Neutral Citation No. [2024] CAT 10

Case Number: 1381/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

13 February 2024

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Date of Hearing: 11 February 2025

Before:
THE HONOURABLE MR JUSTICE WAKSMAN
(Chair)
EAMONN DORAN
DEREK RIDYARD
Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN LE PATOUREL

Class Representative

and

(1) BT GROUP PLC

(2) BRITISH TELECOMMUNICATIONS PLC

Defendants

and

COMPETITION AND MARKETS AUTHORITY

Interested Party

REASONED ORDER (COSTS, PERMISSION TO APPEAL AND STAY)

UPON considering the Tribunal's judgment dated 19 December 2024 (amended under the slip rule on 31 December 2024) [2024] CAT 21 (the "Judgment")

AND UPON reading the Defendant's ("BT's") application for costs by letter dated 20 January 2025, the CR's responsive submissions dated 27 January and BT's reply by letter dated 31 January 2025

AND UPON reading the Class Representative's ("the CR's) application for permission to appeal ("PTA") the Judgment filed on 20 January 2024 (the "PTA Application")

AND UPON reading BT's submissions in response to the PTA Application dated 27 January 2024 (the "Response")

AND UPON reading the skeleton arguments for the parties dated 7 February 2025

AND UPON hearing Counsel at a hearing on 11 February 2025

IT IS ORDERED THAT:

1. The CR shall pay 85% of BT's costs of the action to be the subject of a detailed assessment on the standard basis.

2. The CR shall make a payment on account of such costs to BT in the sum of £14,000,000 by 4pm on 13 March 2024.

3. The application for PTA is refused.

4. The application to stay the detailed assessment of BT's costs pending any application to the Court of Appeal for PTA and/or subsequent appeal is refused.

5. The Tribunal declines to make any recommendation to the Court of Appeal that if it grants PTA, any appeal should be expedited.

6. The time for the CR to file any further application for PTA and Notice of Appeal to the Court of Appeal is 4pm on Thursday 6 March 2025.

REASONS FOR THE COSTS ORDERS

7. BT's position is as follows:

    (1) The CR should be liable for 100% of its costs;
    (2) Its total costs are £26,246,133.22;
    (3) The CR should make a payment on account of 70% thereof, being £18,372, 293.25.

8. The CR's position is that:

    (1) The CR should be liable for no more than 50% of BT's costs;
    (2) For present purposes, BT's total costs should be taken to be no more than £16,500,000;
    (3) Therefore, the CR's maximum liability should be taken to be 50% of £16,500,000, namely £8,250,000;
    (4) The CR accepts that it should make a payment on account of a reasonable proportion of the figure of £8,250,000 which it says should not exceed 75% thereof.

(5) Therefore the CR should make a payment on account of no more than £6,187,500, rounded down to £6,000,000.

9. Both sides agreed that the CR may have 28 days in which to make the payment on account decided by us.

10. The abbreviation "MdR" refers to Mishcon de Reya LLP, solicitors for the CR, and the abbreviation "S&S" refers to Simmons & Simmons LLP, solicitors for BT.

What proportion of BT's costs should the CR pay?

11. Both parties made reference to the decision of Roth J on costs in *Merricks v Mastercard* [2024] CAT 57. The Court has a broad discretion in cases where the losing party has nonetheless succeeded on some issues, and as Roth J pointed out in paragraph 21 of his judgment, at the end of the day, the question is what costs order is just and appropriate in a case where the successful party has lost on an issue on which it acted reasonably.

12. To refer more particularly to what Roth J said here:

> "16. The award of costs by the Tribunal is governed by rule 104 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"), which states, insofar as relevant:
>
> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
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> (a) the conduct of all parties in relation to the proceedings;
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> (b) any schedule of incurred or estimated costs filed by the parties;
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> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."
>
> 17. These provisions give the Tribunal a broad discretion as regards costs. In exercising that discretion in an English case, the Tribunal generally follows the practice of the High Court applying the CPR. I consider that the following principles apply.
>
> 18. First, although there is no prescribed "general rule" in the CAT Rules that the unsuccessful party should pay the costs of the successful party, corresponding to CPR 44.2(2)(a), where a party has been wholly successful it should generally be awarded its costs. That is also the approach to the award of expenses in the Court of Session, and the Tribunal is of course a UK tribunal. The question of who has been the successful party should be approached as a matter of common sense, in a practical and commercially realistic way…
>
> 20. Thirdly, where a trial involves a discrete issue, which causes significant distinct costs to be incurred, it is appropriate to consider whether to make an issue-based order. The approach to such orders under the CPR was helpfully summarised by Mr Stephen Jourdan QC, sitting as a judge of the High Court, in Pigot v The Environment Agency [2020] EWHC 1444 (Ch) at [6] and followed by Cavanagh J in Scales v Motor Insurers' Bureau [2020] EWHC 1749 (QB) at [10]:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.
> (4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
> (5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

