Neutral citation [2017] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1267/3/12/16

Victoria House
Bloomsbury Place
London WC1A 2EB

2 June 2017

Before:

ANDREW LENON QC
(Chairman)
WILLIAM ALLAN
PROFESSOR COLIN MAYER CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

JUDGMENT

INTRODUCTION

1. British Telecommunications plc ("BT") is appealing, pursuant to section 192(1)(e) of the Communications Act 2003 ("the 2003 Act"), from a costs order dated 8 July 2016 made by the Competition and Markets Authority ("CMA") pursuant to section 193A of the 2003 Act ("the Costs Order"). The Costs Order was made in respect of the CMA's costs incurred in connection with the reference to it of price control matters in BT's appeal in Case No: 1238/3/3/2015. The Costs Order required BT to pay £572,897 in respect of the CMA's costs.

2. Section 193A was inserted into the 2003 Act by section 54 of the Enterprise and Regulatory Reform Act 2013 with effect from 1 April 2014. Section 193A provides as follows:

> "**193A Recovery of CMA's costs in respect of price control references**
>
> (1) Where a determination is made on a price control matter referred by virtue of section 193, the CMA may make an order in respect of the costs incurred by it in connection with the reference (a "costs order").
>
> (2) A costs order may require the payment to the CMA of some or all of those costs by such parties to the appeal which gave rise to the reference, other than OFCOM, as the CMA considers appropriate.
>
> (3) A costs order must—
>
> (a) set out the total costs incurred by the CMA in connection with the reference, and
>
> (b) specify the proportion of those costs to be paid by each party to the appeal in respect of whom the order is made.
>
> (4) In deciding on the proportion of costs to be paid by a party to the appeal the CMA must, in particular, consider—
>
> (a) the extent to which the determination on the reference upholds OFCOM's decision in relation to the price control matter in question,
>
> (b) the extent to which the costs were attributable to the involvement in the appeal of the party, and
>
> (c) the conduct of the party.
>
> (5) A costs order –

(a) must be made as soon as reasonably practicable after the making of the determination on the reference but

(b) does not take effect unless the Tribunal, in deciding the appeal which gave rise to the reference, decides the price control matter which is the subject of the reference in accordance with the determination of the CMA (see section 193(6)).

(6) In a case where the Tribunal decides the price control matter in question otherwise than as mentioned in subsection (5)(b), the CMA may make an order under this subsection in respect of the costs incurred by it in connection with the reference.

(7) Subsections (2) to (4) apply in relation to an order under subsection (6) as they apply in relation to an order under subsection (1); but for that purpose the reference in subsection (4)(a) to the determination on the reference is to be read as a reference to the decision of the Tribunal mentioned in subsection (6).

(8) An order under subsection (6) must be made as soon as reasonably practicable after the decision of the Tribunal mentioned in that subsection.

(9) An amount payable to the CMA by virtue of an order made under this section is recoverable summarily as a civil debt (but this does not affect any other method of recovery).

(10) The CMA must pay any sums it receives by virtue of this section into the Consolidated Fund.

(11) The functions of the CMA under this section, other than those under subsections (9) and (10), are to be carried out on behalf of the CMA by the group constituted by the chair of the CMA in relation to the reference in question."

3. As this is the first case in which the CMA has exercised its power to make a costs order under section 193A, BT has invited the Tribunal to give guidance in this judgment as to the principles governing the operation of this provision. We have set out later some observations on the operation of section 193 arising out of the issues raised by the grounds of appeal in this case.

BACKGROUND

4. The background to this appeal is as follows:

(1) On 19 March 2015 the Office of Communications ("Ofcom") published its statement entitled "Fixed Access Market Review: Approach to the VULA margin" ("the Final Statement"). VULA stands

for “Virtual Unbundled Local Access”. It is the product through which other communications providers have access to BT's superfast broadband network. The Final Statement set out Ofcom’s decision to require BT to maintain a minimum margin between the price it charges for access to its superfast broadband network via the VULA input and the price of those retail packages offered by BT’s retail division that use VULA as an input (the “VULA Margin Condition”).

(2) On 19 May 2015 BT and TalkTalk Telecom Group plc (“TalkTalk”) each filed Notices of Appeal under section 192 of the 2003 Act appealing different aspects of Ofcom’s decision as set out in the Final Statement. Those appeals will be referred to hereafter as the “BT Appeal” and the “TalkTalk Appeal” respectively, and together, the “Appeals”. BT’s Notice of Appeal consisted of six grounds of appeal raising several sub-questions.

(3) A case management conference (“CMC”) was held before the Tribunal on 18 June 2015 in order to determine, amongst other things, the classification of the grounds of appeal as either specified price control matters (“PCMs”), to be determined by the CMA, or non-specified PCMs, to be determined by the Tribunal, in accordance with section 193(1).

