Neutral citation [2013] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Cases No: 1152/8/3/10 (IR)
1156-1159/8/3/10
1170/8/3/10
1179/8/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

9 May 2013

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC (Hon)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants / Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Interveners

Heard at Victoria House on 6 February 2013

RULING ((1) COSTS AND (2) DISPOSAL OF FAPL'S APPEAL)

APPEARANCES

Mr James Flynn QC, Mr Meredith Pickford and Mr David Scannell (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

Ms Dinah Rose QC and Ms Jessica Boyd (instructed by the Office of Communications) appeared for the Respondent.

Ms Helen Davies QC (instructed by DLA Piper UK LLP) appeared for the Football Association Premier League Limited.

INTRODUCTION

1. This unanimous ruling, which adopts the same terms and abbreviations as used in the Tribunal's judgment of 8 August 2012 in cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v. Ofcom*, [2012] CAT 20 ("the Judgment"), deals with applications for costs made by Sky and FAPL. It also deals with the closely related question whether FAPL's appeal should be allowed or dismissed in the light of the Judgment (see paragraph 6 of our ruling on consequential matters of 27 February 2013 ([2013] CAT 4)).

2. By an application dated 18 January 2013, Sky applied for an order that Ofcom pay all of its costs of Sky's main appeal, of the STB and CAM appeals[1] and of Sky's application for interim relief,[2] such costs to be assessed if not agreed. By an application of the same date, FAPL submitted that its appeal should be allowed with costs. Ofcom filed written submissions on costs on the same date, and also on 4 February 2013 by way of reply to Sky and FAPL. We heard oral submissions from all three of these parties at a hearing on 6 February 2013.

SKY'S APPLICATION FOR COSTS

3. Sky submits that the Tribunal has a wide discretion in relation to costs under rule 55 of the Tribunal Rules and that, although the Tribunal has not necessarily adopted a "general rule" that costs follow the event, as under CPR Part 44.2(2)(a), it has nevertheless widely adopted as a starting point in proceedings in all its various jurisdictions under the 1998 Act, the 2002 Act and the 2003 Act, that the overall winner should be entitled to its costs. In support of this Sky refers in its written submissions to a number of cases decided by the Tribunal, including *Kier Group Plc & Ors v. Office of Fair Trading* [2011] CAT 33, at [8]. Sky submits that there is no good reason why that approach should not be followed in the present case.

4. Ofcom's submission is that there should be no order as to costs in relation to Sky's and FAPL's appeals.

[1] See paragraph 7 of the Judgment.
[2] See paragraph 6 of the Judgment.

5. Ofcom submits that there are fundamental differences between the types of case that the Tribunal has jurisdiction to hear, as well as between the facts of each case, and that the width of the Tribunal's discretion under rule 55 of the Tribunal Rules allows the Tribunal to reflect these differences in its approach to costs; that approach is not governed by a general rule of loser pays, such as applies in ordinary civil proceedings under CPR Part 44.2(2); instead the Tribunal has identified the appropriate starting point depending on the type of case; thus, whereas in appeals against decisions applying the *ex post* competition rules the appropriate starting point is that a successful appellant should be compensated for the costs it has incurred, Ofcom submits that different considerations apply to appeals under section 192 of the 2003 Act.[3]

Is Ofcom correct about the Tribunal's "consistent practice"?

6. Ms Dinah Rose QC, who appeared for Ofcom, submitted that although there is a general discretion under rule 55 it is the consistent practice of this Tribunal that the starting point when determining costs in appeals under section 192 of the 2003 Act is that Ofcom should not have to pay the costs if it loses, unless it has behaved unreasonably. In her submission this starting point is not limited to appeals against Ofcom's decisions under its dispute resolution function pursuant to section 185 of the 2003 Act. In support of these submissions Ms Rose took us to a number of authorities, including several decisions of the Tribunal.

7. The first was *British Telecommunications Plc v. Director General of Telecommunications* [2005] CAT 20. This case, also known as *RBS backhaul*, was an appeal by BT from a decision of Ofcom under its section 185 dispute resolution function. Ofcom had resolved a dispute between BT and Vodafone in favour of the latter, and the Tribunal held that Ofcom had erred in so doing. BT sought its costs and Ofcom opposed the application. The Tribunal made no order for costs. After referring to the width of its discretion under rule 55, to the absence of any rule that costs should follow the event, and to the need to proceed on a case by case basis, the Tribunal proceeded to examine the circumstances of the particular case. The

[3] The appeals in question were brought pursuant to subsection 317(6) of the 2003 Act. The provisions of subsections 192(3) to (8) are applied by virtue of subsection 317(7).

Tribunal noted that under the relevant statutory provisions Ofcom was required to resolve a dispute of that kind if requested by one of the parties, and to do so within a specified period. The Tribunal also considered that Ofcom was bound to defend its decision if challenged before the Tribunal (paragraph 55).

8. In relation to this last point, we note that since that judgment of the Tribunal the Court of Appeal has stated that Ofcom should not consider itself bound to defend every dispute resolution decision, and should consider whether it could simply let the disputing commercial parties fight it out on appeal:

> "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 [2003 Act] gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, but it does not follow that it needs to take an active part in the appeal. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom's approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal."
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> (Per Lord Justice Toulson, with whom the Chancellor and Lord Justice Sullivan agreed (*British Telecommunications plc v. Ofcom* [2011] EWCA Civ 245))

9. In *RBS backhaul* the Tribunal also made the following observations, to which Ms Rose particularly drew our attention:

> "60. It is also relevant in our view that in a regulated industry such as this, BT and the other principal parties to these proceedings will be in a constant regulatory dialogue with OFCOM on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which BT and the interveners are, in their own interests, routinely incurring regulatory costs which are not recoverable.
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> 61. Furthermore, none of the parties have submitted that, if the Tribunal does not make a costs order in their favour, they will have suffered a financial hardship by having brought the matter before the Tribunal.
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> 62. In our view, we have to strike a balance between, on the one hand, the fact that BT has been successful, and on the other hand, the various considerations

> mentioned above. Rule 55 gives the Tribunal a wide discretion. Our judgment is that where OFCOM has determined a dispute in accordance with the procedure in the 1997 Regulations, and could have been appealed against by either side, it would not be right to order OFCOM to pay BT's costs in circumstances where OFCOM defended the appeal entirely reasonably and wider public interests were involved. BT has benefited commercially from the stance which it legitimately took. We do not consider that BT will suffer material financial hardship if the costs of this case are treated as part of the general regulatory costs which BT incurs by virtue of the fact that it has significant market power.
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> 63. We do not accept that, in those circumstances, our view as to costs would have a "chilling effect" on the bringing of appeals by companies in the position of BT. On the contrary, we have some concern at this early stage of the Tribunal's jurisdiction under the 2003 Act that an order against OFCOM would have a "chilling effect" in the opposite direction by making OFCOM less resolved to defend its decisions, or more ready to compromise, when faced with appellants with market power and large financial resources. Any such pressure on OFCOM would not be in the public interest."