21. Although rule 104 is more succinct and does not contain the elaboration of conduct set out in CPR rule 44.2(5), the approach in the Tribunal is broadly similar, mutatis mutandis. Where an otherwise successful party has lost on a distinct issue, if the issue was raised unreasonably that will usually justify an adverse costs order. However, unreasonable conduct is not a necessary condition for such an order: see per Birss J (as he then was) in Wobben Properties GmbH v Siemens PLC [2015] EWHC 2863 (Pat) at [8]. Equally, if the issue was raised reasonably, the otherwise successful party will not necessarily be subject to a discount off the recovery of its own costs just because it has lost on that issue. As Coulson J (as he then was) said in J Murphy & Sons Ltd v Johnston Pipes Ltd (No 2 – Costs) [2008] EWHC 3104 (TCC) at [10]:

> "In civil litigation it is almost inevitable that there will have been some point or argument, raised by the otherwise successful party but rejected by the judge, which will have added to the length of the trial. In my view, the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order."

In short, where the party which is successful overall has lost on a discrete issue on which it acted reasonably, the governing criterion is whether any, and if so what, order in respect of that issue is just and appropriate in all the circumstances of the case.

22. Fourthly, the Tribunal should not adopt an over-granular approach to the identification of discrete issues. As Nugee J stated in *Merck* at [9]:

> "Any issue of any complexity is likely to involve sub-issues and sub-sub-issues on which one side or other has the better of the argument: this is not by itself a reason for departing from the general rule.""

13. This reflects what the Tribunal had already said in *Royal Mail v DAF Trucks* [2023] CAT 31, whereby the Tribunal should make an order that reflects the overall justice of the case.

14. We take all of those matters into account here in reaching our decision on costs.

15. This is a case where BT lost on market definition (a substantial issue) and dominance, and it partially lost on Limb 1 (or the CR partially won) in that the Tribunal did find excessive prices sufficient to activate Limb 2, but by no means as high as the CR had contended for. The extent of the excess was an important matter for Limb 2. BT then won on Limb 2. Because of the sequential nature of a claim alleging abuse of a dominant position, notwithstanding BT's failures at the earlier stages, the CR lost entirely, as it had to prove unfairness at Limb 2, regardless of what went before. So this is not a case where, for example, the CR recovered on some claims but not others. It is not that kind of case.

16. Further, as can be seen from our judgment, we did not conclude that BT's position in relation to any of the earlier stages was hopeless, such that it was unreasonable for it to have contested them. This is a relevant factor, although not determinative. It is also fair to say that at least some of the evidence and analysis on earlier stages then became relevant to others, later on. Switching is a good example, considered at more than one stage.

17. The CR's position is that the distinct issues on which it won took up just over 40-50% of the time at trial. See paragraph 18 of its 27 January 2025 response on costs. That statement has to be qualified, because it is misleading to say that the CR won fully on Limb 1 for the reasons already given. Furthermore, and also for the reasons given, it would be wrong in our view to apply a simple 50% discount to BT's recoverable costs where the CR did not actually recover anything. This is in a context where the CR had to succeed on a sequence of issues anyway, where the sequential issues interrelated to some extent, and where BT did not take points unreasonably. Also it is not possible to attribute some of BT's major costs, items like disclosure, to one particular issue or another. The submission that there should be a 50% reduction would be plainly unjust in our view here.

18. We should add that we do not think that whichever party won on or lost on our (strictly unnecessary) quantum decisions (see again the chart at paragraph 18 of the CR's 27 January response) makes a material difference to that analysis.

19. However, all of that said, we think it is just and appropriate here to take account, at least to some extent, of the fact that the CR nonetheless succeeded on matters which occupied a very significant part of the trial and submissions. We consider that this should be reflected in an order which allows BT, not 100% but 85% of its costs. This is what, in our view, reflects the overall justice of the circumstances of the case.

20. This means that the starting point for present purposes i.e. a payment on account is 85% of BT's costs. So we have now to turn to what we should take to be BT's costs for the present purpose of ordering a payment on account.

Costs Starting Point

21. For these purposes, we should make a broad estimate of what we think BT will be allowed on a detailed assessment with an appropriate margin for an overestimate. See *Merricks v Mastercard (Costs)* [2022] CAT 27 at paragraph 10.

