Neutral citation [2010] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1151/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

8 July 2010

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

T-MOBILE UK LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners

Heard at Victoria House on 22 and 23 June 2010

JUDGMENT (ADMISSIBILITY OF EVIDENCE)

APPEARANCES

Mr. Graham Read QC, Miss Maya Lester and Mr. Richard Eschwege (instructed by BT Legal) appeared for the Appellant.

Mr. Javan Herberg and Mr. Ewan West (instructed by the Office of Communications) appeared for the Respondent.

Mr. Meredith Pickford (instructed by T-Mobile UK Limited and Orange Personal Communications Services Limited) appeared for T-Mobile UK Limited and Orange Personal Communications Services Limited.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for Vodafone Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for Telefónica O2 UK Limited.

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

I. INTRODUCTION

1. On 5 February 2010, the Office of Communications ("OFCOM") issued a determination in respect of certain disputes between British Telecommunications plc ("BT") and various mobile network operators regarding BT's termination charges for 080 calls. The mobile network operators in question were:

   (a) T-Mobile UK Limited ("T-Mobile");

   (b) Orange Personal Communications Services Limited ("Orange");

   (c) Vodafone Limited ("Vodafone"); and

   (d) Telefónica O2 UK Limited ("O2").

2. OFCOM's 5 February 2010 determination ("the Determination") is contained in a document entitled "Determination to resolve a dispute between T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls".

3. The Determination was made pursuant to OFCOM's power to resolve disputes under sections 185 to 191 of the Communications Act 2003 ("the Dispute Resolution Process"). BT has appealed the Determination under section 192(2) of the Communications Act 2003 ("the 2003 Act"), this being an appealable decision under section 192(1). The Tribunal must dispose of this appeal in accordance with the provisions of section 195.

4. BT's grounds of appeal are stated in a Notice of Appeal ("the Notice of Appeal") dated 6 April 2010. Pursuant to rule 8(6)(b) of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, "the 2003 Tribunal Rules"), BT annexed copies of the documents on which it relied, including written statements of witnesses of fact or expert witnesses. Paragraph 15 of the Notice of Appeal identified the material that BT relied upon in support of its appeal as follows:

   "In support of this Appeal BT relies on the following:

(i) The expert report of Professor Ian Dobbs;

(ii) The expert report of Dr Dan Maldoom;

(iii) Witness statement of BT's internal economist, Paul Richards;

(iv) Witness statement of mathematician and BT chief network services strategist, Andrew Reid;

(v) Witness statement of Darren Kilburn;

(vi) The various documentary evidence referred to in this Notice of Appeal and the above statements and reports."

[Omitting footnotes and bundle references.]

5. As footnote 17 of the Notice of Appeal makes clear, the evidential position is, unfortunately, not as straightforward (at least as regards the evidence of Professor Dobbs and Dr Maldoom) as the above quotation might suggest. In the case of these gentlemen, BT relies upon three reports from each:

(a) *The evidence of Professor Dobbs.* The report described in paragraph 15(i) of the Notice of Appeal is dated 2 April 2010 and is in fact Professor Dobbs' third report, referred to herein as "Dobbs 3". Professor Dobb's first report ("Dobbs 1") is dated 27 January 2009, and his second report ("Dobbs 2") is dated 1 February 2010.

(b) *The evidence of Dr Maldoom.* The report described in paragraph 15(ii) of the Notice of Appeal is dated 6 April 2010 and is Dr Maldoom's third report, referred to herein as "Maldoom 3". Dr Maldoom's first report ("Maldoom 1") is dated January 2009, and his second report ("Maldoom 2") is dated 3 February 2010.

6. A case management conference took place on 13 May 2010. At this hearing, the Tribunal gave permission to each of T-Mobile, Orange, Vodafone and O2 to intervene. Although Hutchison 3G UK Limited ("Three") was not a party to the dispute before OFCOM, it too applied to intervene, and was permitted to do so. We shall refer to these five mobile network operators collectively as "the MNOs".

7. The correspondence between BT, OFCOM and the MNOs leading up to the 13 May 2010 case management conference made it clear that there were multiple objections to large parts of the evidence that had been served by BT in support of its Notice of Appeal, but also that these objections had yet to be fully articulated. Accordingly, the Tribunal acceded to the parties' joint suggestion that the parties expand upon these objections in correspondence, and that there be an exchange of skeletons dealing with those objections, culminating in a hearing at which those objections would be determined by the Tribunal.

8. Submissions on the evidential objections to BT's evidence were heard on 22 and 23 June 2010. In addition to the benefit of oral argument on those days, the Tribunal was also assisted by the pleadings, witness statements and skeleton arguments submitted by the parties. Time did not allow the MNOs to make oral reply submissions; the MNOs were given the opportunity to make their reply submissions in writing, and we have taken account of these submissions also.

9. There was some debate before us at the 13 May 2010 case management conference as to whether this was a case where BT was applying to admit evidence or OFCOM and the MNOs were applying to exclude evidence under rule 22(2) of the 2003 Tribunal Rules. In a very real sense, the answer to this question turns on the answer to the questions that were argued before us on 22 and 23 June 2010. On 13 May, of course, it was not possible to reach any view as to what the answer to those questions might be. The Tribunal cut this Gordian knot by directing that this should be regarded (or "deemed") as OFCOM's (and, to the extent they maintained objections to BT's evidence, the MNOs') application to exclude BT's evidence. This had the practical advantage of identifying the area of true disagreement between the parties, in that OFCOM and the MNOs had to identify specifically the evidence referenced in the Notice of Appeal to which they were objecting. It also meant that it was for OFCOM to open the application to exclude, supported by the MNOs.

10. We shall begin by identifying the various points taken by OFCOM and the MNOs in respect of the Notice of Appeal and the evidence supporting it. We describe these points in Section II below.

II. POINTS TAKEN BY OFCOM AND THE MNOs IN RESPECT OF BT'S NOTICE OF APPEAL AND THE EVIDENCE IN SUPPORT OF THAT NOTICE

11. We shall describe the points taken by OFCOM and the MNOs in the order in which they made their submissions to the Tribunal. We shall then describe BT's response.

(a) The position of OFCOM

12. OFCOM contended that the following evidence on which BT sought to rely was inadmissible and should be excluded pursuant to rule 22(2) of the 2003 Tribunal Rules:

    (a) Dobbs 2 and Dobbs 3;

    (b) Maldoom 2 and Maldoom 3;

    (c) The evidence of Mr Reid ("Reid 1"), Mr Richards ("Richards 1") and parts of the evidence of Mr Kilburn ("Kilburn 1"). OFCOM's objections to Kilburn 1 are set out in OFCOM's letter of 26 May 2010 and relate to paragraphs 38-41, 44, 49-52 (inclusive) and the whole of section 6 of that statement.