10. Ms Rose submitted that the comment at paragraph 60 pointed up a "key" distinction between cases such as the present, and appeals under the 1998 Act or judicial reviews in merger and market investigation cases. In contrast to the latter cases, Ofcom was a sectoral regulator, and those who wish to participate in broadcasting or in telecoms were required to be licenced by Ofcom and to pay the costs of Ofcom's continuing regulation of the sector. That, she said, was entirely different from the situation where a company has no ongoing regulatory relationship with the regulator but finds itself, in effect, prosecuted by the OFT.

11. With regard to the Tribunal's observations about dispute resolution appeals in paragraph 62 of *RBS backhaul*, Ms Rose submitted that although the present one was not such a case, it was closely analogous because in addition to Sky's and FAPL's appeals against the Statement, appeals were also brought by BT and VM; Ofcom was therefore effectively stuck in the middle, with various commercial interests at loggerheads and an inevitable appeal no matter which way Ofcom decided; by virtue of subsection 316(2) of the 2003 Act, Ofcom was under a statutory duty in the public interest and in the interests of consumers to take a decision and to impose appropriate licence conditions where it considered the criteria fulfilled, and it would be problematic if it were deterred from doing so through fear of an enormous costs award such as is sought here; Ofcom would have faced an appeal even if it had not taken action or had imposed a different remedy.

12. As to the first of these points, it is true that a sectoral regulator has an ongoing relationship with those it regulates, and that the latter incur significant irrecoverable costs in meeting regulatory requirements, as the Tribunal stated in *RBS backhaul*. However, whilst this may be a relevant factor depending on the circumstances, we doubt that it is likely to be a powerful factor in many cases when one comes to consider whether an award of costs to a successful section 192 appellant is appropriate. As the Tribunal said in that same passage, the situation changes once appeal proceedings are on foot. The fact that regulation causes a company to incur costs which it cannot recover directly, and which are therefore simply another outgoing to be borne by its business and ultimately its customers, does not seem to be a compelling reason, of itself, to deprive the company of the costs of a successful legal challenge to regulatory action which, *ex hypothesi*, was wrong.

13. We should also say that, if and in so far as any costs awarded against Ofcom would fall to be recovered in whole or in part from licensees of Ofcom, including Sky itself, as part of the overall funding arrangements for regulation in this sector, this is not in our view a factor which has any real bearing on our decision. If we had reached the conclusion that Sky was otherwise entitled to an order for costs against Ofcom, the fact that there might be some degree of circularity in that Sky would indirectly be making some contribution to the sum that Ofcom was ordered to pay, would not deflect us. Less injustice would be caused by making the order, than by depriving Sky of the whole of its entitlement. It would be fairer in those circumstances for the costs of challenging a flawed regulatory decision to be shared by all those within the regulated sector than borne entirely by one of them.

14. As to Ms Rose's second point, we are of the view that the analogy between *RBS backhaul* and the present case is not as close as Ms Rose has suggested, and that she overstated the position when she suggested that whatever Ofcom had done in the Pay TV matter it would have found itself facing an appeal. The key passage in the judgment in *RBS backhaul* is paragraph 62, where the Tribunal placed emphasis on the fact that the decision under appeal was the result of Ofcom's obligation to resolve disputes between commercial entities, either of whom could appeal therefrom. Whereas in that case Ofcom had no real alternative but to resolve the dispute once this was requested by a party, the position under section 316 is much

more nuanced, and in practice provides Ofcom with more scope for the exercise of judgment and discretion notwithstanding the presence of some mandatory language in the section. For example, the parties whose joint complaint led to Ofcom's investigation had originally requested Ofcom to refer the whole of the Pay TV industry (rather than just the movies market) to the Competition Commission ("CC") for a market investigation. Had Ofcom acceded to that request then it is at least open to doubt whether there would have been a legal challenge to that referral decision. It is, of course, correct that an appeal is theoretically possible whatever the decision, but there was in fact no challenge to Ofcom's referral of movies, and no challenge to the CC's ultimate decision on that referral.

15. That said, as indicated in *RBS backhaul*, it is certainly a relevant consideration whether and if so to what extent in any particular case the possibility of a substantial award of costs is likely to have a chilling effect on Ofcom doing what it considers to be appropriate in the exercise of its statutory duties. However, whatever the position may have been in the infancy of the current regulatory regime, we are not persuaded that the risk that a mature and responsible regulator such as Ofcom would be deflected by that consideration is of itself so substantial as to justify accepting *as a general principle* that an adverse order for costs should not be made against Ofcom in section 192 appeals.

16. Next Ms Rose took us to the Tribunal's judgment in *Hutchison 3G (UK) Limited v. Ofcom* [2006] CAT 8 ("*H3G*"). This was a section 192 appeal, but the decision appealed against was not made pursuant to the dispute resolution function. The Tribunal first stated that it was a clearly established principle that any issue of costs should be decided on a case by case basis. It then explained (at paragraph 44) that the reason for making no order for costs was that the appellant:

> "…has succeeded only in part. It would be a mischaracterisation of our judgment to suggest that [the appellant] has "substantially" succeeded in its appeal. [The appellant] did not succeed on a very significant number of issues that were advanced by way of argument, and those issues took significant time and effort. Furthermore, the extent to which it succeeded was reflected in the limited point which our order specifically sent back to Ofcom for reconsideration. The attack launched by [the appellant] was far more extensive than the level of its success… Furthermore, [the appellant's] case was to some extent a moveable feast…. Dealing with this shifting material will have caused the incurring of unnecessary costs by the other parties. Doing the best we can to reflect the time and costs

> involved in the issues on which it fought and won, fought and lost, and the shifting ground, we consider that the right order for costs would be that there be no order for costs."