22. As already noted, BT says that its costs for these purposes should be taken to be £26,246,133.22 and by S&S's letter dated 17 January 2025, it provided to MdR a breakdown of those costs by phase. It sought £18,372,293.25 as a payment on account. MdR wrote back to S&S on 19 January 2025. Among other things, MdR said that a costs figure of £26m was clearly excessive where its own costs were £17m (although in fact this figure was net of VAT), and despite the fact that in the sixth Witness Statement ("WS") of Sarah Houghton of MdR, dated 24 November 2023 she said that the CR's amended budget was now £22,114,688.30 (being exclusive of the cost of purchasing ATE insurance).

23. By S&S's letter to the Tribunal dated 20 January 2025, BT made its application for costs. The CR provided a detailed response to that application on 27 January 2025, which was settled by Mr Nicholas Bacon KC. Part of that response was to propose various reductions to BT's costs schedule, the result of which was that, according to the CR, the correct starting point was not £26,246,133.22, but rather £18,242,500.00. See paragraphs 20-21 of that response.

24. BT provided a response to the CR's points on the individual phases in its solicitors' letter dated 31 January 2025 and in paragraph 41 of its Skeleton argument for today.

25. However, in the CR's Skeleton Argument for today, served on 7 February 2025, it changed its position. It said that in fact the starting point should be taken to be no more than £16,500,000. The reason for that figure is said to be this: the amount of ATE insurance purchased by the CR's funder, Harbour Litigation Funding Ltd ("HFL") was limited to £16.5m in respect of any adverse costs order made against the CR. Further, there was an express indemnity in respect of adverse costs, made to BT from Harbour Fund V, L.P ("HFV"), a fund managed by HFL, again limited to £16.5m. All of this was made clear to BT in the first part of 2021. Further, the provision of the ATE insurance was an important factor going to certification. In the CR's first WS he set out at paragraph 101 the total amount of the ATE insurance which came to £16.5m. At paragraph 103 he stated that:

> "I am informed by my legal advisers that this level of cover should be sufficient to cover BT's recoverable costs, if ordered to do so."

26. The CR says that at no point then or thereafter, did BT ever come back to say that this level of adverse costs cover was inadequate or anything like that. The first that the CR heard about BT's costs at over £26m was in S&S's letter dated 17 January 2025. Therefore, submits the CR, he was entitled to proceed on the basis that BT's costs, if ever claimed against him, would not exceed

£16.5m. Accordingly, it would now be unfair or unjust if the starting point, for today's purposes at least, was anything more than £16.5m. Alternatively, given that BT knew that there was cover limited to £16.5m and did not react to it, it suggests that in any event, a figure of over £26m as claimed now is plainly excessive. So the original figure of £18,242,500, which the CR has been prepared to take as the starting point for BT's costs, was now discarded.

27. We feel bound to observe that if this was such a significant point, it is remarkable that it was not taken right at the outset, when MdR first responded on costs, in its letter dated 19 January 2025. It appears that it was only "on the table as it were" at some point before counsel who appeared for the CR on costs today, Mr Roger Mallalieu KC, was instructed. We do not accept that this is irrelevant, in circumstances where we do not know why the point was apparently missed at the outset. It goes to the whole question (referred to below) as to the extent to which either the CR or its funders, relied on what is said now to be some sort of silent representation made on behalf of BT that £16.5m was an acceptable cap for its costs.

28. One important point of context is that in any event, by clause 2(2) of the Investment Agreement between the CR and HFV, HFV provided an unlimited indemnity to the CR in respect of any adverse costs order made against him, subject to fraud etc. What this means is that BT's actual costs protection is not limited to the cover provided by the ATE insurance and the express indemnity. In the event that it ultimately recovers more than £16.5m against the CR following a detailed assessment, it can rely on the unlimited indemnity given to the CR by HFV, which the CR would obviously invoke. In addition, as Mr Willams KC for BT observed, HFV would obviously be a prime candidate for a third party costs order if it became necessary, as it is the funder of the litigation.

29. We accept of course that in making the point about the £16.5m insurance cover, the CR does not have to establish formally an estoppel as such. It makes the point in the context of the overall justice of the position. Nonetheless, and especially because the point was taken so late, we consider that we should bear in mind that there is no actual evidence that the CR or HFV actually relied upon what they may have assumed to be the position on the part of BT, nor did they in the event interrogate BT's costs position, bearing in mind that its costs of the litigation were very likely to exceed those of the CR.

30. We do take into account that the correspondence from early 2021 shows that BT was making specific points about the underlying adequacy of the ATE insurance policy and the express indemnity, but not in terms of quantum. However, albeit in that context, we think that the following extract from MdR's letter to S&S dated 29 April 2021 is significant.

