Case No: C3/2010/2254

Neutral Citation Number: [2011] EWCA Civ 245
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Marcus Smith QC, Peter Clayton and Professor Paul Stoneman
1115/3/3/10 [2010] CAT 17

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2011

Before:

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

- -

Between:

BRITISH TELECOMMUNICATIONS PLC	**Respondent**
- and -	
OFFICE OF COMMUNICATIONS	**Appellant**
-and-	
HUTCHISON 3G UK LIMITED ("Three")	**Intervener**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

- -

Ms D Rose QC, Mr J Herberg and Mr T Jones (instructed by **Ofcom**) for the **Appellant**
Mr G Read QC, Ms M Lester, Mr R Eschwege (instructed by **BT Legal**) for the **Respondent**
Mr B Kennelly (instructed b**y Baker & McKenzie)** for **The Intervener Three**

Hearing dates: 22-23 February 2011

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Judgment

Lord Justice Toulson:

Introduction

1. This appeal is against a procedural decision of the Competition Appeal Tribunal ("CAT"). The CAT is due to consider an appeal brought by BT (the present respondent) from a decision of Ofcom (the present appellant), relating to a dispute between BT and various mobile network operators ("MNOs"). The dispute was referred to Ofcom under section 185 of the Communications Act 2003 ("CA 2003") by four MNOs – T-Mobile, Orange, Vodafone and O2. Ofcom made a determination under section 188 in favour of the MNOs against which BT has appealed. The MNOs are technically interveners in the appeal to the CAT. Another MNO, Three, is also an intervener because its interests are similarly affected, although it did not make a separate referral of the dispute to Ofcom.

2. Ofcom's complaint in this appeal is that the CAT has agreed in a preliminary ruling to allow BT to introduce evidence on the appeal which it had not presented to Ofcom. Ofcom is concerned about the effect of the ruling in the present case but it is still more concerned about the general principles involved. The parties have advanced wide ranging arguments supported by nearly 2000 pages of case law.

3. The questions at the heart of the appeal are whether there is a general exclusionary principle which the CAT failed to recognise and whether, in so far as it had a discretion, it exercised that discretion unlawfully. Appeals from the CAT to this court lie only on a point of law.

4. Mr Read QC for BT drew attention to what he said were significant ways in which the general principle advanced by Ofcom had shifted as the case has progressed. Refinement is not uncommon as a case progresses. It is, however, essential to identify with clarity the foundation and ambit of the suggested general exclusionary principle, as it is now presented.

5. The CAT considered that Ofcom's approach "would cause the Dispute Resolution Process, and the determination of appeals arising out of it, to be slower and more cumbersome than it otherwise would be". Among other things, it was concerned that Ofcom's approach would add a round of procedural argument. Its warning needs to be heeded. The CAT is an experienced and expert tribunal. If this court is to lay down a general principle of the kind for which Ofcom contends, it must be careful that such a ruling does not bring about the state of affairs which the CAT fears, i.e. more procedural argument about the precise scope and application of the principle identified by this court, with the potential for further appeals. This underscores the need for clarity both as to the foundation of the principle and as to its scope.

6. Ofcom's core argument, as put in its skeleton argument and in Ms Rose's oral submissions, is that "an appellant on an appeal against a section 188 decision should not, save in exceptional circumstances, be entitled to adduce fresh evidence before the Tribunal". It became apparent as the argument developed that two sources for the principle are relied upon. Their practical effect may be similar but they are different in nature and require separate examination.

7. One involves a question of statutory interpretation. It is said that on a proper interpretation of the CA 2003, the grounds of appeal are limited to showing that Ofcom erred, on the material which was before it or which it ought to have considered, on a matter of fact or law or discretion. If so, additional facts or new expert reasoning is self evidently inadmissible because it is irrelevant to the question whether Ofcom erred on the material before it. No true question of discretion arises.

8. The other involves the rule in *Ladd v Marshall* [1954] 1 WLR 1489. This is a common law rule, which it is submitted should be applied to an appeal from Ofcom to the CAT, because it is a rule of general application to appeals and because the reasons for it apply as much in the case of an appeal to the CAT as they do in ordinary civil litigation.

Statutory framework

9. The UK electronic communications industry is highly regulated. The European regulatory framework is established by Directive 2002/21/EC ("the Framework Directive"). The UK regulatory framework is established by the CA 2003. Ofcom is the UK "national regulatory authority" for European and UK regulatory purposes.

10. The Framework Directive and the CA 2003 provide, among other things, for the resolution of disputes between entities involved in the industry.

11. Article 20 of the Framework Directive provides:

> "1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, …issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within 4 months except in exceptional circumstances. The Member State concerned shall require that all parties co-operate fully with the national regulatory authority."

12. Effect is given to article 20 by sections 185 to 191 of the CA 2003. Section 185(3) gives a right to bodies providing electronic communications networks or services to refer disputes with one another to Ofcom. Section 186 requires Ofcom to accept jurisdiction over such a dispute, unless it considers that some other form of dispute resolution would be appropriate. If it decides that it is appropriate to handle the dispute, section 188(5) requires Ofcom to make a determination within 4 months thereafter, except in exceptional circumstances. If it is practicable for the determination to be made before the end of the 4 month period, section 188(6) requires it to be made as soon as practicable.