17. The Tribunal went on to say that other relevant factors did not detract from, and probably reinforced, their conclusion. These included the fact that the appealed decision had been made in the context of a market review which the regulator had been obliged to carry out under the governing EU directive, and that the decision itself had been endorsed by the European Commission. Although that context "of itself might not mean that Ofcom should not pay costs if it gets something wrong and loses an appeal, it must be borne in mind that so far as Ofcom is concerned this is not commercial litigation" (paragraph 45). Given the wider public interest "costs might not follow the event to the same extent as in other litigation" (paragraph 46). The Tribunal expressly declined to express a view as to whether the "chilling effect" would by itself be sufficient to deprive the successful appellant in that case of costs to which it was otherwise entitled (paragraph 47).

18. Thus the Tribunal held that the result of the case did not justify an award of costs in the appellant's favour. The judgment reinforces the case by case approach and identifies possibly relevant factors in cases of that kind. The Tribunal also states (albeit in somewhat tentative terms) the well-established position that under rule 55 there is no rule, such as applies in other litigation, that costs should follow the event (paragraph 46). *H3G* does not in our view provide any support for the wide principle in relation to section 192 appeals for which Ms Rose contends. If anything, it takes as a starting point that costs follow the event.

19. The next authority was *Vodafone Limited v. Ofcom* [2008] CAT 39 ("*Vodafone*"). This was a successful section 192 appeal against a decision of Ofcom relating to number portability. It was not a dispute resolution decision. The Tribunal made an order that each party should bear its own costs. In its ruling the Tribunal made the now familiar reference to the need to adopt a case by case approach to the issue of costs, stating that the "question of whether to award costs in a particular set of circumstances… is a case specific exercise…" (paragraph 15). The Tribunal referred to dicta in two decisions of the Divisional Court (to which we will refer again below): *City of Bradford v. Booth* [2000] EWHC (Admin) 444 (per Lord

Bingham CJ) ("*City of Bradford*"), and *R (Cambridge City Council) v. Alex Nestling Limited* [2006] EWHC 1374 (per Toulson J), and to paragraph 60 of the judgment in *RBS backhaul* (cited at paragraph 9 above). Then the Tribunal noted a number of specific factors relating to the circumstances of the case before it; these included: (i) that the appeal in question had provided a useful opportunity for the Tribunal to clarify the scope of Ofcom's responsibilities when undertaking policy decisions of that kind; (ii) that the end result sought by Ofcom in the decision was neither illegitimate nor beyond Ofcom's powers, nor indeed opposed in principle by the appellant; (iii) that the decision was not made in bad faith nor was it an unreasonable exercise of Ofcom's public function; and (iv) that Ofcom's failure to withdraw its decision following the appellant's CPR Part 36-type letter was not unreasonable, as in the circumstances Ofcom was not bound to conclude that it would lose the appeal.

20. It is clear that in the light of these specific factors the Tribunal did not consider it appropriate to make an award of costs against Ofcom. Nowhere in the judgment is there anything to suggest that the Tribunal was applying a principle applicable to section 192 appeals generally, or that it was engaged in anything other than the "case specific exercise" to which the Tribunal had expressly referred at the outset of its ruling.

21. Next Ms Rose took us to *The Number (UK) Limited v. Ofcom* [2009] CAT 5 ("*The Number*"). This was a successful section 192 appeal against a dispute resolution decision of Ofcom under section 185. The appellant sought its costs from Ofcom, and the Tribunal made an order that each party bear its own costs. At the outset of its ruling the Tribunal cited rule 55 and said this (at paragraph 3):

> "How the Tribunal's discretion will be exercised is critically fact-dependent and will therefore depend on the circumstances of each case, although in each case the discretion should be exercised so as to deal with it justly."

22. The Tribunal later made observations upon which Ms Rose placed particular reliance:

> "4. …OFCOM are, of course, in a unique position as regulator under the 2003 Act when dealing with the resolution of disputes under section 185. In addition, OFCOM have statutory duties to perform and fulfil a role as guardians of the

> public interest. They are called upon in the exercise of their functions to exercise judgments and to take positions on factual and legal issues. It is therefore strongly arguable that this puts OFCOM in a different position from other parties when it comes to making costs orders, whether against OFCOM or in their favour, in cases where the manner of the exercise of their functions is in issue….
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> 5. It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it.
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> 6. …We cannot therefore conclude that any practice has been demonstrated to us that OFCOM should not, in an ordinary case, be subject to an adverse costs order. However, in principle we think that that is the correct approach. OFCOM is a body charged with duties in the public interest (see, for example, section 3 of the 2003 Act); they should not be deterred from acting in the way which they consider to be in that interest – provided that they act reasonably and in good faith – by a fear that in doing so they may find themselves liable for cost."

23. Ms Rose submits that the Tribunal was here setting out principles applicable to the generality of section 192 appeals and not just a dispute resolution decision such as the Tribunal was considering. In our view that is not a correct reading of the Tribunal's ruling. First, it would be surprising for the Tribunal to purport to lay down principles for cases other than the one with which it was concerned; it had just emphasised that the exercise of the Tribunal's discretion under rule 55 was "critically fact-dependent". Secondly, at the very outset of the passage cited above the Tribunal makes clear that Ofcom's "unique position as regulator" for these purposes relates to its *dispute resolution* function – the Tribunal says so in terms: "…when dealing with the resolution of disputes under section 185." Moreover the Tribunal uses the expression "unique position as regulator" again later in the passage. It seems clear to us that it is using it to mean the same thing. Third, the fact that the Tribunal also referred to the existence of other statutory duties of Ofcom does not mean that the ruling is to be taken as governing also cases where Ofcom was *not* engaged in its dispute resolution function, i.e. to cases where the central factor identified by the Tribunal in its ruling is absent. We do not consider that that is the effect of this ruling, which in our view is concerned only with appeals against

Ofcom's dispute resolution role under section 185. We note that in *Eden Brown Limited v. OFT* [2011] CAT 29, a costs ruling by the Tribunal in a successful appeal against a penalty imposed under the 1998 Act, the Tribunal commented on *The Number* as follows (at paragraph 4):

> "…as regards appeals under section 192 of the Communications Act 2003… against decisions by OFCOM *resolving disputes under section 185 of that Act*, the Tribunal has stated that the starting point is that OFCOM should not normally be the subject of an adverse costs order where it has acted reasonably and in good faith: *The Number (UK) Ltd v OFCOM (costs)* at [5]." (Our emphasis.)

