Neutral Citation Number: [2010] EWCA Civ 391

Case Nos: C1/2009/1203, 1211, 1212 and 1214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Ms Vivien Rose, Prof A Bain OBE and Mr A Scott TD)
[2009] CAT 1 AND [2009] CAT 11

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2010

Before :

LORD JUSTICE LLOYD
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE RICHARDS

- -

Between :

(1) Vodafone Limited **(2) Telefónica O2 (UK) Limited** **(3) T-Mobile (UK) Limited** **(4) Orange Personal Communications Services Limited**	**Appellants**
- and -	
(1) British Telecommunications plc **(2) Office of Communications**	**Respondents**

- -
- -

Tim Ward (instructed by **Herbert Smith**) for **Vodafone**
Kelyn Bacon (instructed by **SJ Berwin**) for **Telefónica**
Jon Turner QC and **Meredith Pickford** (instructed by **Regulatory Counsel, T-Mobile**) for **T-Mobile**
Marie Demetriou (instructed by **Field Fisher Waterhouse**) for **Orange**
David Anderson QC and **Sarah Ford** (instructed by **BT Legal**) for **BT**
Tom de la Mare (instructed by **Ofcom Legal Department**) for **Ofcom**

Hearing dates : 10-11 March 2010

- -

Approved Judgment

Lord Justice Richards :

1. These are appeals by four mobile telephone network operators ("MNOs") against decisions of the Competition Appeal Tribunal ("the Tribunal") relating to the imposition of price controls by the Office of Communications ("Ofcom") pursuant to the Communications Act 2003 ("the 2003 Act"). I shall refer to the appellants as Vodafone, O2, T-Mobile and Orange respectively. They all appeal with permission granted by the Tribunal. Ofcom, although technically a respondent to each appeal, was granted permission by this court to cross-appeal and has to a large extent made common cause with the appellants. The effective respondent is British Telecommunications plc ("BT").

2. The proceedings arise out of a decision by Ofcom, published in the form of a Statement dated 27 March 2007, relating to the wholesale service of mobile call termination ("MCT"), which is a service whereby a caller on one network is connected to a mobile recipient on another network. Ofcom found that each of the MNOs (together with Hutchison 3G UK Limited, which has played no part in the proceedings before this court) had significant market power in the markets for MCT on their respective networks, and imposed price controls on the charges that the MNOs could set for MCT for each of the four years from 1 April 2007 to 31 March 2011. This replaced earlier price controls and involved a reduction in average charges by an equal percentage each year (referred to as the glidepath) to arrive at a specified maximum rate in year 4.

3. BT appealed against that decision to the Tribunal pursuant to section 192 of the 2003 Act. The Tribunal referred specified price control matters to the Competition Commission ("the Commission") pursuant to section 193. The Commission published a provisional determination indicating that it was minded to find, as BT had argued, that the price controls had been set at too high a level (allowing the MNOs to charge too high a rate for MCT). The Tribunal then agreed to decide, as preliminary issues before the Commission made its final determination, various questions as to its powers on disposal of the appeal, including this:

> "Does the Tribunal have power under section 195(4) to direct OFCOM to retake the decision so as to substitute for the existing price control a new price control covering the whole of the period covered by the 2007 Statement (namely 2007-2011) or does it only have power to direct OFCOM to revise the price control as from the date of the disposal of the appeal so that the new price control applies only to the unelapsed period which remains at that moment?"

In a judgment dated 22 January 2009 ("the Disposal Powers Judgment") the Tribunal held that it would have power on disposing of the appeal to direct Ofcom to reset the price control for the whole of the period 2007-2011.

4. The Commission had received a copy of the Disposal Powers Judgment in draft so as to enable it to take account of the judgment in reaching a final decision on the price control matters referred to it. In its determination, dated 16 January 2009, the Commission found that Ofcom had erred in its calculation of the price controls. It determined that the maximum rate for year 4 should be reduced and that the glidepath

should be revised so as to achieve equal annual percentage reductions from Ofcom's starting-point down to the new maximum rate in year 4.