13. Article 4 of the Framework Directive provides for a right of appeal:

> "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 maybe a court, shall have the appropriate expertise available to 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….* (Emphasis added).

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty."

14. The contrast between paragraph 1 and paragraph 2 is instructive. Paragraph 1 requires a right of appeal to a body which has the "appropriate expertise" to ensure that "the merits of the case are duly taken into account". If that body is not judicial, there must be a right of "review" by a court, which need not have the same expertise and whose remit will be narrower. In the UK the CAT has the dual characteristics of having the appropriate expertise to ensure that the merits of the case are fully taken into account when hearing an appeal and of being judicial in character.

15. Article 4 is given effect by section 192 of the CA 2003. This section, and in particular subsection (6), are of central importance in this appeal. The section provides:

"(1) This section applies to the following decisions –

(a) a decision by Ofcom under this part or any of parts 1 to 3 of the Wireless Telegraphy Act 2006 that is not a decision specified in Schedule 8;

…

(2) A person affected by a decision to which this section applies may appeal against it to the Tribunal.

(3) The means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules.

(4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules.

(5) The notice of appeal must set out –

(a) the provision under which the decision appealed against was taken; and

(b) the grounds of appeal.

(6) The grounds of appeal must be set out in sufficient detail to indicate –

(a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and

(b) to what extent (if any) the appellant is appealing against the exercise of a discretion by Ofcom, by the Secretary of State or by another person."

16. Ms Rose submitted that section 192(6)(a) on its proper interpretation limits the role of the CAT under that paragraph to considering whether, on the material before Ofcom and/or which it ought to have considered, the decision was based on an error of fact or was wrong in law or both; it does not permit an appellant to adduce fresh evidence to show that the decision was erroneous.

17. Section 195 sets out how the CAT is to dispose of appeals:

"(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).

…

(9) In this section "the decision-maker" means -

(a) Ofcom or the Secretary of State, according to who took the decision appealed against…"

18. The Competition Appeal Tribunal Rules ("the CAT Rules") were introduced by Statutory Instrument on 20 June 2003. Sections 192 to 195 of the CA 2003 came into force on 25 July 2003.

19. Rule 8 of the CAT Rules deals with the time and manner of commencing appeals. Rule 8(6) provides:

> "There shall be annexed to the notice of appeal –
>
> (a) a copy of the disputed decision; and
>
> (b) as far as practicable a copy of every document on which the appellant relies including the written statements of all witnesses of fact, or expert witnesses, if any."

20. Rule 22 contains provisions about evidence:

> "(1) The Tribunal may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the Tribunal.
>
> (2) The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken."

21. It is unusual for an appellate body to be given express power to dictate what evidence it requires to decide the issues. On its natural reading, this rule entitles the CAT to require the provision of evidence which was not before Ofcom, if it considers that it needs such evidence in order properly to decide the issues.

22. Rule 68 provides:

> "(1) Subject to the provisions of these rules, the Tribunal may regulate its own procedure.
>
> (2) The President may issue practice directions in relation to the procedures provided for by these rules."

23. Under rule 68(2), on 20 October 2005 the President of the CAT issued a Guide to Proceedings ("the CAT guide"). Section 2 of the guide provides a summary of the types of appeals which may be brought before the CAT. They cover a range of appeals under the Competition Act 1998, the Enterprise Act 2002 and the CA 2003.

24. Section 3 sets out the general approach to the rules. It provides:

"3.1 The Rules are based on the same general philosophy as the CPR and pursue the same overriding objective of enabling the Tribunal to deal with cases justly, in particular by ensuring that the parties are on an equal footing, that expense is saved, and that appeals are dealt with expeditiously and fairly.

…

3.4. The five main principles of the Rules are as follows:

(i) Early disclosure in writing

…

(ii) Active case management

…

(iii) Strict timetables

…

(iv) Effective fact-finding procedures

The Tribunal will pay close attention to the probative value of the documentary evidence. Where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, the Tribunal may permit the oral examination of witnesses. As regards expert evidence, the Tribunal will expect the parties to make every effort to narrow the points at issue, and to reach agreement where possible.

(v) Short and structured oral hearings

…"

25. Section 12 deals with evidence. It states:

"**General**

12.1 Strict rules of evidence do not apply before the Tribunal. The Tribunal will "be guided by overall considerations of fairness, rather than technical rules of evidence"…

Witness statements

12.2 The function of a witness statement is to set out in writing the evidence in chief of the maker of the statement. Accordingly witness statements should so

far as possible, be expressed in the witnesses' own words.

…

12.6 As regards witnesses of fact, a witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the case files, to set out quotations from such documents or to engage in matters of argument.

…

Expert evidence

12.8 As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. It may be appropriate to organise, prior to, or at some stage during the hearing, a structured discussion, in the presence of the Tribunal, between the parties and their experts, in an endeavour to focus on the main points of dispute…

12.9 The Tribunal considers that, as under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his expertise: that duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. Expert evidence presented to the Tribunal should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion…

12.10 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received his instructions. An expert's report should, in particular, set out the material facts, and the substance of all material instructions on the basis of which it was written…

12.11 If the expert wishes, at any stage, to ask the Tribunal for directions then this should be mentioned to the Registrar who will raise the matter with the Tribunal.