(4) On 29 June 2015 the Tribunal published its case management ruling ([2015] CAT 13) in which it determined the classification of the grounds of appeal as follows:

(i) BT’s Ground 1 and Ground 5A were non-specified PCMs to be determined by the Tribunal;

(ii) All other grounds (i.e. BT’s Grounds 2 - 4, 5B, 5C and 6 and TalkTalk’s Grounds 1 and 2) were specified PCMs to be referred to the CMA.

(5) By order dated 17 July 2015 the Tribunal issued directions for the future conduct of the Appeals:

(i) BT and TalkTalk were directed to provide to the Tribunal Registry by 17 November 2015 an agreed draft of the questions in their respective Appeals which were to be referred to the CMA for determination. In compliance with that direction, the draft questions in both Appeals were submitted on 17 November 2015.

(ii) In relation to the BT Appeal only, the Tribunal directed that all pleadings and evidence must distinguish clearly between the specified PCMs and the non-specified PCMs. On 2 September 2015, BT filed an Amended Notice of Appeal, structured in accordance with the case management ruling of 29 June 2015 (see (4) above) and these directions.

(6) In October 2015, in anticipation of the specified PCMs being referred to it in mid-November, the CMA began initial planning work in respect of the references and it was decided to appoint one appeal group to determine the PCMs in both appeals (the "CMA Appeal Group"). From the first week of November 2015 onwards, weekly staff meetings took place and the members of the CMA Appeal Group began to familiarise themselves with the documents in the appeals.

(7) On 20 November 2015, following submission of the draft questions to be referred to the CMA (see (5)(i) above) and in the light of the parties' indication as to their limited availability, the Tribunal communicated its decision (made at the CMA's request) to defer the reference to the CMA of the specified PCMs until the week commencing 4 January 2016. The CMA also invited the Tribunal to direct that the reference period be extended from four to six months, to which none of the parties objected.

(8) A CMC was held at the CMA's offices on 3 December 2015.

(9) On 5 January 2016, the Tribunal referred the specified PCM reference questions in both Appeals to the CMA for determination by 5 July 2016.

(10) On 6 January 2016, the CMA wrote to the parties to give guidance on a number of administrative and procedural matters. In accordance with that letter:

(i) A technical presentation was held at BT's offices on 8 January 2016.

(ii) A core submissions hearing was held on 15 January 2016.

(iii) Written core submissions were submitted by each of BT, TalkTalk, Ofcom and Sky UK Limited on 22 January 2016.

(iv) Further written core submissions were submitted by each of BT and TalkTalk on 1 February 2016.

(11) During January 2016 work was done by the CMA on analysis of the questions raised by the BT and TalkTalk Appeals, on further consideration of the approach the CMA should take in the BT Appeal and on the preparation of working papers and presentations.

(12) In February and March 2016 bilateral meetings with the parties took place to discuss particular issues and clarify matters and work began on the drafting of the provisional determination of the reference questions (the "Provisional Determination").

(13) On 8 April 2016 the CMA circulated a confidential version of its Provisional Determination, finding no errors on the part of Ofcom in the TalkTalk or BT Appeals, except in relation to an issue raised by BT as to the duration of the monthly period imposed by Ofcom for testing

compliance with the VULA Margin Condition. The CMA provisionally concluded that, amongst other matters, the one-month compliance period under the test adopted by Ofcom was unduly restrictive to BT.

(14) On 11 April 2016 the CMA also sent the parties its remedies letter setting out its proposals as to the design of a remedy for the error it had provisionally found (the "Remedies Letter"). These focused on consideration of the length of the period over which it might be appropriate to measure BT's compliance with the test. The CMA invited the parties' representations on these issues.

(15) The parties submitted comments on the Provisional Determination and the Remedies Letter on 25 April 2016. A remedies hearing in the BT Appeal took place on 25 May 2016.

(16) On 13 June 2016 the CMA sent its final determination to the Tribunal (the "Final Determination"), the text of which was largely the same as that of the Provisional Determination.

(17) On 23 June 2016 the CMA sent a draft costs order to the parties. This was accompanied by a consultation letter as required by §8.7 of the CMA's publication "*Cost recovery in telecoms price control references: Guidance on the CMA's approach (CMA5)*" (the "CMA5 Guidance"). BT responded on 30 June 2016 with a number of comments, noting that the CMA had not provided any particulars of how it had arrived at its estimate of the total time spent on each of the two references and saying that, without the particulars, the parties could not participate properly in the consultation process and that the particulars of actual costs incurred by the CMA were necessary in order to allow for an effective right of appeal.

(18) On 8 July 2016 the CMA issued the final Costs Order accompanied by a letter responding to BT's comments.