5. The Tribunal then had to consider various challenges brought by the MNOs to the Commission's determination, and to arrive at a final disposal of the appeals. In a judgment dated 2 April 2009 ("the Final Judgment") it dismissed the various challenges, upheld BT's appeal to the extent set out in the Commission's determination, and directed Ofcom to adopt a price control on the basis put forward by the Commission. Specifically, its directions included (at para 82(a)):

> "For the 2G/3G MNOs OFCOM shall adopt a price control in which:
>
> (i) The glidepaths start at the level of the headline regulated 2G rates in 2006/07.
>
> (ii) The TACs [target average charges] descend in annual reductions of equal percentage each year from the starting points of the glidepaths to arrive, in 2010/11, at the level of 4.0 ppm (in 2006/07 prices)."

6. By a decision published on 2 April 2009, Ofcom adopted revisions to the 2007-2011 price controls in accordance with the Tribunal's directions. The revisions were expressed to take effect from 3 April 2009. They involved amendments to the figures for each of the four years.

7. On the appeals to this court, all four MNOs and Ofcom contend that the Tribunal had no power to order Ofcom to impose revised price controls in respect of the period that had already elapsed at the date when the revisions came into effect (in broad terms, in respect of years 1 and 2 of the four-year price control set by Ofcom's original decision of 27 March 2007): the price controls could be amended only with prospective, not retrospective, effect.

8. If the Tribunal did have such a power, Vodafone and T-Mobile contend in the alternative that the exercise of the power was legally flawed.

9. The potential importance of these issues for the parties is explained by a passage in the Final Judgment:

> "58. … The background to this … is that BT considers that the terms of its Standard Interconnect Agreement ('SIA') with the MNOs allow it to recoup monies from them in the event that the level of MCT charges is altered by the regulator. The wording of the SIA indicates that this entitlement might depend on whether the MCT charge is formally re-determined by OFCOM rather than just found, at the end of the appeal process, to have been wrong. The MNOs strongly dispute the existence of any such right."

We were told that the sums in issue may amount to hundreds of millions of pounds sterling.

The common regulatory framework

10. The 2003 Act implements a set of EU directives establishing a common regulatory framework in the sphere of electronic communications. The directives of particular relevance for present purposes are Directive 2002/21/EC ("the Framework Directive") and Directive 2002/19/EC ("the Access Directive").

11. Article 15(1) of the Framework Directive provides that the European Commission is to adopt a recommendation identifying "those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives". Article 15(2) makes provision for the publication of guidelines for market analysis and the assessment of significant market power. Article 15(3) requires national regulatory authorities, taking the utmost account of the recommendation and the guidelines, to define relevant markets appropriate to national circumstances in accordance with the principles of competition law. Article 16 lays down various requirements on national authorities to carry out market analysis and to intervene where there is a lack of effective competition. In particular, Article 16(4) provides:

> "Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist."

12. Those provisions must be read in the light of the recitals, especially recitals (25) and (27):

> "(25) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. …
>
> (27) It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area …. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. …"

13. Article 13 of the Access Directive makes specific provision for the imposition of price control and other obligations where justified by a market analysis:

> "1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.
>
> 2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. …"

14. In addition to those provisions concerning the functions of national regulatory authorities, I should also note, because it is relevant to BT's submissions, that Article 4 of the Framework Directive lays down requirements as to a right of appeal from the decisions of such authorities:

> "1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise. …"

The 2003 Act

15. Ofcom imposed price controls in this case by way of a significant market power ("SMP") services condition set pursuant to section 45 of the 2003 Act. The relevant provisions of section 45 are as follows:

> "45. *Power of OFCOM to set conditions*

> (1) OFCOM shall have the power to set conditions under this section binding the persons to whom they are applied in accordance with section 46.
>
> (2) A condition set by OFCOM under this section must be either –
>
> (a) a general condition; or
> (b) a condition of one of the following descriptions –
>
> …
> (iv) a significant market power condition ('an SMP condition').
>
> …
>
> (7) An SMP condition is either -
>
> (a) an SMP services condition; or
> (b) …
>
> (8) An SMP services condition is a condition which contains only provisions which –
>
> (a) are authorised or required by one or more of sections 87 to 92; …
>
> …
>
> (10) OFCOM's power to set a condition under this section making provision authorised or required by this Chapter includes each of the following –
>
> …
> (e) power to revoke or modify the conditions for the time being in force."