The dispute

26. The underlying dispute is about charges levied by BT on MNOs in relation to 080 calls.

27. BT considered that, upon existing regulatory preference, calls made to 080 numbers were generally intended to be free to callers. A call made to a 080 number "terminates on", i.e. connects with, a service provided by a service provider ("SP"). Typically, the SP will be the provider of some form of helpline. The SP is likely to be required by BT to make a payment for the usage of the BT network. (It may be in the interests of the SP to operate such a service at a cost to itself. For example, a bank has an interest in encouraging the prompt reporting of lost or stolen credit cards.)

28. BT does not charge callers who use a BT fixed line for making a 080 call, but MNOs have over the years made charges for the use of their networks to initiate 080 calls. BT resents this practice, not least when it affects BT's own mobile customers. BT's mobile services use the Vodafone network and BT is charged by Vodafone for calls to 080 numbers made via the Vodafone network. BT passes those charges on to its mobile customers.

29. BT has standard interconnection agreements with MNOs. BT has a right under those agreements to notify proposed changes to the prices it charges for those who use its network, but if the contractual counterparty considers that the proposed charges are not fair and reasonable, it may protest and refer the dispute to Ofcom.

30. On 3 June 2009 BT issued a Network Charge Change Notice 956 ("NCCN 956"), notifying communications providers ("CPs") that it intended to introduce a new levy of charges for "terminating" 080 calls on its network, i.e. connecting those calls, when they originate from a non-BT network.

31. The charges which BT proposed to introduce were to be on a sliding scale depending on how much the CPs charged their own customers. Under the graduated scheme, BT would make payments to CP providers who made no charge to their own customers; it would pay nothing, but charge nothing, to CPs who charged their own customers at a rate not exceeding 8.49 pence per minute; and above that level it would charge the CPs.

32. This announcement led BT into disputes with the MNOs. On 15 September 2009 T-Mobile made a request to Ofcom to resolve the dispute. On 6 October 2009 Ofcom told the parties that it had accepted the dispute and that its deadline for determining it would be 5 February 2010.

33. Later in October Ofcom received similar requests from Orange, Vodafone and O2. On 13 November 2009 Ofcom informed the parties that the other MNOs would be joined to the dispute between BT and T-Mobile.

Ofcom's decision

34. On 23 December 2009 Ofcom issued a draft determination, which it published on its website, and requested any comments on it by 12 January 2010.

35. Prior to issuing its draft determination, Ofcom had told the parties in clear terms that it would not be considering as part of its determination whether the specific charging scheme in NCCN 956 was fair and reasonable. Its first task, it said, was to consider whether it was fair and reasonable for BT to impose any such charge.

36. In its draft determination Ofcom stated:

> "**Overall provisional conclusion**
>
> 1.13 We consider that, in certain circumstances…
>
> (i) it could be fair and reasonable for BT to impose a termination charge for calls to 080 numbers hosted on its network, which originate on the 2G/3G MNOs network; …
>
> 1.14 However, in the light of all the relevant factors and the available evidence, our overall provisional conclusion is that neither the termination charges set out in NCCN 956 nor a payment to cover the costs of origination of any of 2G/3G MNOs has, in the present circumstances, been demonstrated as being fair and reasonable.
>
> 1.15 For this reason we provisionally conclude that the Parties to the Dispute, namely BT and each of T-Mobile, Vodafone, O2 and Orange, should revert to the terms on which they were trading prior to the introduction of the NCCN 956.
>
> 1.16 We further provisionally conclude that, to the extent that BT has received payments from one or more of the 2G/3G MNOs as a result of NCCN 956, it should repay any payments made by the 2G/3G MNOs and pay interest on those payments."

37. This involved a major change in the scope of the determination, which BT had no reason to anticipate. The draft determination went on to set out the analytical framework which Ofcom used in reaching its provisional conclusions. It involved three principles:

> "**Principle 1;** the 2G/3G MNOs should not be denied the opportunity to recover their efficient costs of originating calls to 080 numbers hosted on BT's network…
>
> **Principle 2;** the payment in either direction should, taking into consideration our statutory duty:

(i) Provide benefits to consumers, taking into account Direct, Indirect and Mobile Tariff package effects; and

(ii) avoid a material distortion of competition among either OCP's (Originating Communications Providers) or among terminating communications providers (TCPs).

Principle 3; following the submissions of the 2G/3G MNOs, it also important that the payment in either direction should be reasonably practicable to implement."

38. The reference to Ofcom's statutory duties was to section 3 of the CA 2003, under which it is the "principal duty of Ofcom" to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

39. On 12 January 2010 BT submitted a response to the draft determination. Section 1 of the response was an executive summary. It concluded:

"1.11 Ofcom clearly concludes that it is appropriate, subject to Principle 1, for a terminating commutations provider to charge for 0800 or 0808 calls. BT's pricing clearly passes the proposed Principle 1 test as the disputing communication providers retain significant revenue over and above their efficient costs.

1.12 Ofcom originally chose to limit the scope of this dispute to the principle of when it would be appropriate to charge for terminating 0800 or 0808 calls. The scope does not extend to the nature or structure of the pricing or the charges specifically levied. By examining the details of the possible effects of BT's specific pricing proposal Ofcom is extending the scope unnecessarily. There is no reason for Ofcom to change this scope now…

1.13 In order to be consistent with the scope originally set for this dispute, Ofcom should refer this matter back to BT and the disputing communication providers to undertake the required commercial negotiation, in good faith."