13. In paragraph 13 of a letter (dated 11 May 2010) sent by OFCOM to the Tribunal shortly before the 13 May case management conference, OFCOM stated:

> "Ofcom intends to contend that both as a matter of principle and for reasons of public policy, evidence should not ordinarily be admitted on such an appeal, particularly where it relates to analyses that could have been undertaken before Ofcom reached its decision and submitted in sufficient time for it to be taken into account, or to arguments that could have been made below. Ofcom has a limited four month period in which it [is] obliged by the legislation to complete its determination, save where there are exceptional circumstances. It would, it is suggested, subvert Ofcom's decision making process and role were evidence which could have been submitted below, but which was excluded as not being capable of being considered in accordance with the legislative constraints, be routinely or ordinarily admitted on appeal. It would, effectively, turn the Tribunal into a primary decision maker. The issue is thus, as Ofcom sees it, a significant one."

14. This submission was expanded on in subsequent correspondence, the skeleton arguments and oral submissions. 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.

15. These two, distinct but related, limits, were reflected in OFCOM's categorisation of BT's evidence. OFCOM contended that there were two categories of evidence on which BT was seeking to rely which were inadmissible and should be excluded pursuant to rule 22(2) of the 2003 Tribunal Rules. These categories were as follows:

(a) *Category 1.* Material that was put before OFCOM during the administrative procedure that preceded the Determination, but which was not taken into account in the Determination. Category 1 comprises Dobbs 2 and Maldoom 2 (paragraph 39 of OFCOM's skeleton). As OFCOM explains in paragraphs 31 and 39 of its skeleton, OFCOM considered whether this material might constitute "exceptional circumstances" sufficient to justify an extension to the statutory four month timetable for disputes to be resolved under the Dispute Resolution Process. It considered that this material did <u>not</u> constitute such exceptional circumstances. Having reached this conclusion, OFCOM did not consider Dobbs 2 and Maldoom 2 any further for purposes of the Determination.

(b) *Category 2.* Material that was never before OFCOM during the administrative procedure that preceded the Determination, but which was submitted as part of the Notice of Appeal (paragraph 40 of OFCOM's

skeleton). This evidence comprises: Dobbs 3; Maldoom 3; Reid 1; Richards 1; and Kilburn 1.

16. Before us, Mr Javan Herberg for OFCOM, suggested that the approach to the admissibility of evidence was one of principle, where a clear direction from the Tribunal would be of assistance, not only in this case, but also in future cases. Furthermore, there was a link between the evidence admissible on an appeal, and the nature of the arguments that an appellant would be able to make on the substantive hearing of the appeal. It is trite, but nevertheless important, to appreciate that if certain evidence is excluded as inadmissible, arguments that an appellant might otherwise be able to bring will be unarguable, because the evidence to support them will be lacking.

(b) The position of Vodafone

17. By contrast to the approach of OFCOM, Vodafone contended that questions of admissibility did not turn on clear limits of the sort contended for by OFCOM. Rather, admissibility was simply a matter for the Tribunal's discretion pursuant to rule 22(2) of the 2003 Tribunal Rules. In argument, Mr Tim Ward, for Vodafone, submitted that the Tribunal should be slow to adopt any hard and fast rules, and that the question of admissibility was essentially one of discretion, albeit a discretion that was informed by the rules describing the various decisions (defined in s192(1)) that can be appealed to the Tribunal under the 2003 Act.

18. Vodafone's contention was that, in this case, the Tribunal should exercise its discretion under rule 22(2) of the 2003 Tribunal Rules not to admit (or to exclude) the Category 1 and Category 2 evidence.

(c) The position of Three

19. Three supported the approach of OFCOM.

(d) The position of O2

20. O2 broadly endorsed the approach of OFCOM. Additionally, O2 contended that Reid 1 and Richards 1 – which are statements in the form of factual witness statements, rather than expert reports – should, if they were to be admitted at all, be in the form of expert reports, rather than factual witness statements.

21. O2 stressed that this was not a point of formality, for the responsibilities of an expert to a court are both onerous and important.

22. Finally, O2 contended that Kilburn 1 should not be admitted because it amounted to advocacy and ran counter to paragraph 12.6 of the Tribunal's October 2005 Guide to Proceedings ("the CAT Guide").

(e) The position of T-Mobile and Orange

23. In their written submissions to the Tribunal, T-Mobile and Orange took no position on OFCOM's contentions. Before us, however, Mr Pickford for T-Mobile and Orange indicated that whilst T-Mobile and Orange had nothing to say in respect of OFCOM's submissions that the Category 1 and Category 2 evidence should be excluded, T-Mobile and Orange did not support (indeed, were contending against) the general restrictions that OFCOM was contending for regarding the admissibility of evidence generally under section 192 of the 2003 Act, which we have identified in paragraph 14 above.

24. Beyond this, T-Mobile and Orange:

    (a) Objected to the admissibility of Reid 1 and Richards 1, on the grounds that their evidence was not factual, but expert.

    (b) Objected to Kilburn 1 (specifically, paragraphs 38 to 41 and sections 4, 5 and 6) on grounds similar to those advanced by O2.

(c) Objected to BT's Notice of Appeal, on the grounds that it failed to make sufficiently clear how the evidence adduced by it supported the contentions made in the Notice of Appeal.

(f) Summary of objections

25. The points taken against BT's Notice of Appeal, and the evidence that it served in support of its Notice, can thus be classified under the following heads:

(a) That the Category 1 and Category 2 evidence served by BT ought to be excluded. This would have the consequence that those parts of the Notice of Appeal that depend on this evidence would have to be struck out.

(b) That Reid 1 and Richards 1 were inadmissible as factual evidence, because this evidence was, in reality, expert opinion evidence. There was a subsidiary question as to whether, even if put in a form appropriate to expert evidence, this evidence was admissible as such.

(c) That Kilburn 1 is inadmissible because it amounted to advocacy or argument.

(d) That the Notice of Appeal itself was objectionable because it failed to make sufficiently clear how the evidence adduced by BT supported the contentions made in the Notice of Appeal.