16. Section 47(1) provides that Ofcom must not set a condition under section 45 or modify such a condition unless satisfied that the condition or (as the case may be) the modification satisfies the test under section 47(2), which is, in summary, that the condition or modification is objectively justifiable, is such as not to discriminate unduly, is proportionate, and is transparent in relation to what it is intended to achieve.

17. Section 87, to which reference is made in section 45(8)(a), authorises the setting of SMP conditions and provides, so far as material:

> "87. *Conditions about network access etc.*
>
> (1) Where OFCOM have made a determination that a person to whom this section applies ('the dominant provider') has significant market power in an identified services market, they shall –

> (a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and
>
> (b) apply those conditions to that person.
>
> …
>
> (9) The SMP conditions authorised by this section also include (subject to section 88) conditions imposing on the dominant provider –
>
> (a) such price controls as OFCOM may direct in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities …."

18. Section 88 contains detailed provisions concerning the setting of SMP conditions that impose price controls:

> "88. *Conditions about network access pricing etc.*
>
> (1) OFCOM are not to set an SMP condition falling within section 87(9) except where –
>
> (a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
>
> (b) it also appears to them that the setting of the condition is appropriate for the purposes of –
>
> (i) promoting efficiency;
> (ii) promoting sustainable competition; and
> (iii) conferring the greatest possible benefits on the end-users of public electronic communications services.
>
> (2) In setting an SMP condition falling within section 87(9) OFCOM must take account of the extent of the investment in the matters to which the condition relates of the person to whom it is to apply.
>
> (3) For the purposes of this section there is a relevant risk of adverse effects arising from price distortion if the dominant provider might –
>
> (a) so fix and maintain some or all of his prices at an excessively high level, or
> (b) so impose a price squeeze,

> as to have adverse consequences for end-users of public electronic communications services. …"

19. Sections 94 to 104 contain provisions relating to the enforcement of conditions. By section 94, where Ofcom determines that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition set under section 45, it may give that person a notification accordingly. The person then has an opportunity to make representations about the matters notified, to comply with the conditions of which he remains in contravention, and to remedy the consequences of the contravention. Failure to comply and to remedy the consequences of the contravention can lead to the service of an enforcement notification under section 95 and to penalties under section 96. Serious and repeated contraventions can give rise to additional sanctions under sections 100 and 103. Further, section 104 provides for civil liability for breach of conditions. By subsection (1)(a) the obligation of a person to comply with conditions set under section 45 is a duty owed to every person who may be affected by a contravention of the condition. By subsection (2), breach of such a duty which causes loss or damage is actionable. By section (3), however, it is a defence for the person against whom such proceedings are brought to show that he took all reasonable steps and exercised all due diligence to avoid contravening the condition; and by subsection (4) the consent of Ofcom is required for the bringing of proceedings by virtue of subsection (1)(a).

20. Sections 185 to 190 contain provisions for the reference to Ofcom, and resolution by Ofcom, of various disputes, including disputes between communications providers. Those provisions are entirely separate from the provisions for the setting of conditions, but I need to mention them because they feature in the submissions on the present appeals. The right of one or more of the parties to a dispute to refer it to Ofcom is conferred by section 185(3). Where Ofcom makes a determination for resolving a dispute referred to it, its only powers are those conferred by section 190. By section 190(2), its main power is to do one or more of a number of specified things, including:

> "(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment."

Section 190(4)(a) provides that nothing in the section prevents Ofcom from exercising, in consequence of its consideration of any dispute, its powers to set, modify or revoke SMP conditions.

