynn?  
3 MR FLYNN: Sir, the consequentialness of Mr Turner's  
4 proposal, I think what is of course of greatest concern  
5 to Freeserve is that further elaboration might be made  
6 of the reasoning for rejecting a complaint which has  
7 already been rejected - and I think Mr Turner has  
8 indicated that there would be difficulties with  
9 appealing that - and therefore that there would not be  
10 a substantive reconsideration, as you asked him  
11 expressly, of the underlying merits of the complaint.  
12 The worst position for Freeserve would be that the  
13 result of this proceeding was that whatever the  
14 Director did was unappealable to this Tribunal.  
15 THE CHAIRMAN: Let us just explore that, Mr Flynn, just for  
16 my own understanding. If the Director elaborates his  
17 reasons, he will need to take a position on what the  
18 relevant legal principles are presumably as applied to  
19 the underlying facts of the case.  
20 MR FLYNN: As I understand it, the underlying facts of the  
21 case are those which were, as it were, current before  
22 him at the time he made the decision that he made.  
23 THE CHAIRMAN: Yes.  
24 MR FLYNN: What is intended is that fuller explanation  
25 should be given for the conclusion to which he has  
26 already come.  
27 THE CHAIRMAN: Well the underlying facts of the case,  
28 insofar as we can determine them from the existing  
29 decision, is that there is a period in which BTs retail  
30 broadband business is apparently making losses but that  
31 it will come into profit at some point in what the  
32 Director considers to be a reasonable period. The  
33 Director will have to apply to that factual substratum  
34 presumably his understanding of what the European law  
35 is on predatory pricing and reach a view.  
36 If he reaches a view, it would be open presumably  
37 to an appellant to challenge at least the legality of  
38 the view that he has reached by saying 'that is not in

1 conformity with existing case law' or, alternatively  
2 'there is no case law on this point' and he should not  
3 have been looking at it in that way. For example, he  
4 should look at it in terms of the length of the  
5 subscriber contract instead of the length of time over  
6 which a reasonable investor would recover his money, or  
7 whatever. It is not clear to me that it would not be  
8 appealable.

9 MR FLYNN: I think what Mr Turner said to the Tribunal was  
10 that there would be a difficult argument on the  
11 appealability of the outcome. I can see that there  
12 could be a difficult argument if simply he is re-  
13 stating or amplifying reasons for a conclusion to which  
14 he has already come.

15 Mr Turner also said that some things lay in the  
16 past, the special offer, and so forth.

17 Our submission on that is that it is not in the  
18 past. The starting date remains the same. The concern  
19 from the practical point of view should be that any  
20 consideration should take into account the developments  
21 to which you have drawn attention in the judgment and  
22 any further that might be put forward by Freeserve or  
23 indeed anyone else to the Director, as I said earlier,  
24 to assist him in coming to a new conclusion. I note  
25 you said, Sir, that he cannot as it were shut us out,  
26 but we would like in some way to be assured that if  
27 further material is put before him to update and  
28 further substantiate the Freeserve complaint, that  
29 should be taken into account in this evaluation.

30 THE CHAIRMAN: I would have thought, at least  
31 provisionally, that if the position is that the  
32 Director, in the light of the judgment, is  
33 reconsidering the reasoning in paragraphs 15 to 17 of  
34 the Tribunal's judgment with a view to reaching a  
35 further decision on Freeserve's complaint, I would have  
36 thought on ordinary principles that he would be obliged  
37 to take into account any further observations from both  
38 Freeserve and BT on what conclusions he should draw in

1 the light of the judgment, if nothing else, and any  
2 other matters which Freeserve and/or BT considers to be  
3 relevant. He, the Director, may well decide they are  
4 not relevant or for some reason he should not take them  
5 into account, but I would have thought it is difficult  
6 to say that he was not obliged to take into account, or  
7 to at least receive observations from BT and Freeserve  
8 following the judgment as to what the contents of any  
9 new decision should be.

10 Would that not be right, Mr Turner?

11 MR FLYNN: If I may say so, Sir, from Freeserve's point of  
12 view, that is an extremely helpful indication.

13 THE CHAIRMAN: Well let us see what Mr Turner says.

14 MR TURNER: Our feeling on this is that, in the absence of  
15 any further facts or further complaint from any party,  
16 including Freeserve, then the issue will be the  
17 application of legal principles, as you, Sir, have  
18 explained, to the facts that were presented at the time  
19 and having explained the way in which he approaches the  
20 issue there will be a possibility of that going  
21 further, being subject to appeal. However, if a  
22 further complaint is made about contemporaneous conduct  
23 on the part of BT, obviously in relation to that the  
24 Director will need to form a view, assuming that he  
25 pursues the complaint, about the application of those  
26 legal principles to the new facts.

27 I would mention that if one is contemplating the  
28 presentation of a further complaint, then the issue of  
29 the timescale within which a new decision can be  
30 produced becomes more difficult. The indication of two  
31 months was produced on the basis that we would be  
32 elaborating in accordance with the terms of the  
33 Tribunal's judgment the reasoning in the original  
34 contested decision.