(g) BT's response

26. BT's contentions on these four points was as follows.

(i) Admissibility of the Category 1 and Category 2 evidence

27. BT contended that there were no limits on an appellant's ability to adduce evidence such as those contended for by OFCOM. In paragraph 1 of its Notice of Appeal, the basis for this contention appeared to be that "[p]ursuant to section 195 of the [2003] Act, this is a full *de novo* appeal on the merits". For the purposes of the hearing on

22-23 June, BT put the point a little differently. BT's argument was well-summarised in paragraph 50 of OFCOM's skeleton argument:

> "BT apparently contends that, as a "full merits appeal", the Tribunal is concerned with "the correctness of Ofcom's decision at the time it is before the Tribunal" (see Written Submissions of Appellant for Case Management Conference on 13 May 2010, paragraph 6). It appears to envisage no constraint on the nature of the "merits" arguments which may be deployed to attack Ofcom's decision, other than that such arguments must be made by reference to grounds set out in the notice of appeal. They may be entirely distinct from, and unrelated to, the arguments which were advanced to Ofcom. As a necessary corollary of such an approach, an appellant may adduce whatever evidence it considers necessary to support its case on appeal, regardless indeed of whether that evidence was adduced below. In effect, the appeal to the Tribunal would be akin to a *de novo* hearing, albeit framed by reference to the correctness of Ofcom's decision."

28. In other words, provided that the evidence adduced was referable to the grounds of appeal set out in the notice of appeal, it was admissible.

29. No doubt anticipating the risk that the Tribunal might adopt an approach to admissibility along the lines advocated by OFCOM, BT also contended that it had very much been taken by surprise by the content of the draft determination that had been issued by OFCOM as a precursor to the Determination. Dobbs 2 and Maldoom 2 had, therefore, been submitted late in the day in response to the draft determination. For its part, OFCOM did not accept this explanation, and submitted a witness statement of Mr Neil Buckley of OFCOM describing the process whereby the Determination was reached. In response, BT submitted a witness statement of Mr Anthony Fitzakerly of BT.

(ii) Reid 1 and Richards 1

30. BT contended that Reid 1 and Richards 1 were properly served as factual witness statements; but, if necessary, it expressed a willingness to re-serve such evidence in the form of expert reports.

(iii) Kilburn 1

31. BT contended that Kilburn 1 was perfectly proper factual evidence, and not "advocacy".

(iv) Objectionability of the Notice of Appeal

32. BT contended that the Notice of Appeal was properly pleaded.

III. STRUCTURE OF THIS JUDGMENT

33. This judgment considers:

(a) In Section IV, the principles that the Tribunal should apply in determining whether the Category 1 and Category 2 evidence should be admitted. In particular, we consider the limits contended for by OFCOM (paragraph 14 above); the discretionary approach contended for by, amongst others, Vodafone (paragraph 17 above); and BT's contention that there are no limits on an appellant's ability to adduce evidence (paragraphs 27-28 above).

(b) In Section V, we apply these principles to the Category 1 and Category 2 evidence to determine its admissibility.

(c) In Section VI, we consider the admissibility of the Reid 1, Richards 1 and Kilburn 1 witness statements. Although the submissions directed to Kilburn 1 were different to those directed to Reid 1 and Richards 1, we consider that the admissibility of these statements is best considered together.

(d) In Section VII, we consider T-Mobile's and Orange's objections to BT's Notice of Appeal.

Our conclusions are set out in Section VIII.

IV. ADMISSIBILITY OF EVIDENCE IN SECTION 192 APPEALS

(a) An overview of the section 192 appeal procedure

34. Section 192(2) of the 2003 Act provides that "[a] person affected by a decision to which this section applies may appeal against it to the Tribunal". Section 192(1)

defines the scope of section 192, identifying four classes of decision to which section 192 applies. These four classes are set out in sections 192(1)(a) to (d).

35. Sections 192(3) to (8) then describe the manner in which appeals to the Tribunal are to be made. Section 195 states how the Tribunal is to dispose of an appeal under section 192.

36. We shall refer to this form of appeal as a "Section 192 Appeal", and consider the provisions relating to such appeals in greater detail below. For the present we would observe that these provisions do three things:

(a) First, they define which decisions can be appealed to the Tribunal by way of a Section 192 Appeal.

(b) Secondly, they describe, procedurally, how such a Section 192 Appeal is to be made to the Tribunal.

(c) Thirdly, they set out how the Tribunal must dispose of a Section 192 Appeal.

(b) Decisions that can be appealed to the Tribunal by way of a Section 192 Appeal

37. As we have noted, section 192(1) identifies four classes of decision which can be appealed by way of a Section 192 Appeal. These four classes are set out in sections 192(1)(a) to (d) of the 2003 Act.

38. Section 192(1)(a) refers to a decision by OFCOM under Part 2 of the 2003 Act. Part 2 of the 2003 Act comprises sections 32 to 197 of that Act. Sections 185 to 191 make provision for OFCOM's power to resolve disputes. We refer to this process as the "Dispute Resolution Process". The Determination was made pursuant to the Dispute Resolution Process.

(i) The Dispute Resolution Process

39. Sections 185(1) and (2) of the 2003 Act define the disputes to which section 185 applies, and the parties between whom such disputes may arise. Section 185(3) provides that "[a]ny one or more of the parties to the dispute may refer it to OFCOM". It is for OFCOM to stipulate the manner in which such a reference is to be made (sections 185(4)-(6)). In the present case, OFCOM accepted jurisdiction to resolve the disputes between BT and the MNOs under section 185(1)(a) of the 2003 Act. This is clear from paragraph 2.14 of the Determination.

40. Section 186 governs the steps that follow where a dispute is referred to OFCOM under section 185, in terms of whether OFCOM accepts or does not accept the dispute. Essentially, OFCOM is constrained to accept jurisdiction over disputes falling within section 185, unless it is satisfied that the criteria for dispute resolution by alternative means set out in section 186(3) are met.

41. Section 188 of the 2003 Act sets out the procedure that OFCOM must apply in terms of resolving disputes. Sections 188(5) and (6) make very clear that the Dispute Resolution Process is intended to be swift:

> "(5) Except in exceptional circumstances and subject to section 187(3) [which provides for court-imposed stays on the Dispute Resolution Process], OFCOM must make their determination no more than four months after the following day –
>
> (a) in a case falling within subsection (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and
>
> (b) in a case falling within subsection (1)(b), the day on which the dispute is referred back to them.
>
> (6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable."

42. OFCOM's powers to resolve referred disputes are set out in section 190. Section 191 makes provision for OFCOM to require information in connection with the dispute.

(ii) Inter-relationship between the Dispute Resolution Process and Section 192 Appeals

43. On behalf of OFCOM, Mr Herberg stressed the speedy nature of the Dispute Resolution Process, and suggested that any appeal arising out of such a process must be similarly swift. Otherwise, the statutory purpose underlying the Dispute Resolution Process would be thwarted. It was noted before us that both the Dispute Resolution Process and Section 192 Appeals derive from, and seek to implement, certain of the UK's obligations under EU law regarding electronic communications. The relevant EU law comprises Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive"), and four more specific directives, known as the "Specific Directives". One of these is the "Access Directive", Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities.