21. Sections 192 to 196 concern appeals against decisions by Ofcom and other decision-makers, including decisions to set SMP conditions. By section 192(2), a person affected by such a decision may appeal against it to the Tribunal. Section 193 contains provisions for the reference of price control matters by the Tribunal to the Commission. Although the reference to the Commission in this case forms an important part of the background to the issues before the court, I do not need to set out the detailed provisions of section 193 or the related rules, namely the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

22. That brings me at last to section 195, concerning the Tribunal's powers and duties as to the disposal of an appeal, which is central to the first issue:

> "195. *Decisions of the Tribunal*
>
> (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
>
> (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.
>
> (3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
>
> (4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.
>
> (5) The Tribunal must not direct the decision-maker to take any action which he would not otherwise have power to take in relation to the decision under appeal.
>
> (6) It shall be the duty of the decision-maker to comply with every direction given under subsection (4) …."

The Tribunal's reasoning as to its power to give directions

23. The basis on which the Tribunal concluded that it had power to direct Ofcom to reset the price control for the whole of the period 2007-2011, not just in relation to the unelapsed period, appears from the following passages of the Disposal Powers Judgment (with original emphasis):

> "39. We agree that SMP conditions are intended to constitute *ex ante* regulation rather than *ex post* regulation such as the application of the prohibitions in the Competition Act 1998. To that extent the MNOs are right when they argue that the exercise of the power to impose SMP conditions is intended to operate 'prospectively' and not 'retrospectively'. The question is what those terms mean in this context and in particular whether, if the Tribunal were to direct OFCOM to set a replacement price control rather than just a revised price control, we would be offending against the principle and therefore directing OFCOM to do something which it does not have power to do.
>
> 40. In the Tribunal's judgment section 195 does envisage that the Tribunal can direct OFCOM to adopt a replacement price control covering the whole period covered by the price control which has been found to be based on erroneous principles. Section 195(3) *requires* the Tribunal to include in its decision a

decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal. Then the Tribunal is *required* to remit the decision to OFCOM with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision. OFCOM is then *required* by section 195(6) to comply with every direction given.

41. The statutory scheme therefore contemplates that the Tribunal has sufficient powers generally to give effect to its decisions by directing OFCOM to take action. It is true that this is qualified by the words 'if any' in parentheses. But it contemplates that in the generality of cases there will be something that the Tribunal can, and hence must, direct OFCOM to do in order to put right the errors which have been identified.

42. If the interpretation urged on us by OFCOM and the 2G/3G MNOs is correct there will be a large number of cases where the Tribunal is unable to 'give effect' to its decision when it remits the decision to OFCOM because of the time that has elapsed during the hearing of the appeal. …

…

45. We do not accept that the wording of [section 195(5)] gives any clear support either for BT's interpretation of the provisions or for the MNOs'. We must read and interpret this wording in the context of the overall appeal procedure set up by sections 192 onwards. In the Tribunal's judgment the primary task of the appellate body in challenges to SMP conditions is to determine first whether OFCOM fell into error when devising the price control and, if it did, what OFCOM ought to have done. As we indicated in the ruling with which we referred the specified price control matters to the CC …, it may not be possible in every case for the CC and the Tribunal to come up with substitute numbers. This will depend on the nature of the error identified. But the statutory framework directs us and the CC to do this as far as possible. It follows from this that our powers must extend to being able to fulfil that primary function and that those powers are not truncated or frustrated in an arbitrary way dependent on the length of time it takes for the appeal to be resolved.

46. The Tribunal is unanimous in concluding that our powers to direct OFCOM as to what the price control should be cover the whole of the price control period and are not limited to the unelapsed period of the price control at the conclusion of the appeal."

24. Later in the judgment, at para 58, the Tribunal held that its task on disposing of a challenge to an SMP condition "does not include attempting to enable wholesale customers to recoup from the MNOs or their transit customers any overpayments during the expired period of the price control": the fact that the legislature did not include in section 195 a provision similar to section 190(2)(d) "indicates that the Tribunal's role in such appeals does not extend to adjusting the position of private parties for the purpose of compensating those who have overpaid".

25. The Final Judgment did not add materially to the Tribunal's reasoning. The Tribunal agreed with the Commission that it was "appropriate to redetermine the whole of the price control condition by setting TACs for all four years" (para 60), and implemented the approach in its Disposal Powers Judgment in directing Ofcom to modify the price controls in respect of each of the years 2007-2011.

