Neutral citation [2011] CAT 35

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case Number: 1146/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

<u>28 October 2011</u>

Before:

MARCUS SMITH QC
(Chairman)
PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

<u>Appellant</u>

- v -

OFFICE OF COMMUNICATIONS

<u>Respondent</u>

- supported by -

CABLE & WIRELESS UK
VIRGIN MEDIA LIMITED
GLOBAL CROSSING (UK) TELECOMMUNICATIONS LIMITED
VERIZON UK LIMITED
COLT TECHNOLOGY SERVICES

<u>Interveners</u>

RULING (COSTS)

INTRODUCTION

1. On various dates in October 2010, the Tribunal heard an appeal by British Telecommunications plc ("BT") against a determination by OFCOM ("the Determination") contained in a document entitled "Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and Colt and BT regarding BT's charges for partial private circuits".

2. The Tribunal determined this appeal in a judgment handed down on 22 March 2011 ([2011] CAT 5, "the Judgment"). Previous to the Judgment, the Tribunal had determined two preliminary issues in a judgment dated 11 June 2010 ([2010] CAT 15, "the Preliminary Issues Judgment"). These judgments are both taken as read, and the terms and abbreviations used in the Judgment are adopted here.

3. In the case of each of the preliminary issues, and in respect of the matters considered by the Tribunal in the Judgment, BT's contentions were rejected by the Tribunal, and the Determination was upheld. OFCOM now seeks an order for the payment of its external legal costs of the proceedings, such costs to be the subject of a detailed assessment, if not agreed. The costs that OFCOM seeks to recover are set out in a schedule dated 9 September 2011. BT has not specifically commented on this schedule. BT does contend, however, that no order as to costs should be made. The Tribunal has received detailed written submissions from both OFCOM and BT on this point (dated 27 July 2011 from OFCOM; 19 August 2011 from BT; 31 August 2011 from OFCOM; and 16 September 2011 from BT). We have taken these written submissions fully into account. None of the parties has requested an oral hearing in respect of this question of costs, and the Tribunal does not consider an oral hearing to be necessary.

RULE 55 OF THE TRIBUNAL RULES

4. The Tribunal's rules of procedure are contained, in the case of appeals to the Tribunal under the 2003 Act, in two statutory instruments: the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) and the Competition Appeal Tribunal

(Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No 2068). The latter rules are not relevant to the matters here under consideration: we shall refer to the applicable rules (that is, those made under SI 2003 No 1372) as "the Tribunal Rules".

5. Rule 55 of the Tribunal Rules covers all proceedings which come before the Tribunal, and provides as follows:

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

6. In *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal described (in paragraph 16) the various forms of proceedings which can come before the Tribunal, and which are all covered by Rule 55 of the Tribunal Rules. In terms of the classification adopted by the Tribunal in the *Merger Action Group* decision, this case falls into the fifth category:

> "Appeals under section 192 of the...2003 Act...against specified decisions of...OFCOM...and other decision-makers. The types of decisions covered by section 192 are many and varied. Such appeals are "on the merits"."

7. The Tribunal went on to say:

> "17. Given the fundamental differences between these jurisdictions, as well as the differences between individual cases even within a single jurisdiction, the discretion afforded to the Tribunal under rule 55(2) and (3) is necessarily wide.

Apart from a reference in rule 55(2) to its discretion to "take account of the conduct of all parties in relation to the proceedings", the rule leaves it to the Tribunal to develop the relevant principles to be applied. As the Tribunal has emphasised on numerous occasions, the width of the discretion enables the Tribunal to deal with cases justly and to retain flexibility in its approach, avoiding the risk of guiding principles evolving into rigid rules..."

8. In *The Number (UK) Limited v Office of Communications* [2009] CAT 5, the Tribunal considered the costs jurisdiction in section 192 cases. After setting out Rule 55 of the Tribunal Rules, the Tribunal stated:

> "3. This jurisdiction is well-known. The Tribunal Rules allow the Tribunal full discretion in awarding costs but contain no express provisions about how the power is to be exercised. How the Tribunal's discretion will be exercised is critically fact-dependent and will therefore depend on the circumstances of each case, although in each case the discretion should be exercised so as to deal with it justly. The position in relation to costs following proceedings under the Competition Act 1998 is summarised by the Tribunal in *Emerson Electric Co v Morgan Crucible Company plc* [2008] CAT 28 at paragraphs [44] and [45] (in respect of a private claim for damages under section 47A of the 1998 Act) and *Independent Media Support Limited v Office of Communications* [2008] CAT 27 at paragraph [6] (in respect of an appeal against a non-infringement decision). In those cases the Tribunal suggested that, while there is no automatic rule, the starting point for the exercise of its discretion in such cases should be that costs follow the event. However, the Tribunal also recognises that the need to deal with each matter justly means that all relevant circumstances of each case will need to be considered.
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> 4. In the present case, the Appellants seek a costs order against OFCOM following the successful outcome of their appeal under section 192 of the 2003 Act against a decision of OFCOM in relation to the resolution of price disputes. OFCOM are, of course, in a unique position as regulator under the 2003 Act when dealing with the resolution of disputes under section 185. In addition, OFCOM has statutory duties to perform and fulfil a role as guardians of the public interest. They are called upon in the exercise of their functions to exercise judgments and to take positions on factual and legal issues. It is therefore strongly arguable that this puts OFCOM in a different position from other parties when it comes to making costs orders, whether against OFCOM or in their favour, in cases where the manner of the exercise of their functions is in issue. The Tribunal has taken this factor into account in other cases under the 2003 Act. For instance, in *Vodafone Limited v Office of Communications* [2008] CAT 39, the Tribunal appears to have attached considerable weight, in declining to make any costs order adverse to OFCOM, to the fact that OFCOM acted as a reasonable regulator and in good faith.
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> 5. It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting

point will, in effect, be that OFCOM should not in the ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it.

6. So far as we are aware, the Tribunal has never awarded costs against OFCOM following an appeal under section 192 of the 2003 Act. We have not been taken in detail to the cases to see what, if any, weight has been attached to OFCOM's role as regulator in the decisions not to award costs against OFCOM in cases where it has lost. We cannot therefore conclude that any practice has been demonstrated to us that OFCOM should not, in an ordinary case, be subject to an adverse costs order. However, in principle we think that that is the correct approach. OFCOM is a body charged with duties in the public interest (see, for example, section 3 of the 2003 Act); they should not be deterred from acting in the way which they consider to be in that interest – provided that they act reasonably and in good faith – by a fear that in doing so they may find themselves liable for cost. In particular, OFCOM should ordinarily be entitled without fear of an adverse costs order, to bring or defend proceedings the purpose of which is to determine the proper meaning and effect of domestic or European legislation..."

9. We entirely agree that it is important that differently constituted Tribunals adopt a consistent and principled approach to the Tribunal's costs jurisdiction, if the discretion is to be exercised judicially. In this regard, we note the growing trend (in other, non-section 192 types of case coming before the Tribunal) towards a rule that costs should follow the event, even where this results in a costs order made against a regulator: see, for example, in cases under section 120 of the Enterprise Act 2002, *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19 and *CTS Eventim AG v Competition Commission* [2010] CAT 8; and, in the case of appeals under the Competition Act 1998, *Eden Brown Limited & Ors v Office of Fair Trading* [2011] CAT 29; *Kier Group plc & Ors v Office of Fair Trading* [2011] CAT 33. We also note that in *T-Mobile (UK) Limited & Ors v Office of Communications* [2009] CAT 8, which was a section 192 case, an order for costs was made against OFCOM in circumstances where it was expressly found that OFCOM did not conduct its defence unreasonably or in bad faith.

10. We also note what the Court of Appeal said, in relation to the UK Border Agency, in *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 at paragraph 60:

> "Notwithstanding the heavy workload of [the UK Border Agency], and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled..."

11. In *The Number (UK) Limited*, the Tribunal was considering the circumstances in which a costs order adverse to OFCOM should be made. That is not this case, and it is not necessary for us to consider further the question of whether, in section 192 cases, OFCOM stands in a special position. Here, we are considering the converse case of a costs order adverse to a party other than OFCOM or (to put the point slightly differently) a costs order in favour of OFCOM.

12. In *The Number (UK) Limited,* the Tribunal indicated (in paragraph 4) that the special treatment of OFCOM arose because of OFCOM's special role, and constituted an exception to the normal rule that – purely as a starting point – costs should follow the event. As we have noted, that question is not before us now; rather, the question before us is whether this should be the starting point when, in section 192 appeals, what is being sought is a costs order adverse to a party other than OFCOM or a costs order in favour of OFCOM.