40. Other parts of the response addressed Ofcom's analytical framework. In relation to Principle 1, it said:

"BT agrees that any originating operator (fixed or mobile) should be able to recover its efficient costs of originating any 0800 call."

BT challenged the conclusion that its charging scheme contravened the principle and suggested:

> "The next step would be for further negotiations to ensue between BT and the 080 OCPs to resolve any issues in regard to the appropriate 080 termination charge, independant outside of this dispute (sic)."

41. In relation to Principle 2, BT said that it did not agree that NCCN 956 would necessarily induce OCPs to raise the retail price of 080 calls. It recognised that there were factors which had to be balanced, but it said:

> "Balancing these aspects there is no evidence that there will be downside direct effects from NCCN 956, and when considered in the broader context of the initiatives being taken on competition and termination, there is every reason to believe the contrary. One artefact of the structure of NCCN 956 is that it may induce MNOs' to lower retail tariffs given that volumes may rise at a lower price with the same absolute retention."

42. On 27 January 2010 BT submitted to Ofcom reports by two experts, Professor Dobbs and Dr Maldoom (referred to as Dobbs 1 and Maldoom 1). Revised versions (Dobbs 2 and Maldoom 2) were submitted to Ofcom on 3 February 2010. On the same day Ofcom responded:

> "Any proper consideration of your latest submission would require us to extend the period for reaching a final determination beyond the statutory deadline of 5 February 2010. As you are aware, Ofcom can only extend the review period in exceptional circumstances in accordance with section 188(5) of the Act. We do not consider that exceptional circumstances apply in this case."

43. On 5 February 2010 Ofcom issued its final determination, which in substance confirmed its provisional conclusion. The final determination is a lengthy document, but Ofcom summarised its view on the pricing structure of NCCN 956 at paragraphs 5.187 to 5.191:

> "5.187 In relation to BT's including Dobbs' arguments that NCCN 956 may actually lead MNOs to leave 080 retail call prices unchanged, or even decrease them, there may be some scope for this but only under certain circumstances. This is because there are a complex set of factors…without detailed information on all of these factors, it is difficult to definitively conclude whether NCCN 956 would result in increased, decreased, or unchanged 080 retail charges.
>
> 5.188 However, we still cannot rule out a risk that 080 retail prices may increase as a result of NCCN 956…
>
> 5.189 Therefore based on available evidence, we do not consider it appropriate to accept BT's assertion that the structure of NCCN 956 would reduce the retail price of

> 080 calls from mobiles. In our view, there is still a risk that retail prices could increase. As a result, we have not changed our provisional conclusion set out in paragraph A3.73 that NCCN 956 is likely to have a negative Direct effect on consumers.
>
> 5.190 We have examined BT's comments on the scope of the Dispute above. While we consider it appropriate to consider the impact that NCCN 956 could have for the purposes of determining this Dispute, we would reiterate that we are of the view that the actual structure and level of termination charges should be subject to commercial negotiations between BT and the 2G/3G MNOs, and we would not want to pre-empt the outcome of such negotiations."

44. Ofcom required BT to repay any amounts paid under NCCN 956 together with interest at the Oftel interest rate.

BT's appeal

45. On 6 April 2010 BT served a notice of appeal. Its wording has been criticised but the essential thrust is clear. It advanced four grounds:

> 1. Ofcom adopted a formulaic analysis which failed to pay proper regard to relevant considerations, particularly the desirability that 080 calls should be free to the caller and that revenue in the platform which included 080 numbers should be fairly shared.
>
> 2. Principle 1 is doubtful and was applied in an unjust and simplistic fashion.
>
> 3. In applying principle 2, Ofcom placed an unreasonable burden on BT to demonstrate the absence of detriment to competition, and Ofcom's analysis of the effects of NCCN 956 on consumers and competition was superficial and flawed.
>
> 4. Having stated that the scope of the dispute did not include consideration of the specific charges introduced by BT in NCCN 956, it was unfair for Ofcom to do precisely that and to order the parties to revert to the trading conditions that applied before NCCN 956 came into effect. This gave an unjust negotiating advantage to the MNOs.

46. The section of the notice of appeal which dealt with the third ground included the following paragraph:

> "Turning first to the benefit to consumers, BT annexes to this notice of appeal the following:

- Expert report of Professor Ian Dobbs, Professor of Business Economics and Finance at Newcastle University;

- Expert report of Dr Dan Maldoom, Economist and Partner of DotEcon Limited

- Statement of mathematician and BT Chief Network Services Strategist, Andrew Reid; and

- Statement of Paul Richards, Senior Regulatory Economist at BT."

47. The reports by Professor Dobbs and Dr Maldoom were fresh reports (Dobbs 3 and Maldoom 3). A footnote to the notice of appeal referred to their earlier reports.

48. There was a good deal of argument about the extent to which the new evidence (Dobbs 3, Maldoom 3, Reid and Richards) amounted to BT advancing a "new" case. A comprehensive analysis would be lengthy and I do not believe it to be necessary. Mr Read helpfully accepted that Ofcom summarised it fairly in its supplementary skeleton argument:

> "Whereas BT had previously said only that NCCN 956 might create incentives to reduce retail prices, the [new] evidence is designed to show that it did create those incentives. This argument is supported by complex economic and algebraic analysis. If the evidence is admitted, it will need to be evaluated for the first time by the Tribunal itself."