The parties' submissions as to the Tribunal's power

26. The main case for the MNOs was advanced by Mr Turner QC, counsel for T-Mobile, whose submissions were adopted and supplemented by counsel for the other MNOs. Mr Turner took as his starting-point that the relevant provisions of the 2003 Act, implementing the EU directives establishing a common regulatory framework, impose *ex ante* controls on future behaviour for the avoidance of a relevant *risk* of adverse effects arising from price distortion (section 88(1)(a)). The purpose of promoting the statutory objective must inform the interpretation of each of the provisions. In the absence of an appeal Ofcom would have no power to impose a price control for a past period. Such a control would be incoherent, in that it would be impossible for operators to conform their behaviour to something required in the past. Yet the Tribunal's approach requires a retrospective price adjustment. If Ofcom cannot set a retrospective price control apart from an appeal, it cannot do so after an appeal. Under section 195(5), the Tribunal must not direct Ofcom to take any action which "it would not otherwise *have* power to take" in relation to the decision under appeal. The subsection looks to the power that Ofcom has at the time when the decision is remitted to it by the Tribunal. It does not refer to the power that Ofcom "would … *have had*" at the time it originally took the decision under appeal. Moreover the Tribunal was wrong to consider that the other subsections of section 195 and the need to give effect to its decision require a power to direct the imposition of a retrospective price control.

27. Miss Demetriou, for Orange, added submissions directed at rebutting BT's argument that the power to direct retrospective price control is required in order to comply with the requirement under Article 4 of the Framework Directive to provide an effective appeal mechanism in relation to a decision of a national regulatory authority. Miss Bacon, for O2, introduced the presumption against retroactive legislation (relying on *Phillips v Eyre* (1870) LR 6 QB 1 and Bennion, *Statutory Interpretation*, 5th edition, section 97), as an additional reason why the statute should not be read as conferring on Ofcom a power to regulate with retrospective effect. Mr Ward, for Vodafone, made submissions to the effect that this is a public law case and the outcome should not be determined by BT's pursuit of a private law remedy against the MNOs in respect of the overpayments caused by Ofcom setting too high a maximum rate in the decision under appeal: financial harm caused by errors in public law decision-making is often not remedied (see, for example, *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, para 96).

28. Mr de la Mare, for Ofcom, made a number of submissions that were not easy to follow until re-expressed in the form of a written note provided to the court once his oral presentation had been completed. Ofcom's position, as set out in that note, is that any revocation or modification of an SMP condition pursuant to section 45(10)(e) is purely prospective in effect, and that neither Ofcom nor the Tribunal has power to set conditions retrospectively. But where the Tribunal or the Commission identifies errors in Ofcom's analysis relating to past years, this may affect Ofcom's approach to enforcement proceedings and/or the giving of consent to proceedings under section 104 for breach of statutory duty. It may also be taken into account by Ofcom in disposing of any dispute arising under sections 185 to 190 in relation to charges in the period between the original decision and the revision of the price controls set by that decision: for example, an operator who considers the controlled price to be too high may not only appeal against the price control decision but also raise at the same time a dispute with his counterparty as to the right charge for the service, and that dispute can be referred to Ofcom. The existence of an adequate regulatory remedy in the form of Ofcom's discretionary powers of dispute resolution under section 190 means that there is no need to strain the interpretation of Ofcom's powers under section 45 or the Tribunal's powers under section 195.

29. Mr Anderson QC, for BT, pointed to the narrowness of the debate between the parties: the MNOs accept that the Tribunal can specify what the maximum charges should have been for each year of the price control, and the only question is whether it can direct Ofcom not just to recalculate the figures but to adopt a revised price control for the whole period. He did not dispute the *ex ante*, forward-looking nature of the power to set a price control in the first place, but he submitted that this does not mean that any later correction to the price control has to be limited to what is in the future at the time of the correction. The power of modification under section 45(10)(e) extends to the making of revisions that touch on past years and are in that sense retrospective. On that construction of section 45(10)(e), section 195(5) can be given its natural meaning as referring to the power that Ofcom "has" at the time when it makes the modification; but if BT is wrong about section 45(10)(e), then section 195(5) should be read as referring to the power that Ofcom would otherwise "have had", i.e. at the time when the decision under appeal was originally taken. Mr Anderson did not accept that if a price control was modified in respect of a past period, an operator could be found to have been in contravention by acting in a way that was compatible with the original control but incompatible with the modified control. In any event he submitted that Ofcom has a discretion at all stages of the enforcement procedures and that it is unthinkable that the enforcement powers would be exercised against an operator in those circumstances.