44. As the Tribunal has noted in other cases, the Dispute Resolution Process seeks (at least in part) to implement into UK law the provisions of Article 20 of the Framework Directive and Article 5(4) of the Access Directive (*British Telecommunications plc v Office of Communications* [2010] CAT 15 at paragraph [81]), whereas provisions regarding Section 192 Appeals seek (at least in part) to implement Article 4 of the Framework Directive (*Hutchison 3G Limited v Office of Communications* [2005] CAT 39 at paragraph [25]).

45. Mr Herberg suggested that the speedy nature of the Dispute Resolution Process, as well as the European law source for both the Dispute Resolution Process and the Section 192 Appeal provisions were important factors to take into account when construing the statutory provisions relating to Section 192 Appeals.

46. Neither BT, nor the MNOs disputed this. However, Mr Graham Read QC for BT pointed out, the provisions relating to Section 192 Appeals cannot simply be construed in the light of the Dispute Resolution Process. Whilst it is true that decisions under the Dispute Resolution Process can be appealed to the Tribunal by way of a Section 192 Appeal, that process does not apply only to such decisions. The Section 192 Appeal process applies to all the decisions defined in section 192(1). Thus, as BT stated in paragraph 30 of its skeleton, the Section 192 Appeal

process draws no distinction between appeals to the Tribunal in respect of disputes decided under the Dispute Resolution Process, and any of other the decisions listed in section 192(1), which might comprise a decision from a compliance investigation or the imposition of an SMP condition.

47. Accordingly, whilst we accept the force of Mr Herberg's submissions, and take into account in construing them, the relevant provisions of the common regulatory framework, we do not consider that sections 193 to 195 can be construed as if they were a process solely for appealing decisions arising out of the Dispute Resolution Process. As we have said, these sections apply equally, and without differentiation, to all of the decisions defined in section 192(1), and we consider this also to be relevant to the construction of these sections.

(c) A purely discretionary approach?

48. At times, some of the parties came close to suggesting that the question of admissibility of evidence was simply a matter of discretion on the part of the Tribunal. Reference, in particular, was made to rule 22(2) of the 2003 Tribunal Rules, which states:

> "The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken."

49. As Mr Ward pointed out, the 2003 Tribunal Rules apply to an even greater range of proceedings than are defined under section 192(1) of the 2003 Act (for example, appeals under sections 120 and 179 of the Enterprise Act 2002; appeals under section 46 of the Competition Act 1998; and claims for damages under section 47A of the Competition Act 1998). In such circumstances, it is inevitable that a rule as to the admissibility of evidence such as rule 22(2) will be broadly drafted. Of course, the broader the drafting, the less the guidance. We consider that rule 22(2), whilst it provides a considerable discretion, provides very little guidance as to how that discretion is to be exercised.

50. That is not, we would stress, because the Tribunal lacks guidance as to how its discretion should be exercised. It is simply that such guidance is not to be found in

rule 22(2), but in the statutory provisions that provide for an appeal to the Tribunal in the first place. And so, in this case, we are thrown back to the provisions governing the Section 192 Appeals.

(d) How a Section 192 Appeal is made to the Tribunal

51. As we noted in paragraph 36 above, the manner in which a Section 192 Appeal is made to the Tribunal is set out in sections 192(3)-(6) of the 2003 Act. Essentially, the means of making an appeal is "by sending the Tribunal a notice of appeal in accordance with Tribunal rules" (section 192(3)). The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules (section 192(4)).

52. It is important to note that the 2003 Tribunal Rules were already in being when the 2003 Act received the Royal Assent on 17 July 2003, the 2003 Tribunal Rules having been made on 23 May 2003. Of course, in communications appeals, the 2003 Tribunal Rules are supplemented by The Competition Appeal Tribunal (Amendment and Communication Act Appeals) Rules 2004, S.I. 2004 No. 2068 ("the 2004 Tribunal Rules"). But for present purposes, the 2004 Tribunal Rules add nothing to the 2003 Tribunal Rules. The relevant provisions of the 2003 Tribunal Rules are considered further below.

53. According to section 192(5) of the 2003 Act, the notice of appeal must set out:

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

(b) The grounds of appeal.

54. By section 192(6) of the 2003 Act, 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 (or other decision-maker, as the case may be).

55. These provisions set out, with a high degree of specificity, how an appeal to the Tribunal is to be made. The provisions could have made provision for the sort of evidence that an appellant might be entitled to adduce in an appeal under the Section 192 Appeal process, including making provision for the sort of limitations contended for by OFCOM. Significantly, they do not.

56. The notice of appeal is clearly intended by section 192 to be an important document. The notice of appeal is the means of commencing a Section 192 Appeal. Moreover, section 192(3) tells us that "[t]he means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules" (emphasis added).

57. It is accordingly necessary to have reference to the relevant Tribunal rules. The relevant provision within the Tribunal rules is rule 8 of the 2003 Tribunal Rules (which is not affected by the 2004 Tribunal Rules).

58. Although rule 8 is well-known, it is for present purposes important to have regard to its provisions:

> "(1) An appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.
>
> (2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.
>
> (3) The notice of appeal shall state –
>
> (a) the name and address of the appellant;
>
> (b) the name and address of the appellant's legal representative, if appropriate;
>
> (c) an address for service in the United Kingdom;

(d) the name and address of the respondent to the proceedings,

and shall be signed and dated by the appellant, or on his behalf by his duly authorised officer or his legal representative.

(4) The notice of appeal shall contain –

(a) a concise statement of the facts;

(b) a summary of the grounds for contesting the decision, identifying in particular:

(i) under which statutory provision the appeal is brought;

(ii) to what extent (if any) the appellant contends that the disputed decision was based on an error of fact or was wrong in law;

(iii) to what extent (if any) the appellant is appealing against the respondent's exercise of his discretion in making the disputed decision;

(c) a succinct presentation of the arguments supporting each of the grounds of appeal;

(d) the relief sought by the appellant, and any directions sought pursuant to rule 19; and

(e) a schedule listing all the documents annexed to the notice of appeal.

...

(6) 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."

59. The CAT Guide describes one of the main principles underlying the Tribunal rules: each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset (see paragraph 3.4(i)). Rule 8(6)(b) reflects this principle. In the case of an appellant, its notice of appeal – and, more particularly, the documents on which that notice relies – will be produced within

two months of the disputed decision (rule 8(1)), and before any substantive response is received from the respondent and any interveners.

60. Indeed, that is the case here. According to the normal process, neither OFCOM nor the MNOs have provided any substantive response to the Notice of Appeal.

61. The 2003 Tribunal Rules impose no restriction on the evidence that can be adduced in support of a notice of appeal. Certainly, an appellant's ability to adduce evidence is in no way restricted by the sort of limitations contended for by OFCOM. Of course, as we have noted, the 2003 Tribunal Rules apply generally (occasionally, with modification by virtue of the 2004 Tribunal Rules) to all proceedings before the Tribunal. However, Parliament chose, in section 192(3), to define the document commencing a Section 192 Appeal as "a notice of appeal in accordance with Tribunal rules", without glossing or in any way refining those rules.