49. Mr Read added the rider that although the analysis may seem complex to a non-economist, the CAT panel includes an economist, who commented during the argument on the present issue that much of the case was based on economic theory which was "quite detailed and quite algebraic and mathematical" but "not particularly difficult".

50. Ofcom objected to the CAT admitting the new evidence. Ofcom also objected to the CAT admitting Dobbs 2 and Maldoom 2, on the ground that those reports had properly not been considered by Ofcom in view of their lateness and ought not therefore to be considered by the CAT. Ofcom's objection was supported by the MNOs.

51. The CAT held a two day hearing in June 2010 at which it heard argument whether to admit either category of evidence. On 8 July 2010 it delivered a carefully reasoned judgment. It ruled that both categories of evidence should be admitted.

52. The CAT summarised Ofcom's contention as follows:

> "Essentially, Ofcom contended for the existence of clear limits on an appellant's ability to adduce evidence in a section 192 appeal to the Tribunal. Those limits were two-fold:

> (a) First, an appellant would not – save in exceptional circumstances – be entitled to adduce evidence before the Tribunal which could have been, but was not, submitted by the appellant to Ofcom.
>
> (b) Secondly, an appellant would not –save in exceptional circumstances – be entitled to adduce evidence before the Tribunal which was in fact submitted to Ofcom, but too late to enable Ofcom to take that material into account when reaching its decision."

53. The CAT rejected the argument. It held that rule 22(2) of the CAT rules "provides a broad discretion to the Tribunal regarding the admission or exclusion of evidence, which discretion is coloured by the nature of the appeal that is being heard". The CAT also held that, if the general principle contended for by Ofcom was correct, in the present case there were sufficiently "exceptional circumstances" which made it just to admit the evidence. It said:

> "107 …BT should have had the opportunity to be able to address the reasonableness and economic effect of the NCCN 956 charges, and for most of the Dispute Resolution Process was deprived of that opportunity. The Dispute Resolution Process is a short one, and between 6 October 2009 (when the process began) and 23 December 2009 (when the draft determination was issued by Ofcom), BT was under a misapprehension induced by Ofcom as to the scope of the dispute being determined.
>
> 108. For the Tribunal not to be able to hear evidence on the point would not be consistent with basic justice and would certainly not result in a proper appeal on the merits, given that (without this evidence) BT would be unable to challenge the application by Ofcom of its analytical framework."

The appeal

54. In its notice of appeal Ofcom challenged the CAT's ruling in its entirety, but it has subsequently accepted that it should have allowed an extension of the period for determining the dispute so as to enable it properly to consider Dobbs 2 and Maldoom 2. Accordingly, it no longer objects to the CAT considering those reports. The appeal is therefore confined to the CAT's decision to admit Dobbs 3, Maldoom 3, Reid and Richards.

55. Ofcom was supported on the hearing of the appeal by Three. The other MNOs took no part.

56. There are essentially three issues:

1. Whether the grounds of appeal under s192 of the CA 2003 contain the limitation contended for by Ofcom as a matter of statutory construction;

2. whether the CAT ought to have applied a general exclusionary principle analogous to the rule in *Ladd v Marshall*;

3. whether the CAT erred in law in the exercise of its discretion by applying the wrong principle, failing to take into account relevant considerations or reaching a decision which was beyond the bounds of such discretion as it may properly have had.

The first and second issues reflect the distinction referred to in the introductory part of this judgment.

Section 192(6)(a) of the CA 2003

57. In support of Ofcom's contention that, on its proper interpretation, section 192(6)(a) confines an appeal against a factual finding to scrutinising the finding which was made on the material which Ofcom considered or ought properly to have considered, Ms Rose relied on the wording of the subsection, the provisions of the Framework Directive, the provisions of section 195 of the CA 2003 (setting out how the CAT is to dispose of appeals) and a passage in the judgment of Jacob LJ in *T-Mobile (UK) limited v Office of Communications* [2008] EWCA Civ 137 1373, [2009] 1WLR 1565:

> "30 …it seems to me to be evident that whether the "appeal" went to the CAT or by way of judicial review, the same standard for success would have to be shown. In either case it would not be enough to invite the tribunal to consider the matter afresh – as though the award had never been made.
>
> 31 …it is inconceivable that Article 4, in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something materially wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision."

58. Ms Rose emphasised a number of features of the statutory scheme:

1. Ofcom is the primary decision-maker, and its position as such is recognised in section 195 of the CA 2003. The CAT

may remit a decision to Ofcom and give directions to Ofcom, but its role is essentially to review the decision of the primary decision-maker. This was recognised in the passage cited from the judgment of Jacob LJ.

2. As the statutory regulator, Ofcom's role is not simply that of an arbitrator. It has a positive statutory duty to consider the interests of consumers.

3. The purpose of an appeal is to provide a check on the way in which Ofcom carried out its decision making. Ofcom's proper role would be undermined if it were open to an appellate body not merely to review Ofcom's discharge of its duty on the material available to it, but to make an independent decision on material which Ofcom neither considered nor should have considered.