30. Mr Anderson relied on Ofcom's powers of dispute resolution, in particular section 190(2)(d), as showing that the 2003 Act sees nothing wrong with the retrospective adjustment of a rate of charge once an error has been identified, and he submitted that section 190(2)(d) is difficult to reconcile with the contention that a direction under section 195 can have no bearing on the past relationship between the parties. He welcomed Ofcom's recognition of the remedy under section 190 but did not agree that it was an adequate substitute for an effective remedy in the context of section 195.

31. Other points made by Mr Anderson included submissions that the presumption against the retrospective operation of legislation has no application to this situation,

and that the scope of the remedy under section 195 engages both public and private interests. In relation to the latter issue, he referred to a passage in Lord Woolf's report, *Access to Justice*, July 1996, where it is said that "Appeals serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and to set precedents" (chapter 14, para 2). There may be cases where the passage of time makes it unfeasible to correct a wrong decision; but that does not help the MNOs: the statute should not be interpreted in such a way as to prevent the Tribunal from correcting a wrong in relation to the setting of price controls.

32. As a separate point, Mr Anderson placed reliance on the obligation under Article 4(1) of the Framework Directive to have an effective appeal mechanism, which follows from the general principle of effective judicial protection under EU law (see Case C-426/05, *Tele2 Telecommunication GmbH v Telekom-Control-Kommission*, judgment of the European Court of Justice dated 21 February 2008, para 30). He said that the relevant right protected by Article 4(1) is the right of BT as a person contracting with MNOs to have the benefit of a lawful limitation on price control conditions, or the right to ensure that the conditions applied are lawful. To achieve the requisite standard an appeal must be practical and effective in relation to the whole period under appeal, and for that purpose there must be a way of giving effect to the conclusions of the appeal tribunal. This should inform the interpretation of the Tribunal's powers under section 195.

33. I should also mention that submissions were directed by both sides to the question whether, if BT were able to reopen past financial transactions with the MNOs as a result of the retrospective modification of the price control conditions, any recovery of overpayments would be a windfall to BT which would not be passed on, or would be passed on only in part, to its customers. This is a complex factual and economic issue into which it is unnecessary to delve, since whichever way it is resolved it cannot affect the construction of the statute.

The Tribunal's power: discussion

34. I am satisfied that the Tribunal has no power to direct Ofcom to impose revised price controls on a retrospective basis, that is to say in respect of a period that has already elapsed when the revisions come into effect. The issue is a short one and I can state my reasons relatively briefly.

35. First, I think it plain that the Tribunal does not have power under section 195 to direct Ofcom to take action that Ofcom itself would not otherwise have power to take in relation to the decision under appeal. Section 195(5) so provides and is clear in its terms. Directions are circumscribed by, and cannot enlarge, Ofcom's ordinary powers. If Ofcom would have power to take a particular action in the absence of an appeal, the Tribunal can direct Ofcom to take it. If Ofcom would have no power to take such action in the absence of an appeal, the Tribunal cannot direct Ofcom to take it. Moreover, the focus is on Ofcom's powers at the time when the decision under appeal is remitted, not at the time when the decision was originally taken. Section 195(5) refers to the power that the decision-maker "would otherwise *have*" (emphasis added). It cannot sensibly be read as referring to the power that the decision-maker

"would otherwise *have had*" at the time of the original decision: that is not what it says, and it would have been expressed very differently if that had been the intention.

36. It is therefore necessary to consider Ofcom's power to amend an existing SMP condition. As all the parties before the court accepted, the relevant power is that conferred by section 45(10)(e), namely "power to revoke or modify the conditions for the time being in force". Does that include a power to modify a condition with retrospective effect?