62. The mechanics of an appeal to the Tribunal are clear under the 2003 Tribunal Rules:

(a) The notice of appeal must be lodged within two months: rule 8(1). This time limit cannot be extended except in exceptional circumstances: rule 8(2).

(b) The notice of appeal must contain the grounds of appeal and the evidence (including expert evidence) supporting it: rule 8(6).

(c) The notice of appeal can only be amended subsequently with permission: rule 11(1). The circumstances where an amendment adding a new ground for contesting the decision will be allowed are highly restrictive: rule 11(3).

63. Thus, it is clear that the Tribunal rules do contain quite clear restrictions regarding the evidence that an appellant may adduce. The evidence must accompany the notice of appeal, which must be served within two months. It is simply that those restrictions are not the restrictions contended for by OFCOM.

64. Sections 192(3) to (6) could, had Parliament so intended, have imposed further restrictions regarding the notice of appeal. Arguably, sections 192(5) and (6) of the 2003 Act do, although the content of these subsections actually duplicates rule

8(4)(b) of the 2003 Tribunal Rules. What is absolutely clear is that no restrictions of the sort contended for by OFCOM are imposed.

65. For us to accede to OFCOM's argument, and to import into Section 192 Appeals the sort of restrictions that we have described in paragraph [14] above, would be to re-write section 192 to import into the 2003 Act restrictions which Parliament never made.

(e) Disposal by the Tribunal of Section 192 Appeals

66. Section 195 of the 2003 Act sets out how the Tribunal must dispose of Section 192 Appeals:

> "(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).
>
> ..."

67. Section 193(2) makes absolutely clear that the Tribunal must decide a Section 192 Appeal:

> (a) On the merits; and

(b) By reference to the grounds of appeal set out in the notice of appeal.

68. Clearly, these are separate and distinct requirements. They go to quite separate matters.

(i) "...on the merits..."

69. The first requirement ("...on the merits...") makes clear the basis upon which the Tribunal must consider the decision that is being appealed to it.

70. Thus, the first limb of section 193(2) quite clearly requires that the appeal be conducted "on the merits" and not in accordance with the rules that would apply on a judicial review. This point was very clearly made in *Hutchison 3G UK Limited v Office of Communications* [2008] CAT 11 at paragraph [164]:

> "However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one."

We consider that this correctly states the legal consequences of section 193(2).

71. That said, Jacob LJ in *T-Mobile (UK) Limited v Office of Communications* [2008] EWCA Civ 1373 made absolutely clear that the Section 192 Appeal Process is not intended to duplicate, still less, usurp, the functions of the regulator. In paragraph [31], he stated:

> "After all it is inconceivable that Article 4 [of the Framework Directive], 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."

72. The first limb of section 193(2) says nothing about admissibility of evidence or the evidence upon which the Tribunal must base its decision. It simply makes clear that a Section 192 Appeal is a "merits" review as opposed to a judicial review.

(ii) "...by reference to the grounds of appeal set out in the notice of appeal..."

73. The second requirement ("...by reference to the grounds of appeal set out in the notice of appeal...") makes clear that the Tribunal considers ("on the merits") the decision that is being appealed to it by reference only to the grounds of appeal set out in the notice of appeal.

74. This second limb also says nothing about admissibility, but simply makes clear that the Tribunal must, on an appeal, consider whether the decision being appealed can be justified in the light of the grounds of appeal, as set out in the notice of appeal. The important point is that the content of the notice of appeal has already been statutorily prescribed. As we have noted (in paragraphs [51] to [65] above), these provisions do not contain the sort of limitations on admissibility contended for by OFCOM.

(iii) A Section 192 Appeal is not a "de novo" hearing

75. As we noted earlier, the Notice of Appeal stated (in paragraph 1) that "[p]ursuant to section 195 of the Act, this is a full *de novo* appeal on the merits". We do not consider that this correctly describes the Section 192 Appeal process.

76. By section 192(6) of the 2003 Act and rule 8(4)(b) of the 2003 Tribunal Rules, the notice of appeal must set out specifically where it is contended OFCOM went wrong, identifying errors of fact, errors of law and/or the wrong exercise of discretion. The evidence adduced will, obviously, go to support these contentions. What is intended is the very reverse of a *de novo* hearing. OFCOM's decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points.

77. The nature of the appeal before the Tribunal is similarly made clear in sections 193(3) and (4) of the 2003 Act. These sections make plain that it is not for the Tribunal to usurp OFCOM's decision-making role. The Tribunal's role is not to make a fresh determination, but to indicate to OFCOM what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal and then to remit the matter back to OFCOM.

78. In short, a *de novo* re-run of the original investigation is not envisaged. The Section 192 Appeal process is a sharper tool, based on a three stage process:

(a) The notice of appeal must set out specifically the alleged deficiencies in the decision under appeal.

(b) The Tribunal considers those deficiencies on the merits.

(c) If those deficiencies – or any of them are made out – the matter is then remitted to OFCOM.

(f) Effects on the Section 192 Appeals

79. We consider the statutory provisions relating to Section 192 Appeals to be extremely clear. Nevertheless, a number of the parties – OFCOM in particular – addressed themselves to the consequences that might entail, were evidence like BT's Category 1 and Category 2 evidence to be admissible in Section 192 Appeals. Out of deference to the careful argument of the parties, we consider these points in the following paragraphs.

80. OFCOM submitted that BT's suggested approach to the admissibility of evidence would have certain very serious adverse consequences. Paragraphs 50 to 54 of OFCOM's skeleton state as follows:

> "50. BT apparently contends that, as a "full merits appeal", the Tribunal is concerned with "the correctness of Ofcom's decision at the time it is before the Tribunal"...It appears to envisage no constraint on the nature of the "merits" arguments which may be deployed to attack Ofcom's decision, other than that such arguments must be made by reference to grounds set out in the notice of appeal. They may be entirely distinct from, and unrelated to, the arguments