24. We were then shown *T-Mobile (UK) Limited & Ors v. Ofcom* [2009] CAT 8 ("*T-Mobile*"). As with *The Number*, this concerned successful appeals from a number of dispute resolution decisions of Ofcom relating to the rates charged for mobile voice call termination. The Tribunal made an award of costs against Ofcom and in favour of the successful appellants. The Tribunal referred to the judgment in *The Number*, and in particular to its emphasis on the need for a case by case approach, and its confirmation that Ofcom may be liable for a successful appellant's costs even in the absence of any bad faith or unreasonable conduct if it is appropriate in all the circumstances to make such an order (see paragraph 4). The Tribunal stated that there had been a "compendium of serious errors" in Ofcom's methodology for assessing the reasonableness of prices and that the interests of justice lay in favour of awarding costs against Ofcom, notwithstanding Ofcom's reliance upon its "unique quasi-judicial role" (Ofcom's description) in deciding disputes pursuant to section 185, and notwithstanding that there was no suggestion of bad faith or unreasonable conduct. As to whether such an order would risk a "chilling effect" on Ofcom's exercise of its regulatory obligations, the Tribunal considered the argument "unduly alarmist". The Tribunal made what it termed a "modest" order amounting to £160,000 in total.

25. Ms Rose contrasted that amount with the indicative costs being claimed here, which are very much larger. As already indicated, we do not believe that the possibility of an award of costs in a section 192 appeal poses so substantial a risk of deterring Ofcom from taking appropriate regulatory action as to justify a *general principle* that such an award should not normally be made. However, the nature and extent of the risk that an award in a particular case could create a chilling effect is a relevant

factor when the Tribunal is considering whether to make an award against Ofcom and if so on what terms it should be made.

26. In *British Telecommunications plc v. Ofcom (Partial Private Circuits)* [2011] CAT 35, a dispute resolution appeal under section 192, the Tribunal made an award of costs *in favour* of Ofcom. In doing so the Tribunal applied as a starting point the principle that costs normally follow the event. However the Tribunal expressly declined to express a view about whether that starting point was the appropriate one where costs were being sought *against* Ofcom, whilst noting the following statement by the Court of Appeal, in relation to the UK Border Agency, in *R (Bahta) v. Secretary of State for the Home Department* [2011] EWCA Civ 895 at paragraph 60:

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

27. Finally, so far as decisions of the Tribunal are concerned, Ms Rose drew our attention to *Everything Everywhere Limited v. Ofcom* [2011] CAT 45, a further section 192 appeal involving the exercise by Ofcom of its dispute resolution function in which costs were awarded in favour of Ofcom.

28. We thought it right, and indeed were invited by counsel, to consider these costs rulings in some detail in view of Ofcom's submission that it is the consistent practice of this Tribunal to take as a starting point the principle that, in the absence of bad faith or unreasonable conduct, Ofcom should not have to pay any costs of the successful appellant in an appeal brought under section 192. We have not found this submission to be substantiated in the light of these costs rulings.

29. In the section 192 appeals in which Ofcom was *successful* the Tribunal applied as a starting point that costs should follow the event, whilst expressly declining to comment on a situation where Ofcom was the loser. This same approach (i.e. of beginning the analysis by considering which, if any, party is the winner in the appeal) also appears to have been adopted by the Tribunal in *H3G,* where the

decisive reasoning underlying the order of "no order for costs" was that the appellant had not been a clear winner in the appeal, having scored only a somewhat partial victory and lost on a significant number of the issues raised. In *Vodafone*, although the Tribunal discussed *RBS backhaul*, it emphasised the case by case approach and placed considerable reliance on specific factors which militated against awarding costs to the successful appellant in that case – in particular the narrow, somewhat technical nature of the victory given that the regulatory outcome (availability of number portability) had not been challenged in principle by the appellant. As to *RBS backhaul* and *The Number*, these were both appeals against dispute resolution decisions of Ofcom under section 185. In *T-Mobile*, another dispute resolution appeal, the Tribunal awarded costs in favour of the successful appellant even though there was no suggestion that Ofcom had acted unreasonably.

30. In the light of these rulings Ofcom's proposed starting point (that in the absence of unreasonable conduct there should be no order for costs against Ofcom) cannot in our view be said to have been applied consistently in section 192 appeals, as submitted by Ofcom. We do not propose to add to what has been said in other Tribunal rulings about the appropriate approach to costs in appeals against dispute resolution decisions under section 185. The latter have been described by Ofcom itself as involving the performance of a "unique quasi-judicial" function, and one can understand why the special nature of such decisions might be said to affect the appropriate starting point for the award of costs on an appeal therefrom. However, the present case does not fall into that category.

What is the appropriate starting point in a case such as the present?

31. In the course of her submissions as to how the Tribunal should approach a case such as the present. Ms Helen Davies QC, who appeared for FAPL, drew our attention to *Tesco PLC v. Competition Commission* [2009] CAT 26 ("*Tesco*"). This costs ruling of the Tribunal related to a challenge by way of judicial review under section 179 of the 2002 Act to a decision of the CC following a market investigation into the grocery sector, carried out under that Act.

32. In *Tesco* the CC, who had lost, submitted that it should not be required to pay any of the successful applicant's costs. In so submitting the CC relied upon strikingly similar arguments to those made by Ofcom in the present case. After referring to the well-known dictum of Dyson J (as he then was) in ***R v. Lord Chancellor, ex p Child Poverty Action Group*** [1999] 1 WLR 347 (paragraphs 36-37) in which the learned judge explained why it is normally as appropriate in public law cases as in private litigation that costs should follow the event, the Tribunal decided that the starting point in such a case should be that the successful applicant would obtain an award of costs in its favour. A costs order was ultimately made against the CC after all relevant factors were considered.