4. Speed is an important feature of the scheme. Article 20 of the Framework Directive and section 188 of the CA 2003 prescribe an intentionally short timescale for the determination of disputes. They are to be determined within 4 months, save in exceptional circumstances.

5. If a party considers the circumstances to be exceptional and requires further time to be able to place the material it wishes before Ofcom, it should ask for an extension. BT did not do so.

6. The deliberately short timescale reflects the need for the players in the market to have commercial certainty when they make pricing decisions. A party which loses a dispute is free to raise the matter afresh with Ofcom in the light of new evidence, and BT has done in the present case. It has introduced a variation of NCCN 956, which has led to a further referral to Ofcom. But the financial consequences of any ruling on the new scheme will be limited to the date of its introduction.

7. If it is permissible for a disputing party to put fresh evidence before the CAT, not only will the CAT's judgment be made without the benefit of the material having been considered by Ofcom, but the principle of swift adjudication would be undermined and the period of financial uncertainty for the parties would be extended for possibly a considerable time.

59. I am not persuaded by these arguments that section 192(6)(a) is to be construed as limited in the way that Ofcom contends.

60. The task of the appeal body referred to in Article 4 of the Framework Directive is to consider whether the decision of the national regulatory authority is right on "the merits of the case". In order to be able to make that decision the Framework

Directive requires that the appeal body "shall have the appropriate expertise available to it". There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression "merits of the case" is not synonymous with the merits of the decision of the national regulatory authority. The omission from Article 4 of words limiting the material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of the case, it is not typically limited to considering the material which was available at the moment when the decision was made. There may be powerful reasons why an appeal body should decline to admit fresh evidence which was available at the time of the original decision to the party seeking to rely on it at the appeal stage, but that is a different matter.

61. The construction for which Ofcom contends would be capable of causing real injustice, because it would preclude the appeal body from considering evidence even if it were highly material and if the party seeking to rely upon it could not be criticised for not having adduced it earlier. It would be possible to meet that objection by saying that the limitation contended for by Ofcom should be subject to an exception in cases where it would cause injustice, but that is the *Ladd v Marshall* approach to which I will come.

62. Section 192 of the CA 2003 came into effect one month after the introduction of the CAT rules referred to in section 192(3). Before the enactment of the CA 2003 the CAT had considered the question whether in appeals from the Director General of Fair Trading under the Competition Act 1998 the parties were limited in the introduction of new evidence. The CAT held that they were not: *Napp Pharmaceutical holdings v The Director General of Fair Trading* [2002] CAT 1, [2002] Comp A R 13 at [134]. In that case the CAT referred to it as virtually inevitable that, at the judicial stage, certain aspects of the decision were explored in more detail than during the administrative procedure, and that it might be appropriate for the CAT to receive further evidence and hear witnesses.

63. There are differences in wording between the Competition Act 1998 and the CA 2003, but the CAT has a similar function under both Acts. The same rules apply and Parliament must be taken to have been aware of the approach taken by the CAT towards the determination of appeals from the relevant regulator.

64. In *T-Mobile* Jacob LJ was not considering the issue with which the court is presently concerned. The issue in that case was whether the proper method of challenge to a particular decision of Ofcom was by way of statutory appeal or judicial review. In holding that the proper avenue was judicial review, Jacob LJ observed that judicial review was a flexible remedy capable of being adapted to meet the requirements of Article 4 of the Framework Directive. He observed [27] that judicial review was capable of providing a "full merits investigation" where that is necessary. He was not concerned with the scope of the evidence which the court might entertain either on a judicial review application or on a statutory appeal.

65. A statutory scheme which permits an appeal body to receive fresh evidence is not necessarily inconsistent with the appeal body being obliged to have proper regard for the role of the primary decision-maker. For example, the Licensing Act 2003 creates a system of appeal from decisions of licensing authorities to the magistrates' court, in which the parties may call fresh evidence, but the court is bound to pay careful

attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place primary responsibility for making such decisions on local authorities : *R (Hope and Glory Public House Limited) v City of Westminster Magistrates Court* [2011] EWCA Civ 31. Liquor licensing and electronic communication regulation are very different fields of regulation, but the characteristic of Ofcom that it has a particular duty towards the public does not make it unique. Under the Licensing Act primary responsibility is placed on local authorities precisely because Parliament considered that their contact with the electorate made them the appropriate primary body for weighing the public and private interests at play on a licensing application in their area.

66. Ms Rose said that the statutory limitation for which she contended would not exclude all fresh evidence. Fresh evidence would be admissible to show that there had been procedural unfairness. More problematically, she said that fresh evidence would also be admissible to show error in Ofcom's comprehension of the effect of the material before it. I can see ample scope for procedural arguments over whether additional evidence is admissible under the rubric of seeking to show that Ofcom has in some respect misapprehended the effect of the material before it.

67. Finally there is the argument about speed. This is two edged. The Framework Directive prescribed a timetable for the national regulatory authority to make its decision. It did not prescribe a timetable for the appeal process required by Article 4. This is unsurprising. (There may be more that one tier of appeal. Article 4 itself contemplates the possibility of a two-tier appeal system, first to a non-judicial body having the appropriate expertise to consider the merits of the case and then a review by a court or judicial tribunal. The time that an appeal may properly take is likely to depend on the complexity of the subject matter.) It could be considered that the shortness of the time within which Ofcom must make its decision is a reason for not imposing a statutory bar on the introduction of fresh evidence, but leaving that to the sense of justice of the appeal body.