13. In such a case, we can see no reason – unless constrained by authority – why the ordinary rule should not apply. BT contended differently. BT contended that there was a general principle that pertained in cases such as this; and that the general principle was that there should not be a costs order in favour of OFCOM or against a party other than OFCOM unless there was a "good reason" for making such an order; alternatively, a costs order should only be made "where the losing party's conduct has been "manifestly unreasonable"" (paragraph 7(1) of BT's 19 August 2011 Submissions, and paragraphs 9 to 11 of BT's 16 September 2011 Submissions). In support of this proposition, BT relied upon:

    (a) Paragraph 39 of the Tribunal's decision in *British Telecommunications plc v Office of Communications* [2005] CAT 21.

    (b) Paragraph 48 of the Tribunal's decision in *Hutchison 3G (UK) Limited v Office of Communications* [2007] CAT 7.

(c) Various submissions made by OFCOM on costs "in other cases".

14. With great respect to those making submissions on behalf of OFCOM "in other cases" with regard to what an appropriate costs order might be, we do not derive very much assistance from such submissions in what were, after all, "other cases", turning on their own facts.

15. As regards the earlier decisions of the Tribunal relied upon, paragraph 39 of the Tribunal's decision in *British Telecommunications plc v Office of Communications* [2005] CAT 21 needs to be read in context. The relevant part of the decision reads as follows:

> "29. The Tribunal notes that there have only, to date, been two appeals before the Tribunal pursuant to section 192 of the 2003 Act, this case and the *RBS Backhaul* case. Accordingly the present appeal was brought at the very early stages of development of a new appellate regime.
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> ...
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> 32. ...the present appeal was the first appeal to consider matters arising under the General Conditions of Entitlement and raised issues of considerable importance to BT and to competing CPS providers. Although the appeal concerned the true construction of one provision of the General Conditions, the issues upon which the Tribunal was required to adjudicate were complex and involved consideration of relevant European legislation, the statutory framework, BT's interconnection agreements, the legislative background to the introduction of CPS and interconnection, as well as technical industry documents issued in implementation of the requirement on BT to provide CPS. We were not referred to any authority, either of the Community courts or any national court, which had previously given judicial consideration to these matters. Although the Tribunal upheld the Notification, in our view the appeal was reasonably brought by BT.
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> 33. We also note, that at paragraphs 341 and 342 of our judgment we held that from the point of view of legal certainty and also perhaps from the point of view of proportionality, it seemed to us that there was a degree of doubt at the margin as to what was meant by "marketing activity" in the Notification. Although that ambiguity was not such as to invalidate the Notification, it was desirable that it be resolved...
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> 34. In those circumstances we consider that although BT was unsuccessful before us the appeal was brought reasonably and has resulted in a clarification of the law and practice in an area which was previously unclear. There was, in addition, an important public interest in clarifying the important points at issue.

35. BT submitted that unless losing parties are subject to costs orders when unsuccessful on appeal, then parties will not be disciplined either in bringing appeals or in their conduct of such appeals. There has been no evidence of any such problem in appeals before the Tribunal in other statutory contexts to date. The costs of bringing an appeal in this area are already substantial and vexatious appeals are likely to be rare. In any event we note that the Tribunal has wide powers of case management, which it exercises, to ensure that appeals before it are conducted economically, expeditiously and fairly. The Tribunal also has powers to dispose summarily of appeals that are clearly lacking in merit. It was not suggested in this appeal that the conduct of any of the parties was ill disciplined. Nor is there any evidence to date that there is a risk that OFCOM is acting as an "over-eager" regulatory body, as submitted by BT.

36. It is also relevant in our view that in a regulated industry such as this, the principal parties to these proceedings will be in a constant regulatory dialogue with OFCOM on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which the participants in this industry are routinely incurring regulatory costs which are not recoverable.

37. Against that background, we have to strike a balance between the various interests involved. Rule 55 gives the Tribunal a wide discretion. In this case we do not consider it right to order BT to pay costs, on the basis that its appeal was reasonably brought in a complex regulatory case and there are no grounds for criticising BT's conduct of the appeal. The costs in our view should rest where they fall as part of these parties' general regulatory costs.