> "…Since its foundation in 2007 Harbour has funded over 120 cases worldwide, with a total combined claim value of US$19 billion. Its funds are never leveraged, and the entire budget for each case

> Harbour supports is ring-fenced so that its funds are always available to meet its commitments and are not dependent on other cases succeeding.
>
> As for all of Harbour's funds, HFV is subject to the capital adequacy requirement of the Association of Litigation Funders of England and Wales, which requires independent verification by a third party. The enclosed letter from MUFG Fund Services ("MUFG"), the independent third party responsible for administering HFV's books and records including with respect to financial US$ 17.57 million had been drawn down as of 31 March 2021. As at 31 March 2021, therefore, HFV's total undrawn capital commitments were US$399.41 million, as confirmed by the letter from MUFG.
>
> It is therefore evident that HFV has more than sufficient resources to meet any potential adverse costs order made against the PCR, irrespective of the ATE Policies that is has secured in relation to the proceedings.
>
> Next steps
>
> Harbour has now provided your client with more than sufficient evidence of its ability to pay he defendant's recoverable costs if ordered to do so, in addition to having spent over £I million on securing the ATE Policies. It does not intend to engage in further correspondence on this point, wasting unnecessary time and cost…"

31. This emphasised that in any event, HFV could meet any recoverable adverse costs order in favour of BT, and of course that was reflected in its indemnity to the CR.

32. In all of those circumstances, we do not consider that the fact of the limits of the ATE insurance and express indemnity make it unfair to use a starting point for BT's costs which is above £16.5m.

33. Nor do we consider that such a limit, and it having been conveyed to BT, indicates that BT's present costs figure must be excessive if it is above £16.5m. Again we note here that the CR's budgeted costs if VAT was included were over £22m even if some of those costs may have been in respect of the cost to the CR of distributing any damages award had it been secured.

34. Finally, since the payment on account is to be £14m, there is sufficient ATE cover to pay this amount, anyway.

35. Accordingly, we return to the way in which the CR had originally addressed BT's quantum of costs and by reference to the starting point then suggested of £18,242,500.

36. The Tribunal does not propose to undertake a detailed analysis of BT's costs schedule and the CR's criticisms of it at this stage. We do agree, however that there should be some reductions which we set out below by reference to the amounts which we are prepared to "allow" to BT for each phase. Where appropriate, figures have been rounded down.

    (1) Pleadings: there is no reason to reduce BT's costs here which are not much more than the CRs. £2.5m is allowed;

    (2) Disclosure: we recognise the much greater burden on BT here. Nonetheless £5.4m seems to us to be excessive; £4.75m is allowed;

(3) Witness statements: We agree that £907,120.05 is excessive in relation to the production of the six witness statements of the four witnesses who were called. £600,000 is allowed;

(4) Experts' reports: albeit that it may be said that the approach taken by BT's experts meant that in some cases the reports were more extensive, we consider that an overall claim for £9,200,814.44 is excessive; £7.5m is allowed;

(5) Pre-trial: there is no real reason for a reduction; £4.5m is allowed;

(6) Trial: there is no real reason for a reduction; £2.9m is allowed;

(7) Post-trial: there is no real reason for a reduction; £374,000 is allowed;

(8) ADR: £227,000 is allowed;

37. This yields a total figure of £23,351,000 which will be the starting point for the further calculations below. Our assessment of that figure is of course only relevant for the purposes of the interim payment application. We are not in any way binding what a costs judge may ultimately decide on a detailed assessment, nor could we, and our rejection of the point about the £16.5m is, again, only in the context of our ultimate assessment of the interim payment. It is a matter for the CR whether it chooses to advance the point again at the detailed assessment and we make no comment one way or the other whether it will then be open to it to do so.

38. This means that the net starting point for today's purposes is £19,848,350, being 85% of £23,351,000.

Payment on Account

39. BT seeks 70% of its starting point costs figure. This is what CR received in respect of the award of costs in its favour on certification. We consider that 70% should apply here equally, taking into account both our starting point and the need for a margin for any overstatement. 70% of £19,848,350 yields a figure of £13,893,845 which we round up to £14m.

REASONS FOR REFUSING PTA

Generally

40. Essentially, the grounds of appeal amount to no more than disagreements with the findings made by the (specialist and expert) Tribunal on the evidence, in what was a complex and highly fact-sensitive case. This is despite the CR seeking to characterise such disagreements as indicating perversity or irrationality on the part of the Tribunal, so as to constitute an appeal as a matter of law (see s.49(1A) of the Competition Act 1998). None of these grounds have a real prospect of success.