Rule in *Ladd v Marshall*

68. Ms Rose submitted that the rule in *Ladd v Marshall* is of general application in civil appeals and that the reasons for it apply with equal validity to appeals to the CAT. She also relied on the factors advanced in support of her argument on the construction of section 192(6)(a) as reasons why the CAT should admit fresh evidence only in exceptional cases.

69. There are significant differences between the procedure for determining a dispute under the CA 2003 and an ordinary civil claim. A civil claim is ordinarily determined after a trial at which witnesses give evidence and can be cross-examined. A dispute under the relevant part of the CA 2003 is determined by Ofcom on paper. Whereas oral examination of witnesses on a civil appeal is highly exceptional, because there should have been a proper opportunity for it at the trial, any oral examination of witnesses in a dispute of the present kind will necessarily be at the appeal stage.

70. Under Article 4 of the Framework Directive, the appeal body is concerned not merely with Ofcom's process of determination but with the merits. Ofcom is not only an adjudicative but an investigative body, and the appellant may wish to produce

material, or further material, to rebut Ofcom's conclusions from its investigation. It is unsurprising that the CAT should adopt a more permissive approach towards the reception of fresh evidence than a court hearing an appeal from a judgment following the trial of a civil action. Indeed, as Sullivan LJ observed, the appeal body might in some cases expect an appellant to produce further material to address criticisms or weaknesses identified by Ofcom.

71. Ofcom submitted in its skeleton argument that an unfettered right to adduce fresh evidence on appeal might cause parties to avoid proper engagement with Ofcom during the dispute resolution process. No party has an unfettered right to adduce fresh evidence on an appeal to the CAT, and there is force in Ms Rose's argument that parties ought to be encouraged to present their case to Ofcom as fully as the circumstances permit. That is a factor, among others, to be borne in mind by the CAT when considering the discretionary question whether to admit fresh evidence. Other relevant factors would include the potential prejudice (in costs, delay or otherwise) which other parties may suffer if an appellant is permitted to introduce material that it could reasonably have been expected to place before Ofcom. These are not necessarily the only relevant factors.

72. The court was asked by Ofcom to give clear guidance to the CAT about the exercise of its power to admit fresh evidence. Before the CAT there was argument whether it was for the party seeking to adduce fresh evidence to show why it should be given permission to do so, or was for the opposing party to show why permission should not be granted. Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case. There are several reasons why I consider that it would be inappropriate, and is unnecessary, for this court to do so.

73. First, the potential circumstances are infinitely variable. During the argument Sullivan LJ asked Ms Rose what bright line test could be applied for drawing a line between acceptable and unacceptable fresh evidence. The discussion which followed persuaded me that the quest is elusive and that any formula which this court sought to lay down would be counterproductive, in that it would be more likely to lead to further procedural arguments than to avoid or resolve them. Secondly, the CAT is a specialist tribunal. It has far more knowledge and a much surer feel for case management in its field than this court. Thirdly, the CAT's approach to the application of the CAT rules is set out in the CAT guide. Its overall approach is to exercise its powers in such a way "that expense is saved, and that appeals are dealt with expeditiously and fairly". This court should be wary of trying to tell the CAT how it should do so.

74. These points can be illustrated by reference to the comment of the economist member of the panel, to which I have referred, that much of the case turns on economic theory supported by algebraic and mathematical calculations. Introduction of further calculations of that kind before a specialist appeal tribunal is different, for example, from trying to introduce fresh evidence from a bystander on appeal from a trial of a

personal injury claim. The CAT may or may not consider that it would be proportionate and just to allow further algebraic calculations to be introduced in support of one economic theory or another, but that is quintessentially a matter for the tribunal to decide.

The CAT's exercise of its discretion

75. The CAT considered that refusal to admit the fresh evidence "would not be consistent with basic justice and would certainly not result in a proper appeal on the merits" in the circumstances that for most of the short period allowed for the dispute resolution process BT was under a misapprehension, induced by Ofcom. At first sight, the CAT was well entitled to form that view. Indeed, the case might be thought to provide a compelling illustration of why the strict general exclusionary rule contended for by Ofcom would be capable of causing injustice.

76. Ms Rose submitted that the CAT's exercise of its discretion was flawed because it left out of account a number of relevant considerations, namely:

> 1. BT's response to the draft determination, which was not to ask for an extension of time but rather to put in evidence in support of the reasonableness of the NCCN 956 charging scheme, without complaining that it was unable to put in as much evidence as it would have wished due to shortness of time;
>
> 2. prejudice to the MNOs or consumers;
>
> 3. the need for legal and regulatory certainty; and
>
> 4. prejudice to Ofcom because of its inability to deal with the fresh material.

77. The second of these points, prejudice to MNOs, was also emphasised by Mr Kennelly in his oral submissions on behalf of Three.