38. However, we accept BT's broad proposition that a possible sanction in costs remains relevant in public law proceedings, as it is in litigation between private parties. Such a sanction may be appropriate in other cases. The Tribunal is not saying that it will not exercise the discipline of a costs orders against OFCOM or any other party, if the circumstances warrant. We do not, however, consider that an order against BT is appropriate in the present case.

39. More generally, however, we consider that it is desirable, in a technical sector such as the present, not to expose parties who seek to exercise their right to appeal to the Tribunal to unduly onerous risks as to costs, in addition to their own costs which may already be substantial by virtue of the inherent complexity of the subject matter. In those circumstances, it seems to us that a good reason would need to be shown before the Tribunal was prepared to award costs in OFCOM's favour in regulatory appeals. We see no such good reason in the present case.

40. We add for completeness that we have had drawn to our attention the funding arrangements under which OFCOM operates. OFCOM is apparently funded by grant in aid from the Department of Trade and Industry, and partly by a levy on the regulated companies concerned. The present matter apparently comes under the budgetary heading "Networks and Services" in respect of which administrative charges are payable to OFCOM by providers of electronic

communications services pursuant to section 38 of Act. Those charges are levied as a percentage of relevant turnover, in accordance with a tariff.

41. Companies such as BT and the Interveners therefore contribute by way of administrative charges to the expenses incurred by OFCOM in regulating the "Networks and Services" sector. The effect of this is, apparently, that if BT is ordered to pay OFCOM's costs, the costs to the rest of the industry would be less by a proportionate amount. If, by contrast, there is no order for costs, BT will support its own costs, and indirectly a proportion of OFCOM's costs, through the administrative charges it pays.

42. However, we are of the view that these specific funding arrangements should not be treated as relevant to our analysis, not least because the connection between the costs of this case and the funding arrangements described above are too indirect. The tariffs for 2004/05 were apparently already set in accordance with the OFCOM publication "Licence and Administrative Fees – Statement of Principles for Broadcasting Act Licences and Telecommunications Regulation" when this case was determined. What impact the costs of appeals may have on charges in 2005/06 and later years, and how far that is likely to be material to future contributions from the various providers in question, whose relevant turnover will also vary from year to year, are matters which seem to us too distant from the present case to be taken into account. Accordingly we have not investigated the details of the funding arrangements any further.

43. Having regard to all the matters mentioned above, we consider that, as between BT and OFCOM each side should support their own costs."

16. Two points must be noted. First, as the Tribunal noted (paragraph 29 of the decision), there had (at that time) been very few section 192 appeals to the Tribunal. Secondly, the Tribunal did not purport to lay down a general rule as regards costs (see, in particular, paragraph 37: "In this case..."). Rather, considering all the circumstances – in particular, the general importance of the questions raised, and the clarity that the appeal had brought to these questions – the Tribunal considered that, in all the circumstances, no order as to costs should be made.

17. The Tribunal's decision in *Hutchison 3G (UK) Limited v Office of Communications* [2007] CAT 7 concerned an application for costs in circumstances where Hutchison 3G (UK) Limited was seeking to withdraw an appeal. At paragraph 48, the Tribunal stated:

"More generally, in this evolving jurisdiction, where regulatory and legal procedures inter-twine, all parties are still to some extent "feeling their way" on procedural issues. It seems to me, in those circumstances, that the Tribunal should be slow to sanction in costs procedural decisions taken by one side or the other, unless the conduct is

> manifestly unreasonable. Looking at this case as a whole, it does not seem to me that the conduct of either party has been manifestly unreasonable."

18. Again, the Tribunal noted that this was a young jurisdiction, and that (particularly on procedural issues), parties were still feeling their way. No general rule as to costs was articulated by the Tribunal; and it must be stressed that the Tribunal was considering costs after a procedural decision had been taken to withdraw an appeal, rather than costs after a substantive hearing and judgment on the merits.

19. In short, we do not consider that the authorities cited by BT stand for the proposition for which they were advanced. We do not consider there to be a general rule that (in section 192 cases) costs should only be awarded in favour of OFCOM or against a party other than OFCOM unless there is a "good reason" for making such an order or unless the losing party's conduct has been "manifestly unreasonable". We consider that such an approach would unduly fetter the discretion of the Tribunal in section 192 cases.