33. In the course of its analysis the Tribunal in *Tesco* noted that market investigation decisions were sufficiently similar to decisions made following a merger reference to require the same approach to the award of costs. The Tribunal observed at paragraph 29:

> "…It is true, as the Commission has urged, that in a market investigation it is required to bring together and weigh a considerable body of evidence, make factual findings which will often involve complex economic and commercial questions, and apply legal principles to those findings, devising if necessary remedial action to address any AEC [adverse effect on competition] identified in the investigation. Typically a report by the Commission following a market investigation will contain a variety of findings and decisions. A market investigation exercise may well have wide and profound effects on the economic and other interests of many citizens and businesses. This can, however, also be the case in a merger assessment. The same can equally be true of many decisions made by Government and other public bodies susceptible to judicial review. Moreover, although the volume and scope of decisions in a single Commission report may render the Commission vulnerable to a legal challenge, neither this nor the existence of wide-ranging powers to investigate possible AECs and devise remedies which can significantly affect many people represents a compelling reason for applying in such cases *as a matter of principle* (as opposed to on the specific facts of a particular case) a distinct and more indulgent approach to the award of costs against the decision-maker. Generally speaking, no question of such an award would arise unless the exercise of such powers had been shown to be impaired in some respect…"

34. Ms Rose points out that in the following paragraph the Tribunal had referred to the rulings in *The Number*, *Vodafone* and *T-Mobile* as not being relevant. However, when that paragraph is read as a whole it can be seen that the Tribunal is distinguishing dispute resolution appeals, such as *The Number* and *T-Mobile*. It is not clear why *Vodafone* was referred to – the reason stated by the Tribunal for

distinguishing the two other cases clearly does not apply to *Vodafone*, and no other reason is given.

35. In our view there are close parallels between the nature of the investigation procedure, the making of detailed findings about possible adverse effects on competition, and the framing of remedial action in a market investigation under the 2002 Act (as in *Tesco*), and the nature of the process and decisions of Ofcom in the present case. Ofcom, too, carried out a detailed investigation of the Pay TV market in order to identify any practices which were liable to have a prejudicial effect on effective competition, and if so to formulate appropriate licence conditions/remedies to resolve the issue. Further, the CC arguably has less discretion under the 2002 Act than Ofcom has under section 316 of the 2003 Act when it comes to deciding whether and how to proceed. Once the subject matter of the market investigation has been referred to it (usually by the OFT or one of the sectoral regulators), the CC is under a statutory obligation to carry out the investigation and make consequential findings and decisions in accordance with a strict statutory procedure and timetable.

36. However, Ofcom submits that the costs principles applicable to a judicial review such as *Tesco* do not provide an appropriate analogy for the purposes of the present appeal, and that a better analogy is to be found in the principles set out by Lord Bingham CJ, in *City of Bradford* (above), which the Court of Appeal had endorsed in two recent decisions.

37. In *Tesco* the Tribunal considered both *City of Bradford* and another Divisional Court judgment, stating as follows:

> "31. …Each involved an appeal to the magistrates from a licensing decision by the local authority where the justices in effect conducted a re-hearing. They were entitled to reach a different decision without finding that the local authority had erred in any way in the original decision, and had a wide statutory discretion to make "such order as to costs as it thinks fit." In *City of Bradford Metropolitan District Council v Booth* [2000] EWHC Admin 444 the Divisional Court (the Lord Chief Justice and Silber J) held that the magistrates had misdirected themselves on costs by applying a principle that costs should follow the event without considering a number of relevant factors. It is difficult to read much more into the case than that. As the Lord Chief Justice said:

> "What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection."
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> 32. In the subsequent *R (Cambridge City Council) v Alex Nestling Limited* [2006] EWHC 1374 case the Administrative Court, reiterated the approach in *Booth* and held that although the power of the court to award costs in such statutory appeals from the licensing decisions of local authorities was not limited to cases where the authority had acted unreasonably or in bad faith, the fact that it had acted reasonably and in good faith in discharge of its public function was an important consideration (see per Toulson J, with whose judgment Richards LJ agreed, at paragraph 11). Such licensing cases are different in nature from an application for judicial review, which concerns the lawfulness or validity of the decision being challenged, and which does not constitute a merits appeal by way of re-hearing. It is perhaps worth noting that where there is an application for costs in a judicial review in the Administrative Court the "loser pays" principle enshrined in CPR Rule 44.3(2)(a) [now 44.2(2)(a)] applies as a general rule, although it is liable to be displaced in the light of the circumstances of specific cases.
>
> 33. We therefore consider that the cases referred to do not provide us with much assistance in identifying an appropriate starting point for dealing with costs of a judicial review…[of a market investigation decision of the CC]"

38. We would respectfully adopt those comments. The present appeal, and indeed *any* appeal under section 192, is emphatically not an appeal by way of a re-hearing of the original decision, and the Tribunal does not allow an appeal under section 192 without finding that the decision was unlawful or otherwise in error in a material respect. (See in that connection subsection 192(6). See also the observations of the Tribunal on the nature of a section 192 appeal in ***British Telecommunications plc v. Ofcom*** [2010] CAT 17 at [75]-[78].) The licensing appeals in the magistrates' court which were the subject of these Divisional Court judgments are therefore wholly different from this case.

39. Ms Rose took us to the two Court of Appeal decisions in which the principles set out in *City of Bradford* were discussed.