> which were advanced to Ofcom. As a necessary corollary of such an approach, an appellant may adduce whatever evidence it considers necessary to support its case on appeal, regardless indeed of whether that evidence was adduced below. In effect, the appeal to the Tribunal would be akin to a *de novo* hearing, albeit framed by reference to the correctness of Ofcom's decision.
>
> 51. Ofcom submits this cannot be the correct approach to the ambit of the right of appeal conferred by section 195(2) CA 2003.
>
> 52. First, it is contrary to the overall role of the Tribunal as envisaged by the legislature in enacting CA 2003, namely to function as an *appellate* body and to determine "appeals" to decisions taken by Ofcom. Once the Tribunal conducts a *de novo* investigation and adjudication of the correctness of the decision, it ceases to be a genuine appellate body of the kind envisaged by the legislation and as contemplated by the European Union legislation which the relevant provisions of CA 2003 sought to implement... Instead, the Tribunal becomes a primary decision-maker.
>
> 53. Second, and following naturally from that conclusion, it would be contrary to public policy to endow the Tribunal with this kind of function. The practical effect would be to usurp Ofcom's role as decision-maker (as the national regulatory authority) and render its role sterile. There would be no real necessity for a party to engage with Ofcom's dispute resolution processes because the whole matter could effectively be re-heard in front of the Tribunal.
>
> 54. Quite apart from constituting a waste of public resources, such an approach cannot be reconciled with the clear intention behind the statutory time limits contained in section 188 CA 2003. These were obviously designed to ensure that a determination proceeds speedily to a conclusion... There would be little purpose in placing such onerous time constraints on Ofcom if its determinations could so easily be overtaken by allowing a party to proceed to an appeal which, given the constraints on the Tribunal and allowing for the practicalities of litigation, would almost certainly take longer than the initial determination and in which entirely new arguments and evidence could be advanced."

81. Essentially, OFCOM suggests that if BT's approach to the admissibility of evidence were right, these consequences would follow:

(a) Appeals to the Tribunal would effectively be *de novo* re-runs of the original investigation before OFCOM, with the result that the Tribunal ceases to be a genuine appellate body and OFCOM's role as decision-maker is usurped.

(b) The appeal process would be slow, in contrast to the swift Dispute Resolution Process.

(c) The disputing parties before OFCOM would be tempted not to engage with OFCOM, and would effectively treat the appeal before the Tribunal as the forum in which key points should be made.

We do not consider these points to be well-founded, for the reasons below.

82. We have considered the nature of Section 192 Appeals in paragraphs [69] to [78] above. For the reasons we give in these paragraphs, we do not accept that BT's approach to admissibility would have the consequences described by OFCOM, and would certainly not turn the process into *de novo* re-runs of the original investigation.

83. We entirely accept that the Dispute Resolution Process is intended to be a quick one: sections 188(5) and (6) of the 2003 Act make this plain. OFCOM's determination must be made within four months. We accept that it would be invidious were the process for the determination of appeals arising out of the Dispute Resolution Process to add considerably to this timescale.

84. The notice of appeal in Section 192 Appeals must be lodged within two months of the decision being appealed against. As we have noted, this is intended to be a substantial document in its own right, annexing the witness statements and expert reports on which the appellant proposes to rely. Thereafter, the timetable to the substantive hearing of the Section 192 Appeal will turn on the directions given by the Tribunal. We do not consider that BT's approach to the admissibility of evidence renders the Section 192 Appeal process slower than it would be were OFCOM's approach to be adopted.

85. We consider that OFCOM's approach to admissibility 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. If there were restrictions on the admissibility of evidence of the sort contended for by OFCOM:

(a) The parties to the Dispute Resolution Process would be tempted to overload that process with evidence that might be helpful, knowing that unless such

evidence was adduced before OFCOM, there might be difficulties in adducing it before the Tribunal in any Section 192 Appeal.

(b) Any decision OFCOM made regarding the duration of its investigation under the Dispute Resolution Process (ie whether "exceptional circumstances" existed to justify a determination being made later than four months under section 188(5) of the 2003 Act) would likely receive far greater scrutiny by the parties than such decisions do at present, simply because – once the Dispute Resolution Process has concluded – the ability to adduce further evidence would be limited.

(c) The process of determining whether "exceptional circumstances" existed under OFCOM's test for the admission of evidence before the Tribunal would add a round of procedural argument in any case where an appellant sought to rely on anything other than what had been adduced before OFCOM, thus delaying the substantive hearing of the Section 192 Appeal.

86. Finally, we consider it most unlikely that disputing parties before OFCOM would be tempted to avoid engagement with OFCOM during the Dispute Resolution Process. As we have stated, Section 192 Appeals are based around the notice of appeal, which is intended to identify specific deficiencies in OFCOM's decision. A party that did not engage in the Dispute Resolution Process would be hard-pressed to identify specific deficiencies in a process in which he did not engage. Equally, given the limited amount of time for the lodging of a notice of appeal, a party who did not engage in the Dispute Resolution Process would have difficulties in adducing all the evidence necessary for his appeal in two months. We have some difficulty in conceiving what incentives there would be for a party to delay submission of material until the Section 192 Appeal, just because the possibility to do so existed.

(g) The role of rule 22(2) of the Tribunal Rules

87. As we have stated, rule 22(2) of the 2003 Tribunal 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. In the present context, given our decision on the admissibility of evidence in Section 192 Appeals, applications to exclude will be more likely than applications to admit, but even these should be rare.

88. That said, we do not consider the Section 192 Appeal process to give the appellant *carte blanche* in terms of the evidence that is served in support of a notice of appeal. It is not a matter that arises for present purposes, but we consider that an application to exclude under rule 22(2) might well be maintainable where (for example): evidence served with the notice of appeal was unrelated to it; or where an appellant had quite deliberately declined to make a point or argument during the course of the Dispute Resolution Process. It also must be noted that evidence that proves to be unnecessary or duplicative can have adverse costs consequences for the party adducing it.

V. ADMISSIBILITY OF THE CATEGORY 1 AND CATEGORY 2 EVIDENCE

89. In the light of the foregoing, our short and unanimous conclusion is that the Category 1 and Category 2 evidence is admissible. For the reasons we have given, we do not consider that there are limits of the sort contended for by OFCOM on the evidence that may be admitted before the Tribunal on an appeal under section 192 of the 2003 Act. For this reason, it is not strictly necessary to consider whether – if such limits existed – sufficiently "exceptional circumstances" pertained so as to enable BT's evidence to be admitted.

90. Nevertheless, as this was a matter that was fully canvassed before us, we shall consider the circumstances in which the Category 1 and Category 2 evidence came to be adduced by BT, and whether these circumstances could be considered to be "exceptional". We note that a test of "exceptional circumstances" exists both in the Dispute Resolution Process (section 188(5) of the 2003 Act) and in the 2003 Tribunal Rules (rule 8(2) and rule 11(3)(c)), albeit in different contexts. The language, at least, is not unfamiliar.

91. The dispute between BT and the MNOs relates to wholesale charges levied by BT upon the MNOs for the termination on BT's network of calls to 0800 and 0808 numbers ("080 numbers"). Under BT's Standard Interconnection Agreement, BT has the right to notify proposed changes in the prices it charges to those who use the BT network. Notification of changes is given by way of "Network Charge Change Notices".