20. Rather, we can see no good reason why, in such cases, the approach laid down for cases under section 120 of the Enterprise Act 2002 should not apply in cases such as the present. This approach was clearly articulated in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19 and *CTS Eventim AG v Competition Commission* [2010] CAT 8. In the latter case, the Tribunal stated:

> "4. As was stated in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal has a necessarily wide discretion on the question of costs, and that discretion can be affected by any one or more of an almost infinite variety of factors, whose weight will vary according to the particular facts. In section 120 cases, the appropriate starting point is that a successful party will normally obtain a costs award in its favour.
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> ...
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> 6. Accordingly, our starting point is that the Commission should pay Eventim's costs. But it was stated in the *Merger Action Group* decision that starting points are just that – the point at which the Tribunal begins the process of taking

> account of the specific factors arising in the individual case before it. There can be no presumption that the starting point can also be the finishing point."

21. We consider that this states the approach that should be adopted when considering whether to make a costs order in favour of OFCOM or against a party other than OFCOM.

22. We are reinforced in this conclusion by the suggestion in the Court of Appeal in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245 at paragraph 87 that:

> "Section 192(2) of the [2003 Act] gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, but it does not follow that it needs to take an active part in the appeal. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom's approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal."

The present case was heard before this statement was made; but, for the future, OFCOM may very well not engage in all the issues in dispute in a particular appeal, leaving the appellant and any interveners to argue such points. In such a case, a general rule such as that stated in paragraphs 20-21 above is all the more appropriate.

COSTS IN THIS CASE

23. As we have noted, in the case of each of the preliminary issues, and in respect of the matters considered by the Tribunal in the Judgment, BT's contentions were rejected by the Tribunal, and the Determination upheld. Accordingly, our starting point is that BT should pay OFCOM's costs.

24. The question is whether there are factors that serve to displace this starting point. BT advanced a number of points to suggest that no order as to costs should be made:

(a) First, it was said that the issues before the Tribunal were complex, difficult and not clear-cut. Whilst almost any telecommunications appeal has its complexities, as this appeal did, we consider that, in this case, BT's contentions were decisively rejected by the Tribunal, for the reasons set out in the Preliminary Issues Judgment and in the Judgment. The fact that some issues might be categorised as complex or difficult is neither here nor there: the fact is that BT lost in relation to these issues. Although we consider that the question of "success" should generally be considered on an "issues" basis (as under CPR Part 44.3(4)), this is not a question that need trouble us in this case.

(b) Secondly, although the issues before the Tribunal were undoubtedly substantial, and involved considerable amounts of money, we do not consider that the true construction and operation of Condition H3.1 raises issues of general importance or public interest. We take the point that where issues of genuine, industry-wide importance are raised in an appeal, it may be inappropriate to order the losing party to pay the costs of such issues. However, that is not this case. The mere fact that, as between the parties before the Tribunal, the issues were substantial, of high monetary value and important does not, in our view, in any way displace the general rule that costs should follow the event.

(c) Thirdly, it was suggested that the fact that OFCOM's costs in section 192 appeals are funded through an industry-wide levy was in some way relevant. For the reasons given in paragraphs 40 to 42 of the Tribunal's decision in *British Telecommunications plc v Office of Communications* [2005] CAT 21, we do not consider this to be a relevant factor.

(d) Finally, BT sought to refute as unfounded criticisms that had been made by OFCOM of its conduct in bringing the appeal: in particular, OFCOM accused BT of a "lack of discrimination" in the range of points it took. Whilst, clearly, a party's conduct is relevant to the Tribunal's costs discretion, where – as in this case – the Tribunal has found no factors capable of displacing the starting point that costs should follow the event, in

the light of the conclusion we have reached as to how the question of costs should be approached (see paragraphs 20-21 above), it is unnecessary to consider this aspect any further, and we do not do so.

ORDER

25. It follows that OFCOM is entitled to an order for the payment of its external legal costs of the proceedings, such costs to be the subject of a detailed assessment, if not agreed, and we make an order to this effect.

26. We should say that the costs claimed by OFCOM seem eminently reasonable (the hourly rates charged by the counsel instructed by OFCOM are, if anything, on the low side of reasonable), particularly in light of the fact that OFCOM is only seeking to recover its external legal costs. We direct that this Ruling be placed before the costs judge for his consideration.

Marcus Smith QC | Professor Peter Grinyer | Richard Prosser

Charles Dhanowa
Registrar

Date: 28 October 2011