40. ***Baxendale-Walker v. The Law Society*** [2007] EWCA Civ 233 ("***Baxendale-Walker***") concerned the approach to costs in disciplinary proceedings brought by the Law Society as, in effect, a prosecutor before the Solicitors Disciplinary Tribunal. The Court of Appeal, after considering the dictum of Lord Bingham CJ in *City of Bradford*, said (at paragraph 40):

> "…identical, or virtually identical considerations apply when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the Tribunal. Unless the complaint is improperly brought, or, for example, proceeds … as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

41. *R (Perinpanathan) v. City of Westminster Magistrates' Court* [2010] EWCA Civ 40 ("*Perinpanathan*") concerned the costs of an application by the Metropolitan Police Commissioner for forfeiture of an amount of cash under the Proceeds of Crime Act 2002, on the ground that there were reasonable grounds to suspect the cash was intended for use in unlawful conduct, namely terrorism. The magistrates' court refused the forfeiture order, accepting that the cash was intended for lawful activity. However the magistrates refused to grant costs against the Commissioner, as they accepted that when the seizure took place and when applying for forfeiture, the Commissioner had reasonable grounds for suspicion. The Divisional Court dismissed an application for judicial review of the magistrates' refusal to award costs, and the Court of Appeal dismissed an appeal against the Divisional Court's judgment.

42. In the course of his judgment Stanley Burnton LJ referred to case law in a number of areas, and cited at length from the Tribunal's ruling in *RBS backhaul* before commenting at [31] that:

> "…the context of the proceedings before [the Tribunal] was very different from the present. What is relevant to the present case is the decision that a public authority carrying out a public duty and acting reasonably was not to be required to pay the costs of its successful opponent in litigation."

43. As we have already discussed, *RBS backhaul* was an appeal against a dispute resolution decision of Ofcom under section 185, and the decisive paragraph in the

Tribunal's ruling identifying that feature (namely paragraph 62 – see paragraph 9 above) was quoted by Stanley Burnton LJ.

44. The learned Lord Justice indicated that the principles in the *City of Bradford* case should be taken as applying in licensing proceedings in the magistrates' court and Crown Court, and also, in the light of *Baxendale-Walker*, in disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest. He went on to say that whether the principle was applicable in other contexts would depend on the substantive legislative framework and the applicable procedural provisions. It was not applicable where the CPR applied (paragraph 40).

45. Ms Rose submitted that the criteria identified by Stanley Burnton LJ were satisfied in relation to the present case. It is true that the CPR do not apply to the Tribunal's costs jurisdiction, but we do not agree that the situations in *Perinpanathan* or *Baxendale-Walker* or *City of Bradford* provide close analogies to the present case. For the reasons discussed earlier, we consider that this case has a much closer connection with, for example, cases involving challenges to market investigation decisions.

46. In other passages in *Perinpanathan* to which Ms Rose referred us, Lord Neuberger MR (as he then was) stated that in cases where there was no principle that costs should follow the event, as for example in CPR Part 44.2(2)(a), guidelines could nevertheless be laid down for the approach to an award of costs in favour of a successful party. However, such guidelines should not be too rigid, and a balance struck between sufficient flexibility to do what is appropriate in the particular case and certainty enabling the parties to know where they stand. Lord Neuberger emphasised that it was desirable for courts to maintain an approach where it had been consistently applied, unless it was wrong in principle or contrary to authority (paragraphs 59 and 64).

47. Given that the Tribunal has *not* established a consistent practice that in successful section 192 appeals the starting point should be that no order for costs should be made against Ofcom unless it has acted unreasonably, and given also that in respect

of most categories of proceedings falling within the Tribunal's jurisdiction the Tribunal has established as a starting point that costs follow the event, Lord Neuberger's comments about consistency point to the approach that should be adopted in the present case.

48. Ms Rose also drew attention to paragraph 73 of Lord Neuberger's judgment, where he commented that the judgment in *Baxendale-Walker* had given strong support to the notion that the principles in *City of Bradford* should apply:

> "where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event."

49. These remarks must presumably be read with his earlier comments about the desirability of following an established approach. Moreover they are made in respect of contexts admittedly very different from the one with which we are concerned.

50. In our judgment the considerations contained in the passage from *Tesco* quoted at paragraph 33 above are also applicable to a case such as the present, and the position and duties of Ofcom as a sectoral regulator, although clearly a relevant factor, do not justify "applying … *as a matter of principle* (as opposed to on the specific facts of a particular case) a distinct and more indulgent approach to the award of costs against the decision-maker." In order to provide the balance, referred to by Lord Neuberger, between sufficient flexibility to enable the Tribunal to do what is just in a particular case, and an appropriate degree of predictability, we consider that the starting point in cases such as the present should be that costs follow the event, even where Ofcom is the loser in the appeal. This approach aligns the present case with the starting point adopted by the Tribunal in most categories of case with which it deals, is consistent with the approach generally found in civil litigation, including, in particular, other public law cases, and provides ample flexibility to reach a just conclusion in each case. Using this starting point is justified in such cases as the present given that regulatory decisions of this kind often have very significant effects on the commercial interests of the regulated entity and sometimes also on the vital interests of other parties (as, for example, claimed by FAPL in the present case). The appeal route is the only recourse

available to those affected by a decision which they consider to be erroneous or invalid.

51. In applying as a *starting point* that costs follow the event when considering costs of a successful section 192 appellant, we are not of course suggesting that other relevant factors should or could be left out of account. In *Merger Action Group v. Secretary of State for Business Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal said:

> "17. …As the Tribunal has emphasised on numerous occasions, the width of the discretion enables the Tribunal to deal with cases justly and to retain flexibility in its approach, avoiding the risk of guiding principles evolving into rigid rules …there is no inconsistency between the wide discretion, and an approach to its exercise which adopts a specific starting point. Without this there may be an increased risk of discordant decisions.
>
> …
>
> 19. It is axiomatic that all such starting points are just that – the point at which the court begins the process of taking account of the specific factors arising in the individual case before it – and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly. The Tribunal's decision in relation to costs/expenses can be affected by any one or more of an almost infinite variety of factors, whose weight may well vary depending upon the particular facts. Beyond recognising that success or failure overall or on particular issues, the parties' conduct in relation to the proceedings, the nature, purpose and subject-matter of the proceedings, and any offers of settlement are always likely to be candidates for consideration, the factors are too many and too varied to render it sensible to attempt to identify them exhaustively."

52. As we have said, the position and duties of Ofcom as a regulator, together with the extent of any risk that an order for costs might have a chilling effect on Ofcom's activities in pursuit of its statutory duties, including its willingness to defend regulatory decisions made in pursuit of the public interest, are always likely to be included in the relevant factors when considering whether to make such an order and the amount thereof.