92. By Network Charge Change Notice "NCCN 956", dated 3 June 2009, BT notified communications providers using its network – which included the MNOs – that with effect from 1 July 2009 it intended to levy specified charges for terminating such calls on its network when they originated from a non-BT fixed or mobile network.

93. Paragraph 6 of the Notice of Appeal describes BT's view of the purpose of NCCN 956:

> "Essentially the NCCN 956 charges imposed a sliding scale of payments upon [communications providers] according to how much the [communications providers] were charging their own customers for 080 calls. Thus if the [communications providers] charged their callers nothing (in line with Ofcom's preferences), BT would make payments to the [communications providers] in respect of those calls. If the [communications providers] were charging 080 callers but up to no more than 8.49 pence per minute ("ppm") [including VAT], BT would make no charge to the [communications providers] (but also make no payment to the [communications providers]). Only if the [communications providers] were charging their callers 8.5ppm or more, would the [communications providers] start paying BT an element of the charges it imposed on callers (although the [communications providers] would still retain the majority of the charge). In fact the only [communications providers] charging callers of 080 numbers significant sums for making the calls are Mobile Network Operators…"

94. This is, of course, BT's own description of the purpose and effect of NCCN 956. We recognise that aspects of it (and perhaps its entirety) are almost certain to prove controversial in due course. Such matters of controversy are, however, not matters for resolution at this juncture, and we shall seek to steer clear of matters that are more properly left for the substantive hearing of this matter.

95. However, it is necessary to note at the outset the thrust of BT's contentions in the Notice of Appeal, namely that NCCN 956 was issued in furtherance of an effort by

BT to ensure that callers using its network to call 080 numbers are not charged (paragraph 3(i) of the Notice of Appeal).

96. Certainly, NCCN 956 was not accepted by a number of mobile communications providers. The essential chronology (focussing, obviously, on the events relevant to the evidential applications before us) leading to the Determination was as follows:

16 September 2009	OFCOM received a submission from T-Mobile (dated 15 September 2009) requesting OFCOM to resolve the 080 dispute between it and BT. A non-confidential version of this submission was sent by OFCOM to BT.
6 October 2009	OFCOM informed the parties that it had accepted the dispute, and that the deadline for determining it would be 4 months from 6 October 2009 – 5 February 2010.
14 October 2009 **23 October 2009** **30 October 2009**	OFCOM received similar requests to resolve the 080 dispute from: (1) Vodafone; (2) O2; (3) Orange.
29 October 2009 **11 November 2009** **11 November 2009**	BT made submissions in relation to the submissions of: (1) T-Mobile; (2) O2; (3) Orange.
13 November 2009	OFCOM wrote to the parties indicating that Vodafone, O2 and Orange would be joined to the existing BT/T-Mobile dispute, rather than each dispute being resolved as an individual dispute.
18 December 2009	BT asked OFCOM when a draft determination is likely to be received. OFCOM's response was that it was intending to issue the draft determination before Christmas.
23 December 2009	OFCOM issued its draft determination. The draft required any comments to be made by 5pm on 12 January 2010.
12 January 2010	BT made submissions on the draft determination, stating that it had "commissioned independent economic evidence and we will be aiming to share as much as is appropriate with Ofcom in the next few days".
27 January 2010	BT submitted to OFCOM Dobbs 1 and Maldoom 1.
3 February 2010	BT submitted to OFCOM Dobbs 2 and Maldoom 2.
5 February 2010	OFCOM issued its final determination.

97. BT's contention was that until it received OFCOM's draft determination on 23 December 2009, it was under a serious misapprehension as to the scope of the dispute. In the words of Mr Fitzakerly of BT (paragraph 4 of his statement):

> "It was always understood [by BT] that Ofcom had expressly *excluded* from the scope of the Dispute any consideration of the specific charges contained in NCCN 956. BT was thus required to address only whether it was fair and reasonable for <u>any</u> termination charge for calls to 080, not the specific ones in NCCN 956."

98. In other words, the question of whether there should be a termination charge was to be considered in the abstract, and the reasonableness or otherwise of NCCN 956 was not within the scope of the dispute. BT's understanding is very much borne out by an "update note" published by OFCOM on its website on 16 November 2009 ("Update Note: 16 November 2009"), part of which reads as follows:

> "**2) Level of charges notified in NCCN 956**
>
> T-Mobile stated in its response to the scope of this dispute that it considered it ought to be adjusted so that it not only consider whether BT is entitled to impose any charge, but also whether the specific charges (including the possibility that different amounts are charged to different operators for the same call termination service) are fair and reasonable.
>
> We do not consider it appropriate to amend the scope of this dispute to include consideration of whether specific charges introduced by BT are fair and reasonable. The main issue in dispute is BTs [*sic*] imposition of a new termination charge for 080 calls. Our first task, as set out in the published scope of the dispute, is to consider whether it is fair and reasonable for BT to impose any termination charge for calls to BT-hosted 080 numbers.
>
> We therefore consider that T-Mobiles [*sic*] request for us to consider the specific charges notified in NCCN 956 is premature. Should we determine that it is fair and reasonable for any payments to be made by either party, we would expect the parties to enter into commercial negotiations following determination of this dispute to consider, what, if any, charges may be justifiable and only bring the matter back to Ofcom should these discussions fail."

99. There can be no doubt that this was BT's contemporary understanding of the scope of the dispute being considered by OFCOM. In an email dated 8 November 2009, OFCOM asked BT whether if "the BT termination charge is 13ppm [pence per minute] then what is the end user average charge for T-Mobile? Are you using 27.50ppm as the base point or something different?" BT's emailed response, on 9 December 2009, asked:

"Can you let me know in what context these questions are posed as we are aware that the 080 charges themselves are not part of the 080 termination rate dispute scope?"

OFCOM's response (by email on 9 December 2009) was as follows:

"While we are not directly considering 080 charges, it is helpful to have this information to help us get an indicative view of the MNO retention on a 080 call (we are considering retention by MNOs as relevant and therefore the average retail price is relevant).

I hope this helps a little with the context."

100. OFCOM's draft determination provided, in the summary section, as follows:

"**Scope of the Dispute**

1.12 We determined the scope of the Dispute as follows:

i) whether it is fair and reasonable for BT to impose any termination charge for calls to 080 numbers hosted on its network, which originate on the Parties' networks;

ii) whether the Parties, as originating mobile network operators, should receive a payment from BT sufficient to cover their costs of originating calls to 080 numbers hosted by BT.

Summary of analysis and provisional conclusions

Overall provisional conclusion

1.13 We consider that, in certain circumstances (which we describe in sections 4 to 6):

(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' networks; and

(ii) it could be fair and reasonable for the 2G/3G MNOs to receive a payment from BT sufficient to cover their efficient costs of originating calls to 080 numbers hosted by BT.

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 the 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 NCCN 956."