(19) The Costs Order included the following provisions:

"**3. Total costs incurred by the CMA**

3.1 The total costs incurred by the CMA in connection with the determination of the References is as follows:

(a) BT Appeal - £636,552; and

(b) TalkTalk Appeal - £112,333.

4. Apportionment of costs

4.1 Pursuant to paragraph 193A(3)(b) of the Act and having particular regard to the factors set out in paragraph 193A(4):

(a) there shall be a reduction of 10% in respect of the costs to be paid by BT in the BT Appeal to reflect the fact that BT succeeded in part, namely in respect of reference question 3(b) where Ofcom was found to have erred in setting a one-month compliance period; and

(b) Talk Talk shall be liable for all of the costs incurred by the CMA in the Talk Talk Appeal.

5. Costs Order

5.1 BT shall pay the CMA's costs in relation to the BT Appeal in the sum of £572,897.

5.2 TalkTalk shall pay the CMA's costs in relation to the TalkTalk Appeal in the sum of £112,333."

(20) In relation to the provision of further particulars, the CMA responded that "there is no requirement under section 193A of the Communications Act 2003, nor in the CMA's guidance, for the CMA to provide any further particularisation of its costs". However, the CMA stated that its costs had been "recorded and identified transparently" and provided a breakdown of its costs by reference to five broad categories of costs incurred and confirmed that these represented the actual costs and expenses necessarily incurred by the CMA.

(21) On 16 August 2016 BT wrote to the CMA requesting the provision of a more detailed schedule of incurred costs in order to assist BT with determining whether to proceed with an appeal of the Costs Order.

(22) On 22 August 2016 the CMA responded, reiterating that it was not required to provide further particularisation of its costs. The CMA did provide some additional detail but refused to provide all the detail requested by BT.

(23) On 8 September 2016 BT filed a Notice of Appeal which included a request for a direction pursuant to Rule 19(1) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") that the CMA disclose the documents recording and/or identifying the CMA's costs incurred in connection with the two references, including in particular documents setting out the information sought by BT's letter of 16 August 2016 and as to the basis on which the CMA decided to allow a reduction of only 10% to reflect BT's success on its reference; and an order pursuant to Rule 19(2)(d) and/or (e) that the CMA give evidence and/or provide information in relation to the particulars of the CMA's incurred costs to BT.

(24) On 29 September 2016 the Tribunal made an order requiring the CMA to file and serve its observations in relation to the disclosure directions sought by BT by 5 October 2016.

(25) On 4 October 2016 the CMA provided BT with the further disclosure sought in its Notice of Appeal. In subsequent correspondence BT withdrew its application for disclosure and directions were agreed for the disposal of this appeal, including a direction that BT be permitted to amend its Notice of Appeal in the light of the disclosure provided by the CMA. It was also agreed by the parties that this appeal should be determined on the papers, without a hearing.

BT'S GROUNDS OF APPEAL

5. In its Amended Notice of Appeal, supported by the first and second witness statements of George Ritchie, BT advances, in summary, the following grounds of appeal.

Ground 1

6. BT's first ground of appeal is that the CMA has wrongly interpreted and/or applied section 193A of the 2003 Act in such a way as to allow recovery of costs even where they had been unreasonably and/or disproportionately incurred.

7. Under this ground of appeal, BT contends, first, that the CMA Appeal Group could not have taken a properly informed decision as to the appropriate level of costs recovery from BT because the CMA's time-recording system did not hold sufficiently detailed information. BT asserts that the CMA's approach to time keeping was deficient in that its time-keeping system, CMA Direct, did not record a description of the work actually undertaken by a staff member on a particular day e.g. indicating the time spent by a person considering particular reference questions. It therefore did not enable the CMA properly to consider the reasonableness and proportionality of the costs incurred. This means that it was impossible to ascertain, for example: (i) how much time was spent overall by how many people in determining each reference question; (ii) what proportion of time was spent in meetings as against time spent working on the determination of reference questions; and (iii) how many people attended each meeting and whether it was reasonable to attend.

8. Second, BT contends that the limited information provided by the CMA disclosed examples of costs charged to BT which were unreasonable and/or disproportionate to include in the Costs Order. It gives as examples:

   (1) The inclusion of transcription costs of the remedies hearing on 25 May 2016 which the CMA has conceded should not have been

included, the CMA having agreed that BT should not bear any of the costs of the remedies phase.

(2) Work done on remedies by remedies specialists before the separate remedies project code was added, and which may have been incorrectly classified as work done on the BT Appeal generally rather than preparatory work on remedies, the costs of which should not have been part of the Costs Order, the CMA having agreed that BT should not bear any of the costs of the remedies phase.