41. To the extent that there are particular points of law invoked by the Claimant, none amount to grounds of appeal with a real prospect of success.

42. Nor is there any other compelling ground for an appeal.

43. Paragraph references in the headings below are to the paragraphs in the PTA Application. Other paragraph references, where preceded by "J", are to the paragraphs in the Judgment.

Ground 1: Limb 1 assessment of common costs

Finding of £250 million common costs rationally unsupportable – paragraphs 6-7

44. The paragraphs from the judgment quoted at paragraph 6 are correct, but as paragraph J816 states, our overall conclusion was that there was a significant risk that Dr Jenkins' baseline scenario was overstated. This used a common costs contribution at BT Consumer level of £390 million in 2015/16. So our £250 million conclusion was £140 million less in that year. That is a substantial deduction.

45. Further, the figures cited by the CR relate solely to 2015/16, and not to the entire claim period. While Dr Jenkins' common cost estimates increased by around 40% between 2015/16 and 2021/22, our approach allowed only a 20% increase in the overall cost per customer. So a comparison based on 2015/16 alone understates the difference between our common costs figures and hers. See paragraphs J920-925.

46. Further, there was no real alternative starting point at this level from the CR, other than to say that common costs should have been insignificant. We rejected that argument after setting out and considering a range of evidence and then said expressly that we had to strike a balance. See paragraphs J898, 902 and 904. In particular, as we stated at paragraph J902:

> "… it is impossible in an exercise like this to be able to reach figures as if undertaking a scientific calculation. Indeed, both sides' experts accept that their approaches involve the exercise of their own, albeit professional, judgment. The same is true of our approach here. We have endeavoured to reach figures on the basis of the totality of the materials (including expert views and the parties' submissions) put before us that seem to represent the most appropriate outcomes. We have done so on the additional basis that if there were to be a minor adjustment here or there to our figures, the overall outcome will not be materially affected."

47. So this is no more than a disagreement with our conclusions on the facts.

No reasoning for £250 million - paragraph 8

48. There is sufficient reasoning in our paragraphs J898 and 905. As is clear, this appeared in our judgment to be a reasonable figure having regard to all the evidence, and taking all factors into account.

Failure to draw adverse inference - paragraphs 9 and 10

49. This point was made at paragraph 371 of the CR's Closing, and we dealt with it at our paragraph J666. We had made numerous references to the failures of BT to provide its own evidence as to BT Consumer's common costs, even if this would have required it to create it (as opposed to disclosing already available contemporaneous information). Further, this case was obviously different from *Royal Mail Trucks* [2024] EWCA Civ 181 where at paragraph 174 Green LJ dealt with how the

Tribunal might obtain information about an alleged cartel by compelling it, or directing that adverse inferences would be drawn if the defendants simply refused then to reveal anything about the cartel's actual operation. And in *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2020] UKSC 24, the issue was a refusal on the part of the defendant to explain how it had covered its costs in the context of a pass-on defence. In this case, while still the subject of our criticism, the problem was not lack of disclosure by BT, but its failure to undertake an exercise to arrive at discrete figures for BT Consumer's common costs - see J702-703. Moreover, any failure to draw an adverse inference is not a matter of law. Finally, the criticism in the last four sentences of paragraph 10 is really just reiterating the CR's general case against BT.

Incentives to withhold information - paragraph 11

50. There is nothing in this point. To the extent that a firm facing a possible abuse claim considers our judgment carefully, it would obviously conclude that we took into account BT's failure to adduce the relevant evidence.

Relying on Dr Jenkins' evidence alone - paragraph 12

51. This is similar to the previous point. Importantly, as we observed at paragraph J793, the CR did not cross-examine her on any of her attributions of common costs in the very detailed exercise which she undertook – see for example Sections A7A and A7B of Annex 7 to HJ1. Instead, the CR just rejected her approach entirely. We did not do that, but took into account the matters identified in paragraphs J795 and 799, as we were entitled to do. (The point made about the CR's failure to cross-examine is not affected by the fact either that the CR did not have to put its entire case to all the witnesses, or that the CR considered that her exercise here was a matter of judgment.)

Rejection of the argument that common costs must have been inherently low - paragraphs 13-14

52. This point is again just a disagreement with our conclusions. We gave this matter sufficient and careful consideration in our paragraphs J761-777. In those paragraphs we took clear account of the CR's points - for example at paragraph J768.