[Terms as defined in the draft determination; footnotes omitted]

101. The above represents an accurate summary of OFCOM's draft determination. Essentially, OFCOM identified an analytical framework for "considering whether a payment in either direction [ie from BT to the MNOs or *vice versa*] is fair and reasonable". The analytical framework is described in paragraphs 4.22*ff* of the draft determination, and it was OFCOM's contention before us that BT either did in fact appreciate, or ought to have appreciated, that these were the sort of criteria that OFCOM would apply, since the analytical framework was closely related or derived from OFCOM's six principles of pricing and cost recovery. This relationship is described in paragraphs 4.55*ff* of the draft determination.

102. We are, for present purposes, quite prepared to accept that OFCOM's analytical framework is derived from OFCOM's six principles. We are a little more sceptical as to whether BT should have appreciated that this was the case, but (happily) we do not have to decide this difficult question of fact.

103. The reason we do not is that OFCOM presented BT with unequivocal statements (contained both in the Update Note: 16 November 2009 and in its 9 December 2009 email) that BT's charges (specifically charges under NCCN 956) were not under specific consideration, and that the scope of the dispute was confined to a question of principle – namely, whether it is fair and reasonable for BT to impose <u>any</u> termination charge for calls to BT-hosted 080 numbers.

104. Had OFCOM's reasoning in the draft determination ended at paragraph 1.13 of its summary (and the rest of the draft determination reflected that), then we consider that BT would have had nothing to complain about. But the content of paragraphs 1.14 and 1.15 – which fairly reflect the detail of the draft determination – demonstrate that OFCOM <u>had</u> (contrary to its previous statements) considered the specific charges imposed by NCCN 956 and had concluded that these charges could not be demonstrated to be fair and reasonable.

105. We say nothing about the substance of OFCOM's conclusion on this point: OFCOM may be right or it may be wrong on the point. Nor do we say anything about whether OFCOM should have extended the four month period for the Dispute Resolution Process on the grounds of exceptional circumstances. Neither of these points are relevant to the question of admissibility before us, and (rightly) none of the parties argued these points. We express no views.

106. However, the question whether exceptional circumstances existed entitling BT to adduce new evidence (in the form of the Category 1 and Category 2 evidence) was plainly before us. According to paragraph 118 of the Notice of Appeal:

> "[e]ach of these economists [being a reference to statements Dobbs 1 to 3, Maldoom 1 to 3, Reid 1 and Richards 1] analyses the benefit to consumers from a different perspective. From each of these different perspectives, the answer is the same: NCCN 956, far from being likely to increase the price that the 2G/3G MNOs charges callers to 080 numbers, has in fact the clear incentive for the 2G/3G MNOs to reduce their charges to 080 caller. The evidence analyses the issue in great depth from many angles: but whichever way one looks at it through the prism of economic analysis, NCCM 956 has the incentive to benefit consumers and Ofcom's analysis cannot stand."

107. If, contrary to the conclusion we have reached, OFCOM is right and there is a rule limiting the evidence that an appellant can adduce in the Section 192 Appeal process, then we conclude that the present case does constitute exceptional circumstances. 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.

VI. THE ADMISSIBILITY OF REID 1, RICHARDS 1 AND KILBURN 1

109. In Brealey & Green *et al*, *Competition Litigation*, 1st ed (2010), para 13.03 fn 1, it is noted that:

> "[t]he distinction between matters of fact and matters of opinion is not always easy to draw. For example, in many competition cases it will be necessary for the court or the CAT to have a detailed understanding of matters relating to the industry in question, often including matters of a technical nature. However, a witness who gives evidence (albeit based on his industry experience) of the characteristics of a particular industry or the likely costs of particular activities is providing factual, not expert evidence."

110. We consider that this statement is true of the present case. The economic and policy arguments that underlie NCCN 956 can be established both through factual evidence and through expert opinion evidence. In the present case, Messrs Reid and Richards are seeking to justify the charges imposed by NCCN 956 as witnesses of fact.

111. It may very well be that Mr Reid and Mr Richards are experts in their fields. However, they are also employees of BT. In these circumstances, BT has decided to present their evidence as evidence of fact and not as expert evidence. Whilst BT might very well have elected to present these witnesses as experts, as opposed to witnesses of fact, we do not consider it appropriate to second-guess BT's decision to adduce this evidence in the form of factual evidence. Obviously, the relationship that Messrs Reid and Richards have to BT is a matter that will, very likely, affect the weight of their evidence. But that is not a matter for this judgment, and we consider it no further.

112. As regards Kilburn 1, no-one contends that this is expert evidence. The question is whether it does not amount even to factual evidence, but is instead mere argument. The prohibition on witnesses engaging in matters of argument contained in paragraph 12.6 of the CAT Guide is an important one. Self-evidently, witnesses of fact should confine themselves to factual matters, and experts to matters of expert opinion.

113. But this is a case where BT is contending that NCCN 956 can be justified in the light of OFCOM's analytical framework. Inevitably, NCCN 956 needs to be

justified, and in such a case the borderline between argument and fact is an extremely difficult one. There is, in our view, a role for evidence that places NCCN 956 into context and states its rationale. In these circumstances, we do not consider that Kilburn 1 is so clearly on the wrong side of the line as to warrant exclusion under rule 22(1). Clearly the weight that can be given to Kilburn 1 needs to be a matter of careful consideration at the substantive hearing.

VII. OBJECTIONABILITY OF THE NOTICE OF APPEAL

114. In argument, it was made clear that T-Mobile and Orange were objecting to paragraphs 116*ff* of the Notice of Appeal, and specifically the fact that BT had failed to identify the passages in Dobbs 1 to 3, Maldoom 1 to 3, Reid 1 and Roberts 1 that supported the plea in these paragraphs.

115. We consider that the plea in paragraphs 116*ff* of the Notice of Appeal is clear, and have set out its substance in paragraph [106] above. The reports cited by BT (so BT would say) go to support this case. It would be premature for us to say anything, one way or the other, on the substance. But BT's contention (right or wrong) is plain to see, and we do not consider that any further clarification is necessary.

VIII. CONCLUSIONS

116. For the reasons we have given, our unanimous conclusions are:

(a) That the Category 1 and Category 2 evidence served by BT is admissible and are not to be excluded pursuant to rule 22(2) of the 2003 Tribunal Rules.

(b) That Reid 1, Richards 1 and Kilburn 1 are admissible as factual evidence and are not to be excluded pursuant to rule 22(2) of the 2003 Tribunal Rules.

(c) That the Notice of Appeal is unobjectionable and does not require amendment or further clarification in the manner suggested by T-Mobile and Orange.

Marcus Smith QC | Peter Clayton | Professor Paul Stoneman

Charles Dhanowa
Registrar

Date: 8 July 2010