37. The power under section 45 to *set* conditions in the first place is indisputably a power to set them with prospective, not retrospective, effect. The purpose of the conditions is to regulate the future behaviour of undertakings with significant market power in markets where there is a lack of effective competition. This is made clear both by the EU directives that the 2003 Act implements and by the terms of the 2003 Act itself.

38. The relevant provisions of the Framework Directive and Access Directive are quoted above. Recitals (25) and (27) of the Framework Directive are particularly striking: they refer in terms to the need for "*ex ante* obligations" in order to ensure the development of a competitive market in markets where there are one or more undertakings with significant market power. The forward-looking nature of such obligations is also apparent from the terms of Article 13 of the Access Directive: for example, the reference to the imposition of obligations in situations where an operator "might" act in a particular way.

39. The same message is conveyed, unsurprisingly, by the implementing legislation. The power under section 45(1) of the 2003 Act is to set conditions *binding* the persons to whom they are applied, and the evident intention is to bind them in respect of their future behaviour. Section 88 provides in subsection (1)(a) that Ofcom is not to set an SMP condition except where there is a relevant *risk* of adverse effects arising from price distortion, all of which is defined by subsection (3) by reference to the pricing behaviour that the dominant provider *might* adopt; and the references in subsection (1)(b) to promoting efficiency and promoting sustainable competition are likewise directed towards the future and not the past.

40. It seems to me that the power of modification under section 45(10)(e) is necessarily subject to the same constraints, and has to be exercised for the same purposes, as the power to set conditions in the first place. By the terms of the subsection, the power to set a condition "includes" power to modify the conditions for the time being in force. The provisions that qualify the power to set a condition therefore also qualify the power to modify conditions. If the power to set conditions is a power to set conditions with prospective and not retrospective effect, then the power to modify existing conditions is likewise a power to modify them with prospective and not retrospective effect.

41. Mr Anderson submitted that the revisions directed by the Tribunal and given effect by Ofcom in this case were retrospective only in the sense that they "touched on the past". In my view, however, they were truly retrospective (or retroactive) in character, purporting to alter the content of past obligations; they did not merely refer to past events in order to determine the content of future obligations. They amended for each of the four years 2007-2011 the terms of a condition that, by section 45(1)(a), was *binding* on the MNOs to whom it was applied. I do not see how breach of a

binding condition could be anything other than a contravention of that condition for the purposes of the Act. If, therefore, the amendment was valid, its consequence was that MNOs who had complied with the condition in the first two years of the four year period became retrospectively and unavoidably in contravention of the condition in respect of those two years; which, in turn, brought them within the scope of the enforcement provisions of sections 94 to 104, albeit Ofcom might be expected to exercise in their favour the various discretions it enjoys under those provisions.

42. If such a surprising result had been intended, I would have expected clear statutory language to that effect. There is no hint of it in the straightforward language of section 45(10)(e). That is a further reason for reading the power of modification in the way I have indicated. I do not think it necessary for this purpose to have specific resort to the presumption against retroactive legislation as a canon of construction or, therefore, to resolve the competing arguments as to whether the presumption is capable of applying in this particular context.

43. As to the arguments about public law and private rights, the construction of the relevant statutory provisions should not be affected by whether it assists or impairs BT's ability to bring a claim in private law against the MNOs. There is in that respect no statutory policy or purpose pushing in one direction rather than another. Nor should the issue of construction be affected by the provisions of sections 185 to 190 relating to the resolution of disputes. The fact that Ofcom has power in that context, pursuant to section 190(2)(d), to direct the adjustment of amounts previously paid tells one nothing about the nature of its power under section 45(10)(e) to modify conditions for the time being in force or about the power of the Tribunal under section 195 to give directions in relation to the modification of such conditions. Whether, as contended by Ofcom, the dispute resolution powers are capable of providing a parallel remedy to operators seeking to challenge the correctness of price controls is an issue that does not need to be resolved in these appeals. No such parallel remedy is needed in order to provide an effective mechanism of appeal against the setting of price controls.