Should an order for costs be made in favour of Sky, and if so what order?

The main appeal

53. We remind ourselves of the need to consider this application in the light of its own particular facts and circumstances, whilst taking as a starting point that costs follow the event.

54. Ofcom submits that "the event" amounts to a score draw, in that Ofcom won on the first ground of Sky's appeal, Sky won on the second ground, and the Tribunal made no findings on the third and fourth grounds. In Ofcom's submission these last two issues – comprising impact assessment and pricing issues – accounted for a very significant proportion of costs, accounting for approximately 138 individual sub-issues and many days of oral evidence from experts before the Tribunal. Further, Sky adopted a disproportionate approach with minute criticisms of every aspect of Ofcom's detailed analysis, each of which Ofcom was obliged to address and respond to. Given that the Tribunal did not have to resolve them it cannot be said whether Sky was right to raise them or not, so the costs of these issues should lie where they fall. As to the other two grounds, whilst acknowledging that the costs of arguing the two legal issues comprised in ground 1 were not equivalent to the costs encompassed in ground 2, Ofcom submits that the latter costs were less than the costs of the unresolved grounds 3 and 4, and on that basis the appropriate order overall is that the parties should each bear their own costs.

55. We do not agree with this analysis of "the event". It does not reflect the fact that Sky is a clear winner. Although it lost on the two jurisdictional arguments, its appeal has been allowed and, subject to the stay we granted pending BT's renewed application for permission to appeal, the licence conditions at the heart of Sky's appeal are required to be withdrawn from Sky's licences. So, on the basis of its second ground – mainly relating to the negotiations – Sky achieved everything it could have hoped to achieve in its appeal. The starting point is therefore that an order for costs should be made in favour of Sky. Should Sky nevertheless be denied *any* costs in the present case on the basis of other factors, including those referred to in paragraph 52 above?

56. Given the size of the indicative amounts which have been referred to, it is likely that, even if these amounts were cut down to a significant extent, the costs ultimately payable by Ofcom would be substantial. As such the risk cannot be entirely excluded that costs of that order of magnitude might conceivably have some influence on Ofcom's approach should a similar case arise in the future. Further, it has rightly not been suggested that Ofcom has acted unreasonably or in bad faith.

57. However, the ground of appeal upon which Sky succeeded related almost entirely to Ofcom's misinterpretation of the factual evidence (mainly contemporaneous documents) of what had taken place in several sets of negotiations over the course of a number of years. These misinterpretations were significant, both in terms of their number and their pivotal relationship with the core competition concerns and the findings upon which Ofcom's regulatory action was founded. Further, the regulatory action in question was undeniably commercially intrusive, depriving Sky of any choice as to the person to whom, and the prices at which, it would wholesale its premium sports channels. If Sky wished to challenge Ofcom's action it had no alternative but to appeal to the Tribunal, and therefore to incur further costs over and above the irrecoverable costs of regulatory compliance generally and of participation in the Pay TV investigation itself. In addition, as we have already explained, the scope of Ofcom's discretion as to precisely how to respond to the joint complaint which led to Ofcom's investigation was not as circumscribed as suggested, nor was an appeal on this scale inevitable no matter how Ofcom had dealt with the matter, as has been argued (see paragraph 11 above).

58. In our view to deprive Sky of any costs award in these circumstances would not meet the justice of the case, and would not be justified by any of the factors in question, including the risk of a chilling effect on Ofcom's future regulatory action in accordance with its statutory obligations. Although, as we have said, this risk cannot be entirely excluded, we do not believe that it is of such a magnitude that we should make no order here. This is the first time in ten years or so that Ofcom has found it appropriate to use section 316. It is therefore not a frequently trodden route of regulatory action. Also, this case may be seen as somewhat unusual in regulatory terms. As distinct from, for example, many *ex post* infringement cases where

factual disputes are commonplace, in an *ex ante* context it is perhaps less common for the fundamental factual basis for Ofcom's action to be disputed in so many respects. Even if such a case arose again in the future, Ofcom has no reason to suppose that the grounds for action would be undermined on appeal if its assessment of the facts was sufficiently rigorous in all respects.

59. We are therefore of the view that an order for costs in favour of Sky is appropriate in the main appeal. We therefore turn to consider the terms of that award.

60. Given the scale of this case, a just and proportionate result can best be achieved by reference to the issues in the appeal, represented by the separate grounds relied upon. On this basis Sky should have the costs of ground 2 on which it succeeded. In that regard Ofcom has noted in its written submissions in reply that the Tribunal found it unnecessary to resolve the difference of expert opinion on the sub-issue relating to the so-called strategic incentives. Nevertheless, we have concluded that the costs of that sub-issue should be included. Although ultimately we did not need to resolve this, the strategic incentives were hares which Ofcom prodded into action and then pursued in the Statement itself: see paragraphs 164 to169 of the Judgment, and in particular the reference there to paragraphs 7.198 to 7.200 of the Statement. In view of the prominence given to the strategic incentives in the Statement, we can see why Sky might well have felt uneasy if it did not deal with them in its appeal, notwithstanding Ofcom's later assurances (including at, and in the lead-up to, the main hearing) that they were non-essential to its core competition concerns. We should add that we see little if any merit in Ofcom's suggestion that its own findings on the subject-matter of ground 2 were based on less substantial oral and written evidence than that put before the Tribunal. By far the most significant material in relation to the various bilateral negotiations with which we were concerned in examing ground 2 were the contemporaneous correspondence and documents. These were available to Ofcom at the time the Decision was made and were annexed to Dr Unger's witness statement.

61. Although Sky is the overall winner, it should not recover the costs of the jurisdiction arguments comprised in ground 1, on which it did not succeed. The fact that Ofcom itself lost on its alternative argument that even if the services in

question were not "licensed services" they constituted "connected services", does not justify any partial recovery of Sky's costs, given that Ofcom succeeded on its primary point. Furthermore, Ofcom's success on these jurisdictional grounds could be said to require some credit in its favour to reflect Ofcom's own expenditure in meeting those arguments. However, looking at the matter broadly this element, which on any view would be likely to be a relatively minor amount, can fairly be seen as well covered by our approach to the costs of grounds 3 and 4, comprising Sky's challenges to the WMO remedy (see below).