35 THE CHAIRMAN: What is slightly troubling me, Mr Turner, is  
36 that this discussion is proceeding on the underlying  
37 assumption that the Director is already minded to come  
38 to the same view and it is only a question of

1           elaborating his reasons, whereas the normal  
2           administrative law consequence of setting aside a  
3           decision is that the authority reconsiders it and when  
4           it reconsiders it, it should not reconsider things  
5           having already shut out the possibility that it might  
6           reach a different view from the view that it originally  
7           reached. That is why Mr Flynn is a bit concerned about  
8           what appears to be a somewhat mechanical exercise in  
9           simply giving better reasons to support the view that  
10          has already been arrived at, without taking into  
11          account any further arguments of law at least, which  
12          might be put forward, or which have surfaced in the  
13          course of the proceedings.

14   MR   TURNER: My position proceeds on the premise that the  
15          Director has a clear view of the way in which he does  
16          approach, or has approached this issue in relation to  
17          predatory pricing, and needs to explain it and that he  
18          did apply it in relation to the complaint. The  
19          Tribunal has not found in the judgment that the  
20          Director made an error of law in its approach.

21   THE CHAIRMAN: Well we have not found that, because we have  
22          not been able to detect the legal basis upon which he  
23          did decide it, so we have not reached that stage. We  
24          have neither blessed nor condemned the conclusions. We  
25          are simply neutral on the point.

26   MR   TURNER: I understand that, but the task at this stage,  
27          therefore, must be to explain the principles according  
28          to which the Director did act.

29                 I would add the qualification that that is not to  
30          exclude the possibility, and of course I accept this,  
31          that when reviewing the matter and considering the  
32          terms of the Tribunal's judgment with care and the  
33          applicable case law, the Director may feel that the  
34          original decision was wrong. However, it is only fair  
35          to say that the Director does have a clear view at the  
36          moment as to the principles that should apply and  
37          considers that in the light of the Tribunal's judgment  
38          the right task is to explain that adequately.

1 THE CHAIRMAN: I think the difference in this case, unlike  
2 the situation that arises in some other cases where the  
3 Director is asked to provide further reasons in the  
4 course of proceedings before the Tribunal, is that this  
5 part of the decision has been quashed, so he starts  
6 again, at least in legal theory he starts again. I  
7 think the Tribunal's view would probably be that if he  
8 did start again and he wished to reach a view that is  
9 going to be of general public importance in this  
10 industry, considering the amount of water that, as it  
11 were, has flowed under the bridge since the original  
12 decision was taken, the arguments on the appeal and the  
13 judgment, it would be only right before he reached that  
14 view if he gave an opportunity to the complainant and  
15 BT to make any representations to him that they thought  
16 fit as to the view they thought he ought to reach.

17 MR TURNER: In relation to the original situation or in  
18 relation to the current situation?

19 THE CHAIRMAN: Strictly speaking I think it must be in  
20 relation to the original situation.

21 MR TURNER: Yes.

22 THE CHAIRMAN: It may be that part of the observations to  
23 be submitted might draw his attention to the fact that,  
24 after all, it was not such a useful exercise to confine  
25 himself to the original situation and that, either for  
26 general reasons or by reason of a further complaint,  
27 his right approach to such an issue would be to look at  
28 it more widely, or that he ought at least to take into  
29 account things that have happened since. For example,  
30 what is to happen to the knowledge we now have that it  
31 was a six month extension of the offer rather than a  
32 three month extension of the offer?

33 MR TURNER: Sir, in relation to that, the Tribunal has  
34 made points about the inadequacy of the subsequent e-  
35 mail written by the officer Naaz Rashid, although she  
36 did say, and it was confirmed in subsequent  
37 representations on behalf of the Director, that that  
38 had been assessed in the same way as the three month

1 extension had been assessed.

2 THE CHAIRMAN: Yes.

3 MR TURNER: Sir, in conclusion we take on board what you  
4 say. We think that it is appropriate to address the  
5 situation from scratch, as it were, in relation to the  
6 original material. But there is an important caveat,  
7 which is that if the matter is to be opened out  
8 essentially by way of a further complaint about  
9 subsequent matters, it does make it very difficult to  
10 set any form of deadline.

11 THE CHAIRMAN: Yes, I see that.

12 MR TURNER: Sir, Mr Gordon has helpfully mentioned to me  
13 as well that one approach we might take is to produce  
14 in draft what we are minded to publish for Freeserve  
15 and BT to comment upon as a starting point.

16 THE CHAIRMAN: That might be a useful way of proceeding.  
17 Thank you for that suggestion, Mr Gordon. It would at  
18 least give the parties a bit more of a target to aim at  
19 rather than be firing rather at random.

20 MR TURNER: Sir, this discussion has somewhat unravelled  
21 my proposed form of undertakings. Perhaps if we were  
22 to proceed upon that basis subsequent to this hearing,  
23 we might sort out the terms of an undertaking.

24 THE CHAIRMAN: Well we, the Tribunal, will need to withdraw  
25 in a moment to see what we think. I think we will do  
26 that now, unless anyone has got anything more they want  
27 to say to us.