78. The first point was argued most forcefully. The CAT did not address it, but that is unsurprising because the thrust of Ofcom's skeleton argument before the CAT was different. Its argument was largely directed to the general exclusionary rule advanced by it. Its response to BT's complaint about being taken by surprise was not to "confess and avoid", i.e. to acknowledge that BT had to some extent been wrong footed but to argue that BT should have asked for extra time if it needed it (which was Ofcom's argument before this court). Rather, Ofcom rejected BT's complaint about being taken by surprise and argued that there was no cause for it to have extended time. It said in its skeleton argument:

> "33. In relation to Ofcom's handling of the Dispute, BT states that it was not possible for it to have produced all of the material which was served with the Notice of Appeal prior to the Final Determination….
>
> 35. …Ofcom does not accept that BT could not have anticipated Ofcom's approach until the Draft

> Determination, nor that the disputed evidence could not have been served earlier with reasonable diligence…
>
> 36. As to the suggestion that the deadline should have been extended, that matter is addressed by Ofcom at footnote 67 of the Final Determination and in its letter to BT of 3 February 2010. As is further explained by Mr Buckley (paragraphs 38-41), Ofcom did examine the evidence submitted on 3 February 2010 [Dobbs 2 and Maldoom 2] to determine whether it constituted the exceptional circumstances necessary to extend the statutory deadline. Ofcom properly and reasonably concluded that it did not constitute such exceptional circumstances….
>
> 95. What is conspicuous about this material [the new evidence] …is its detailed focus on the specific charging principles contained in NCCN 956….
>
> 97. It is not until the submissions of Reid/1, Richards/1, Dobbs/3 and Maldoom/3 that BT for the first time puts forward any in-depth analysis to explain why, in its submission, the specific charging structure in NCCN 956 will act in such a way as to incentivise MNOs to lower their retail prices…
>
> 98. This focus on NCCN 956 is in one sense unsurprising. It implemented the charging tariff that BT implemented in July 2009 and that is at the centre of the dispute. Nonetheless, what is surprising is that the focus on NCCN 956 emerged at such a late stage."

79. The statement of Mr Buckley, referred to in Ofcom's skeleton argument, expressed surprise at BT's contention that it could not have anticipated Ofcom's approach to determining the dispute until it saw the draft determination on 23 December 2009. It is plain from his statement that Ofcom did not at that stage consider that BT had any legitimate cause for criticism of it, and that it therefore did not think that it would be right to extend the period for determining the dispute in order to deal with Dobbs 2 and Maldoom 2 (which had been submitted two days before the expiry of the four month deadline for completion of the process). Mr Buckley also said that Ofcom was concerned that if it were to extend the dispute because this new evidence had been submitted at that late stage, it might set a precedent for the submission of late evidence in the future by parties to disputes.

80. It stretches credulity to suggest that Ofcom might have granted an extension of time if BT had requested it, in the light of the view clearly held by Ofcom that BT ought to have addressed the specific charging structure of NCCN 956 at a much earlier stage.

81. The question whether Ofcom acted unfairly by determining that the specific charges introduced in NCCN 956 had not been shown to be reasonable, when Ofcom had

previously indicated that it did not intend to decide that question at that stage, is an issue in the appeal before the CAT and it would be wrong for this court to express a view about the substance of that issue. However, it seems to me that it is likely to give rise to the question whether BT suffered prejudice as a result of Ofcom's change of position. If so, it is difficult to see how the CAT will be able to assess the question of prejudice without at least looking at the evidence which BT says that it did not have time to produce in the period between the draft determination and the final determination. Ms Rose submitted that BT's notice of appeal to the CAT does not suggest that the fresh evidence is relevant for that purpose, but that is a narrow pleading point. Mr Read stated that BT would wish to rely on the fresh evidence as illustrating the prejudice which it suffered from procedural unfairness.

82. The other points which the CAT was criticised for not addressing were raised at a general level in the submissions to the CAT about the correct approach to the legislation. Thus, Ofcom said in its skeleton argument:

> "The matters that Ofcom is handling under a dispute determination process are frequently of vital commercial interest to the parties. Unnecessary delay has the potential to exacerbate harm. As it was expressed in *T-Mobile (UK) Limited v Ofcom* [2008] CAT 12 [at 81]
>
> > "…The tribunal recognise – and this was common ground among the parties – that the section 185 procedure is intended to provide a relevantly swift and certain solution to disputes between the participants in this sector." "

83. No attempt was made, however, to identify any particular prejudice in the present case. It was not suggested to the CAT, nor in my view could it sensibly been suggested, that those considerations would have been a good reason for refusing to permit BT to adduce the fresh evidence, if the CAT accepted BT's submission that it had been deprived (contrary to Ofcom's argument) of the opportunity of addressing the economic effect of the particular charges under the NCCN scheme for most of the time allowed for the dispute resolution process.

84. I would dismiss this appeal.

Postscript

85. During the argument Ms Rose said that Ofcom is in a difficult position if the CAT admits evidence which Ofcom has not considered, particularly if the result of the appeal may be a remission of the matter to Ofcom. The awkwardness of its position at the appeal stage arises from a combination of the fact that it has not had an opportunity of considering the additional material and the possibility that it may have to do so on a remission. It must therefore be careful not to say anything on the hearing of the appeal which might appear to compromise its independence or impartiality.

86. The Chancellor asked Ms Rose why in such circumstances Ofcom should feel a need to take part on the hearing of the appeal, instead of leaving the interested parties to battle it out. Ms Rose took instructions and it seems to be simply a matter of practice.

87. Section 192(2) of the CA 2003 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.

Lord Justice Sullivan:

88. I agree.

The Chancellor of the High Court:

89. I also agree.