53. Further, the CR's claim (at paragraph 14 of its Skeleton Argument) that the totality of BT's indirect costs indicated by the 2009 RFS was far lower than the amount of common costs estimated by Dr Jenkins provides a "red flag" that the Tribunal failed to take into account is based on an incorrect premise. The totality of indirect costs referred to by the CR in this passage relates to Mr Duckworth's allocation of indirect cost to SFV Services alone, whereas the common cost figure that is the focus of Ground 1 is the common costs for BT Consumer as a whole. So the comparison is flawed.

54. Nor is there any difficulty with our endorsement of Mr Matthew's point in paragraph J769. It seemed clear to us that Mr Matthew was making a good point. This was that the question was not whether

any conceivable operator in the market could exist with lower common costs; rather, it is whether an efficient operator of BT's scale could have done so.

55. As to the question of bundle discounts indicating supply-side costs synergies which in turn suggested the existence of common costs which were not immaterial, we carefully explained our reasons at paragraphs J771-775. The partial quotation from J776 does not reflect our conclusion that, despite the fact that there was no detailed evidence on common costs synergies beyond what Dr Jenkins had said (see, for the context, paragraphs J771-773), and noting a counter-observation from the CR,

> "Nevertheless, the prevalence of bundle discounts across all operators in the market does seem to us to indicate that there are some important synergies arising from joint provision, and this albeit indirect evidence tends to discount the CR's claims that common costs are immaterial."

56. We were well-entitled to make that conclusion on our analysis of the facts before us.

57. The point made by the CR at paragraph 14(2) is misconceived. Common costs can consist of common direct costs and common indirect costs. Our paragraphs J771-775 addressed the argument made at paragraph 382 of the CR's Closing, and explained how synergies arise from the presence of common costs.

58. Finally, we did take account of what was said about immaterial common costs in saying that it would be surprising if the common costs were as high as Dr Jenkins said; see paragraph J777.

59. All of our conclusions here are well within the scope of our evaluative judgment.

Ground 2: Recovery of 40% of common costs from SFV revenues

60. Again, our observations in paragraph J902 (quoted in paragraph 45 above) apply equally here.

Paragraph 906 of the Judgment – paragraphs 16-19

61. The references to Dr Jenkins' figures in our paragraph J906 provided some context for our figure of 40%, where we explain that on her approach (with a margin of 13.5%), the common costs contribution would be a little below 50%, whereas adopting Dr Jenkins' preferred margin of 25% the common cost contribution would have been 62%. The figure we reached of 40% is hardly a "small downward adjustment". There is nothing irrational or perverse in our referring to Dr Jenkins' approach here, notwithstanding what we said about her overall approach at paragraph J856 which was that it could not justify the competitive benchmarks which she said resulted from it, and which we did not adopt. The same applies to what we said in J874 and 896. Overall, the common costs figure of 40% implied a contribution of £100m in 2015/16 which was much less that Dr Jenkins' baseline case of £242m in that year as we observed at paragraph J910. We repeat here the fact that focusing on 2015/16 alone does not give a balanced picture of our assessment across the entire claim period.

Paragraph 907 of the Judgment – paragraphs 20-21

62. There is nothing in the point at paragraph 20. Paragraph J907 provided context for the figure of 40% by reference to the much lower figures which would be implied on a customer number or revenue basis. Had we used those bases, the common costs contribution would have been much less and as we explained, our higher figure takes account of the flexibility in the patterns of common cost recovery that apply even in workably competitive markets and that should therefore be given to BT.

63. Nor is there anything in paragraph 21. As we explained, there should be flexibility to a firm in how it recovers common costs under normal competitive conditions (although not unfettered), which is why we took it into account in reaching our conclusion under Limb 1 as to what a competitive benchmark should be. Indeed, it would be very odd to impose an approach to common cost recovery on a dominant firm that was out of line with the way in which common costs are recovered under conditions of workable competition. So the fact that we previously found BT to be dominant is irrelevant here.

Ground 3 - error of law in assessment of economic value in Limb 2

Overarching point

64. The CR alleged unfairness in itself by detailed reference to 6 different matters (see pages 169-200 of his Closing) and we carefully addressed each of them, in the context of actually considering 11 different matters on unfairness. They essentially concerned matters of fact and expert evidence and this Ground 3 challenge is really no more than a disagreement of our assessment of those matters.

Wrong Approach to assessing economic value – paragraphs 26-28

65. There was no misdirection here. We considered whether, in terms of distinctive value, there was a reasonable relation between the price charged by BT and the competitive benchmark which we had found. See the full text of our paragraph J83. It does not appear that the CR disagrees with paragraph J83 itself, but if it does, there is no basis for that, as a matter of law. We again referred to distinctive value in J956.

66. As we observed at the end of paragraph J83, the assessment of distinctive value (or not) is highly fact-sensitive and involves a considerable amount of judgment, consistent with what was said in paragraph 216 of *Albion Water* cited at paragraph J65. This is also reflected in paragraph 319 of the CR's Closing.