28 MR FLYNN: Sir, if I might just say, I was intending to  
29 reply to one or two points on costs. It will be very  
30 short.

31 THE CHAIRMAN: But on that last point, is something along  
32 those lines sound to you sensible?

33 MR FLYNN: Yes, it does sound sensible and plainly that is  
34 not something which could be achieved in two months.  
35 We entirely recognise that.

36 THE CHAIRMAN: I would have thought, with all respect for  
37 the need for things to be done with due expedition, it  
38 is more important to get this right than to hurry it

1 unnecessarily.

2 MR FLYNN: Quite. That would be our position, Sir.

3 Something for us to respond to, with an opportunity to  
4 put before the Director such facts as we may think  
5 relevant. That would seem to us entirely appropriate.

6 In relation to costs, if I could respond briefly  
7 to one or two of the points made by my learned friends,  
8 in relation to Freeserve's conduct. Mr Turner I think  
9 gave you five reasons why we have been bad and one  
10 reason why he had been beyond reproach. We do not  
11 question that. There is no suggestion from our side  
12 that there is any conduct --

13 THE CHAIRMAN: No. The Director has dealt with this case  
14 impeccably.

15 MR FLYNN: Impeccably. Irreproachable is the word I have  
16 written down.

17 In relation to Freeserve's conduct, if I may make  
18 a general response, the procedure before the Tribunal  
19 is that one has to put in the application simply  
20 everything that one may during the course of the  
21 procedure have to seek. There is very limited  
22 opportunity for amending it. I think what has  
23 commended itself to the Tribunal in various proceedings  
24 is a layered approach to deciding the issues and the  
25 relief which may be necessary as the case progresses.

26 It is fully accepted that the application  
27 contained a request that the Tribunal should itself  
28 decide the issue. That was formally not persisted in  
29 at the substantive hearing but, Sir, that is a matter  
30 which is open to the Tribunal to do and it is open to  
31 Freeserve to seek it. I do not think it is a matter of  
32 the conduct within the meaning of the rules that it  
33 should have done that.

34 In relation to the disclosure point - this is  
35 common to both Mr Turner and Ms Bacon's arguments -  
36 there was a mutual misunderstanding, is the point that  
37 we are trying to impress upon the Tribunal. The  
38 application was not abandoned at the case management

1 conference. The application for disclosure was in the  
2 application document, that Freeserve's intention, as  
3 has been explained to the Tribunal, was to raise that  
4 as an agenda point at the hearing. There was not  
5 anything, from our point of view, to correct when we  
6 saw the Tribunal's agenda. It was simply a matter for  
7 discussion.

8 Mr Barling's bundle I believe I received on the  
9 morning of the hearing and immediately informed him  
10 that there had been a misunderstanding. Certainly by  
11 the time we came to the hearing it was known, certainly  
12 to Mr Barling and I hope to Mr Turner, that we were not  
13 intending to make a heavy disclosure application  
14 without having put in any sort of submissions or  
15 authorities to the Tribunal. That is the point I  
16 remember making to the Tribunal itself.

17 Mr Turner says the application was diffuse if not  
18 prolix. I am not sure that I know what the distinction  
19 is. It was certainly lengthy but, for the reasons I  
20 have explained, really everything has to go in and it  
21 is later for the parties to explain to the Tribunal the  
22 relative weight to be given to different parts of the  
23 case and in which order they are to be taken. I submit  
24 that Freeserve has handled that properly in accordance  
25 with the developing procedure of the Tribunal which,  
26 after all, none of us can yet be completely familiar  
27 with.

28 In terms of our relative success, perhaps I can  
29 simply say that the approach of my learned friends is  
30 to count how many headings did one succeed or fail in.

31 Ours is rather that the Tribunal should attach some  
32 weighting to it and it was on the principal argument on  
33 which we succeeded.

34 Lastly, if I may, on the remainder of Ms Bacon's  
35 application, Sir, it is always going to be the case, as  
36 long as we have a regulator whose task is to consider  
37 complaints against bodies which may be in a dominant  
38 position, that appeals in such cases involve and

1 affect the interests of the body against whom the  
2 complaint is made. Of course they are always going to  
3 be entitled to intervene, which is their choice, and if  
4 they do intervene they may well be expected to assist  
5 the Tribunal by providing material that is not  
6 available to the Director. But, in my submission, the  
7 general rule in this Tribunal and in the administrative  
8 courts is that there is a costs neutrality as regards  
9 an intervener, except in exceptional cases. In my  
10 submission, this is not an exceptional case. It is a  
11 normal case and a complainant's appeal before this  
12 Tribunal. A declaration may well be sought as to  
13 infringement and it is not right to regard BT in this  
14 case as the real defendant. The real defendant is the  
15 Director and his decision. Sir, in my submission,  
16 there is nothing exceptional which should lead to  
17 Freeserve having to bear any part of BT's costs.

18 Unless I can assist the Tribunal further?

19 THE CHAIRMAN: No. Thank you. We will rise for a short  
20 while.

21 **(Adjourned from 11.35 am to 12.35 pm)**

22 (See separate transcript for judgment on costs)

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