62. In the light of the Tribunal's findings in respect of ground 2, we did not need to form any concluded view as to the respective merits of the parties' arguments on grounds 3 and 4. Equally, we have not formed a view about whether Sky's approach to them was disproportionate or unreasonable in light of the nature and number of detailed criticisms made by Sky, as alleged by Ofcom. Nevertheless, and despite Sky's overall success in the appeal, we believe that in all the circumstances it would not be appropriate to require Ofcom to bear any of Sky's costs of these undecided issues. We are therefore of the view that the costs of grounds 3 and 4 should lie where they fall.

63. For the avoidance of doubt we consider that there should also be no order in respect of the costs incurred following the Judgment on issues relating to consequential orders and relief, including the costs of Sky's application for costs. As to the latter, neither Ofcom nor Sky has obtained the order it sought, and it is appropriate for these cost to lie where they fall.

64. The approach which we have adopted means that in respect of the main appeal there will be an award in Sky's favour of its costs relating to ground 2 alone, such costs to be subject to detailed assessment on the standard basis by a costs judge, if not agreed. This will no doubt still be a substantial amount, but we do not consider that it will carry a significant risk of a "chilling" effect on Ofcom's regulatory action in the future such as to justify depriving Sky of this more limited costs award.

Costs of the interim relief application

65. Sky has also claimed the costs of its application for interim relief made in May 2010 before the lodging of Sky's main appeal. That application was resolved when Ofcom, Sky and the other interested parties who were then represented before the Tribunal, thrashed out an agreement which ultimately took the form of the Interim Relief Order. In very general terms, Sky was to offer to make wholesale supply of the premium channels in question to specified interested parties (BT, VM, TUTV and (later by amendment) REAL Digital EPG Services Limited), at the regulated WMO price. The purchasers were to pay the difference between the regulated price and Sky's normal wholesale price into escrow pending the outcome of Sky's main appeal. Apart from this, the Decision was suspended. In effect Ofcom's measure remained in force for the benefit of those who particularly desired wholesale supply, but such supply was not open to the world at large – without further amendment of the Interim Relief Order. Sky also obtained the protection of the escrow arrangements. Costs of the interim relief application did not form any part of the agreement between the interested parties, and were not mentioned at all.

66. In these circumstances, and given in particular that the application was resolved by a multi-partite agreement which did not mention costs, and which left the substance of the WMO in place so far as the main beneficiaries were concerned, we do not consider it would be just or appropriate to order Ofcom to pay Sky's costs of the application. Those costs should therefore lie where they fall.

Costs of the STB and CAM appeals

67. It was accepted by all concerned, including Ofcom, that the effect of the Judgment is that the STB and CAM appeals must be allowed and that the decisions of Ofcom at issue in those appeals should be withdrawn, subject only to the stay granted by the Tribunal pending a possible appeal (see paragraphs 7 and 8 of the Tribunal's subsequent ruling to which we refer at paragraph 1 above).

68. Sky's costs of the STB and CAM appeals are likely to be relatively very small, as no oral argument or oral evidence was addressed to these appeals, which were

conducted entirely on paper. No specific argument has been put to us as to why an order for costs should not be made in respect of them. In all the circumstances we consider that it is appropriate that Sky should have its costs of each of these appeals, such costs to be subject to detailed assessment on the standard basis by a costs judge, if not agreed.

FAPL'S APPEAL

69. In our ruling of 27 February 2013 we stood over the disputed question whether FAPL's appeal should be allowed or dismissed in the light of the Judgment.

70. FAPL submits that, having succeeded in obtaining the primary relief which it had sought in its appeal, namely that Ofcom's WMO should be withdrawn, its appeal should be allowed with costs. FAPL emphasises that the motivation for its appeal was the extreme concern about the adverse impact of the WMO on FAPL, its member clubs, grass roots sports, consumers and many others by reason of a significant reduction in the value of broadcasting rights. These factors were distinct from Sky's own interests in appealing, and FAPL considered they had not been taken into account by Ofcom. Due to the chronological order in which the Tribunal considered the issues raised by the parties, it did not need to consider the impact of the Statement on sports rights. Nevertheless, FAPL submits that it still obtained the outcome that it sought. Accordingly its appeal should be allowed, and an award for costs made in FAPL's favour, with a 10% discount to reflect FAPL's unsuccessful first ground of challenge.

71. We agree that FAPL's appeal was brought in support of legitimate interests which were distinct from those of Sky, and that the FAPL legal team conducted the appeal skilfully and reasonably, and in such a way as to avoid duplication with the submissions of Sky wherever practicable. However the fact remains that, of the six grounds of appeal advanced by FAPL, only one was determined by the Tribunal in the Judgment, and on that ground FAPL was unsuccessful. The other grounds, which related to the WMO remedy, did not need to be decided by the Tribunal and it is not known whether FAPL would have succeeded on any of them. The fact that the Judgment produced the outcome which FAPL desired in bringing its own appeal

is therefore entirely the result of Sky's appeal. In those circumstances we do not consider that it could be right to allow FAPL's appeal, or to order Ofcom to make a contribution to FAPL's costs. Therefore the appropriate order is that FAPL's appeal should be dismissed. In any event there should be no order in respect of the costs thereof.

72. FAPL has submitted that if the Tribunal concluded that FAPL's appeal should be dismissed, the Tribunal's order should provide that such dismissal, and any provision to the effect that there should be no order as to FAPL's costs, should only take effect in the event that (1) any application for permission to appeal by BT has been finally rejected or (2) if permission to appeal is granted, BT's appeal is finally dismissed in its entirety. At the hearing on 6 February 2013 none of the parties signalled any objection to FAPL's proposal. Accordingly we will so order.

CONCLUDING OBSERVATIONS

73. The Tribunal invites the parties to supply an agreed draft order reflecting the Tribunal's conclusions in this ruling as soon as possible and in any event within seven days from today's date.

The Honourable Mr. Justice Barling | Professor John Beath | Michael Blair QC (*Hon*)

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 9 May 2013