67. There is no conflict with what Green LJ said at paragraphs 154-155 of *CMA v Flynn Pharma Ltd* [2020] EWCA Civ 339 ("*Phenytoin CoA*") quoted in paragraph 26 of the Application, because he was there dealing with the "Willingness to Pay Fallacy", and in that context he said that a proxy might be what consumers are prepared to pay in an effectively competitive market.

68. Both parties proceeded on the basis that the Tribunal should consider the question of reasonable relation to the price, unsurprisingly since it is one recognised way of showing unfairness (or not). See *Phenytoin CoA* at paragraph 97 (cited at J49 and see also J51). The CR referred to the question of reasonable relation of BT's prices to economic value in paragraphs 489-490 of his Closing and then sought to explain at length why there was no such reasonable relation – see paragraphs 508-554 of his Closing. We dealt in detail with all of those points. There was no error of law in our focussing on the question of reasonable relation to economic value in that context.

69. In that regard, and contrary to paragraph 28 of the Application, there is no error of law in considering (among other things) the ascription of value by customers subjectively. See our reference to Allergan plc v CMA [2023] CAT 56 ("*Hydrocortisone*") at paragraph J80 of our judgment, whereby subjective value attributed to customers can certainly be taken into account.

Failure to consider whether the constrained market in which BT operated explained its ability to charge excessive prices - paragraph 29

70. This point does not add anything. If there is a reasonable relation to the economic value of the service, that is said to be an illustration that the market power of the firm in question was not in fact responsible for the excess in question. In addition, there were our separate points about Workable Competition at paragraphs 1137-1158.

Positive Brand Value - paragraph 30

71. This suggests that we have elided an ascription of positive brand value to mere willingness to pay and is therefore an error of law. This is not the case. Paragraph J960 of the judgment does say that the essence of the Willingness to Pay fallacy is where customers are willing to pay the price but in truth they have nowhere else to go. However, we do not say that the Willingness to Pay fallacy cannot apply in other circumstances, and as we explained further in paragraph J961, any inference of the ascription of value depends on the facts, and the whole question of the existence or otherwise of customer inertia here (on which our conclusions are at paragraphs J1134-1135). It is implicit in *Hydrocortisone* (see paragraph J83) that if it can be shown that there is a positive ascription of value to the brand, that is something different to and more than simply a willingness to pay. In reality the CR is contending that the phenomenon of switching (and not switching) is irrelevant, which is clearly incorrect in this case.

Mere differences as constituting distinctive value - paragraph 31

72. There is no error of law here, and it is really just a disagreement of our conclusion on distinctive value. We gave very detailed and careful consideration to reasonable relation to economic value at paragraphs J952-1136 which was not merely about the Gives but also the attribution of brand value (including the ability to switch). We also explained at J956 why we rejected Mr Parker's threshold

for distinctive value as being too high. Further, we said that 3 of the Gives did constitute distinctive value at our paragraph J1029, pointing out that distinctive value must be assessed by reference to the impact on the customers in question and the extent of the excess found. At J996-1005 we also considered that one of BT's Gives did not generate significant value to SFV consumers.

Particular errors in the assessment of distinctive value – paragraph 32

73. Paragraph 32(1) alleges double counting because of the Gives' costs being included within the Limb 1 competitive benchmark. However, that does not prevent the question of distinctive value being considered at Limb 2. If it were otherwise, the question of distinctive value could never arise at Limb 2, and this was not suggested in the CR's Closing. A customer may value a feature of a product or service more than the cost of providing it. Whether that is so is the whole point of asking if there is a reasonable relation between price and economic value. We were careful to enunciate a clear distinction between what factors went into Limb 1and what went into Limb 2.

74. Paragraph 32(2) says that our rejection of the argument that the availability of the same Gives to bundle customers means there is no value in the Gives (see paragraph J1029) is inadequate. There is nothing in this. We were entitled to focus on the position of the Class Members whom we had already noted made more use of their landlines than BT customers, or UK Customers, generally, with VOCs valuing traditional telephone which would have an impact on the value of Gives, as we explained at paragraph J964.

75. Paragraph 32(3) challenges our assessment of the Gives. But we carefully considered the extent to which they all became available from rivals, and this is no more than a challenge to our findings of fact.

76. The same is true of the criticism at paragraph 32(4). There was ample material before us to come to a view about the value of the Gives. And we did make reference to what had been offered by competitors at different times.