44. The Tribunal's broad approach was that, if it found an error in the price control, its powers must extend to giving directions to Ofcom to correct that error for the whole of the period of price control because otherwise it would not be able to give effect to its decision, and the fulfilment of its primary function would be frustrated by the length of time it had taken for the appeal to be resolved. In my view, however, the Tribunal underestimated the importance of section 195(5), which places an express limitation on the Tribunal's powers of direction, and was wrong to reason that if it decided that the price control was based on erroneous principles it must have the power to direct a retrospective revision to the price control in order to give effect to its decision. If an error is identified, the Tribunal can make clear what that error is and what the price control would have been if it had been calculated correctly. But in deciding what can and should now be done, and what directions should therefore be given, the Tribunal must proceed by reference to the powers that the decision-maker would otherwise have to take action in relation to the decision under appeal. That follows from the limitation in section 195(5) on the Tribunal's powers of direction. Section 195(3) and (4) are entirely consistent with that limitation, requiring that the Tribunal's decision is to include a decision as to what, *if any*, is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under

appeal, and that the Tribunal shall remit the decision with such directions, *if any*, as the Tribunal considers appropriate for giving effect to its decisions. It cannot be appropriate for the decision-maker to take action that it does not have power to take; and the Tribunal cannot therefore properly decide that it is appropriate for the decision-maker to take such action, let alone can it lawfully give directions that such action be taken. The Tribunal was in error in thinking that the statutory scheme contemplated that its powers went further.

45. I do not accept that the lack of a power to direct the retrospective revision of price controls renders the statutory appellate regime toothless, as contended by Mr Anderson. Even in this case, where the proceedings before the Tribunal and Commission took a very long time, it was possible to make a forward-looking modification of the condition for almost half the period of the price control under challenge. I recognise that proceedings of this kind are complex and that it may not be feasible in practice to achieve a speedy resolution of appeals or to obtain satisfactory interim relief pending their resolution; but the Tribunal can use its case management powers to deal with cases as expeditiously as practicable and to prevent abusive delaying tactics. In any event, the fact that the lapse of time limits the available remedies does not deprive an appeal of value. It can still serve an important purpose by identifying errors and ensuring that they are corrected for the future.

46. For the same reasons I do not accept that my construction of the statute is inconsistent with the requirement in Article 4 of the Framework Directive for an effective appeal mechanism. There is no authority directly in point here: Jacob LJ was addressing a different issue when he said in *T-Mobile (UK) Ltd v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565, at [31], that "What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong". But in my view an appeal is not rendered ineffective by the fact that the Tribunal's power to give directions is constrained by the original decision-maker's powers to take action in relation to the decision under appeal and that an error in price controls cannot therefore be corrected with retrospective effect. I think it unnecessary to address the further arguments as to whether it is open to BT in the circumstances to rely on Article 4 at all.

Other issues

47. My conclusion on the first issue means that the alternative argument advanced by Vodafone and T-Mobile, that if a power existed its exercise was legally flawed, does not arise for decision. Nor will any useful purpose be served by considering it. I have therefore not set out the parts of the Commission's and Tribunal's determinations that are relevant to it.

48. In granting permission to appeal the Tribunal drew this court's attention to various additional issues concerning the operation of sections 192 to 195. It referred in particular to an issue which was considered in the Disposal Powers Judgment but on which the Tribunal itself was unable to reach a unanimous view. The issue was whether the Tribunal had power to direct Ofcom to impose a "future adjusted" price control (described as a price control covering all four years, leaving years 1 and 2 unchanged but re-determining the prices for years 3 and 4 so as to take account of the overcharging in years 1 and 2). The Tribunal said that it would be "useful to know" whether it had such a power. As it seems to me, this court is not in a position to

answer that question or to give the Tribunal any specific guidance in relation to it. The appeals to this court relate to the directions that the Tribunal actually gave, not to directions that it might have given on an alternative basis. None of the parties has directed any argument towards the issue of future adjusted price control. It would be inappropriate and unwise to express any view on it.

Conclusion

49. I would allow the appeals. At the hearing there appeared to be a substantial measure of agreement as to the amendments that would be required to the Tribunal's directions if the appeals succeeded. I hope that the parties will therefore be able to agree the terms of an order. If not, it will be necessary to receive written submissions on any points in dispute.

Lord Justice Moore-Bick :

50. I agree.

Lord Justice Lloyd :

51. I also agree.