77. Paragraph 33 challenges our overall conclusion saying that we should have attempted to assess the extent of the value of each of the Gives and then compare it with the excess in some scientific way. This is unrealistic. We were well entitled to consider the matter in a holistic fashion, with regard to all the evidence before us. (The example given by the CR of what Ofcom did in its 2017 Provisional Conclusions is not apposite: there it was assessing the actual cost of providing the service in the context of BT's line rental price increases; see paragraphs 4.60-4.62.)

Ground 4: error of law in relation to workable competition factors in Limb 2

Rejection of zero economic profits thesis - paragraph 37

78. We rejected this thesis specifically at paragraphs J1139-1141 and were entitled to do so, making the distinction between workable competition and perfect competition. The second sentence of paragraph 37 is simply a repeat of the CR's general case on unfairness which we rejected at length.

Not taking into account that we gave BT the "benefit of the doubt" under Limb 1 - paragraph 38

79. The Tribunal never said expressly or impliedly that we gave BT the benefit of the doubt and we did not do so. We came to a conclusion as to what we considered, overall, was the appropriate competitive benchmark. Once that was done, there was no need to qualify in some way that benchmark for the purpose of assessing unfairness under Limb 2. What the CR is really saying here is (again) that we should not have reached the competitive benchmark that we did. But having done so, there is no "double counting" as it were, when we come to Limb 2. Nor is it perverse to find no unfairness, having determined that particular benchmark, and having regard to all the Limb 2 factors (including the size of the excess).

Ofcom Pricing Trends Report relied upon at paragraph 1146 of the judgment - paragraph 39

80. We deal with this general topic at paragraphs J1145-1151. The point of challenge at paragraph 39 is not correct. As the rubric to Figure 16 shown beneath J1146 says, the prices shown are the average prices charged on a list or promotional basis by the main providers, over a period of time, not prices charged to the same customer. It is clear from Ofcom's analysis that there are disparities in bundle pricing at any point in time between consumers who benefit from promoted prices and the very substantial proportion of consumers who continue to buy from their bundle provider after the promotional period has ended. The purpose of the graph was to show the disparity between list and promotional pricing that persists within a market that is agreed to exhibit workable competition. It is correct that the prices of individual suppliers were not shown, because these were average figures (as acknowledge at J1147), but this does not in any way detract from to the point about price dispersion made at J1150. Since any average price is itself comprised of a range of prices, if one were able to view the dispersion of each and every supplier price that comprised the average figures cited by Ofcom this would almost certainly have revealed greater dispersion than is shown by the averages.

Costs Efficiencies Dispersions – paragraph 40

81. We deal with this at paragraphs 1152-1158. As we said in paragraph J1155, the CR itself said (at paragraph 245 of his Closing) that BT enjoyed costs advantages over its rivals. It then said that one should not take account of costs efficiencies dispersion because BT's own cost advantage was simply due to it being a legacy provider, a point which we rejected.

Ground 5 - Compound interest - paragraph 41

82. This is a short point and in fact is *obiter*. The CR in the PTA Application does not explain why we misapplied the decisions in *Sempra Metals v IRC* [2008] 1 AC 561 and *Merricks Remittal* [2021] CAT 28, he simply says that we should have come to the opposite view. We considered and dealt with the CR's point about aggregate damages specifically at paragraphs J1417-1423. There is plainly no point of law here. We do not consider that the further points made in paragraphs 34 and 35 of the CR's Skeleton Argument take the matter any further. We applied the decisions referred to above, as we should have done – it is not for us to say that they were wrong or inapplicable.

Some other compelling reason for an appeal

83. While these are collective proceedings involving a claim for damages for an abuse of dominant position, the law on abuse of dominant position in this area has been well-established for a considerable period of time. We note the CR's references in his Skeleton Argument to other decisions of the Tribunal which may be the subject of an appeal. However, we are concerned with this case, and can see no other compelling reason for an appeal.

Expedition

84. We understand why the CR says that this case should be expedited on appeal if the Court of Appeal were to grant PTA. However, we think that at this stage, now that the case has concluded, it is a matter for the Court of Appeal to decide if any appeal for which its grants PTA should be expedited. We point out further, though again it is a matter for the Court of Appeal, that if an order for expedition meant that the parties' existing counsels' availability would not be taken into account, this might prove disadvantageous, given the length of the trial and their involvement in it, when it came to any appeal.

Conclusion

85. For all those reasons, permission to appeal is refused.

86. All of the above is our unanimous judgment.

The Hon. Mr Justice Waksman
Chair

Eamonn Doran

Derek Ridyard

Charles Dhanowa C.B.E., K.C. (*Hon*)
Registrar

Made: 13 February 2025
Drawn: 13 February 2025