(3) The charge for the costs incurred in consulting Mr Hill, a tax barrister, on whether VAT should be charged on CMA staff and member costs in regulatory appeals. The fact that the CMA arbitrarily decided to charge a third rather than all of Mr Hill's fees shows that the CMA recognised that Mr Hill's advice was of general relevance to the CMA's functions and they were not costs incurred in connection with the reference to the CMA in BT's Appeal. However, none of the costs should have been included as they were not connected with or necessitated by the reference in BT's Appeal which did not require the CMA to determine whether VAT should be charged.

(4) Costs that were incurred as the result of duplication or over-staffing. BT complains that the time spent by Mr Cooper as project director was included despite the duplication resulting from his being replaced by Mr Jarvis in the same role before the references had been made. BT says that it is unclear why Mr Rock's time spent on preliminary reading was included when he did not contribute to the CMA's determination. More generally the CMA's records suggest that up to 14 staff plus 3 group members attended CMA Appeal Group meetings which BT contends is hard to square with the CMA's professed commitment to an avoidance of over-staffing.

(5) Costs of around £236,000, some 31.52% of the total costs, were incurred before January 2016 i.e. before the references were even made

to the CMA. BT contends that, had the CMA waited until after the reference had been made and it had heard and read the parties' core submissions, the costs would have reduced significantly. Moreover, the CMA's engagement with the issues prior to receipt of BT's core submissions was inconsistent with the CMA's own guidance "*Price control appeals under section 193 of the Communications Act 2003*" (the "CC13 Guidance"). According to this guidance, core submissions form the starting point of the CMA's procedure for determining references in price control appeals. By incurring nearly a third of the costs before reading the core submissions, the CMA had not acted reasonably or proportionately and had "jumped the gun".

9. Third, BT contends that the CMA Appeal Group did not have available to them the "By Person" table or the "By Month" table which the CMA has prepared since BT filed its appeal in this case. It contends that there is nothing to suggest that the CMA Appeal Group was provided with any information regarding how the 47.65% overhead rate was arrived at so as to be able to assess the reasonableness and proportionality of the rate. Moreover, the CMA did not have evidence before it of the costs incurred in other regulatory appeals that it might have used as a cross-check on reasonableness and proportionality. In this regard, whilst accepting that simple "burn-rate" comparisons are of limited value, BT asserts that the costs which the CMA sought to recover equated to a "burn-rate" of around £250,000 per month, which appeared to be significantly greater than the amounts recovered in other regulatory appeals.

10. BT's current estimate of what the CMA should have taken into account, as the starting point for its calculation of the amount of recoverable costs, but failed to do so, includes the following:

    (1) A reduction of at least 5% in the staff costs i.e. around £32,700 from the CMA's starting point figure.

(2) A reduction of £14,783.41 being the overhead margin wrongly applied to two part-time CMA Appeal Group members who appear to have worked away from the CMA's offices.

(3) A reduction of around £7,750 to ensure that BT is not required to pay for any preparatory work done in relation to remedies which the CMA itself has accepted that BT should not have to pay.

(4) Further reductions to remove the transcript costs for the remedies hearing, the costs of Mr Hill's advice on VAT matters, and the time spent by Mr Cooper and Mr Rock.

(5) A further reduction of around £23,600 to remedy the unreasonable decision to incur £236,000 prior to the references even having been made.

11. BT contends that, if these amounts had been deducted, the Costs Order against BT would have been reduced by around £65,500.

Ground 2

12. BT's second ground of appeal is that the CMA failed properly to identify the costs incurred in connection with the reference. Under this ground of appeal, BT contends that the CMA is empowered to recover its costs only where incurred in connection with the reference. As a matter of jurisdiction, the CMA must therefore do all it reasonably can to ensure that it recovers from a party only those costs which were incurred in connection with the reference made in the appeal to which it was a party. To do otherwise might result, in a case of two or more related references, in a party bearing costs which were incurred in connection with a reference in a different appeal.

13. BT contends that the CMA should keep and use separate records for different references which are dealt with in parallel so as to be able to justify the division of those common costs among multiple references on an evidenced

and equitable basis. The CMA has conceded that it could have created separate projects on CMA Direct for work common to both Appeals, work undertaken on the BT Appeal and work undertaken on the TalkTalk Appeal. BT submits that the CMA is likely to have erred in fact and/or in the exercise of its discretion in "guesstimating" a split between the costs incurred in connection with each of the two references. Its current best estimate of the reduction which should be made to ensure that the CMA only recovers the costs specifically incurred in connection with the reference in the BT Appeal is about £125,000.

14. Based on these grounds, BT is seeking an order remitting the case to the CMA with directions that the CMA should amend the Costs Order to reflect the Tribunal's decision and awarding BT its costs of this appeal.

THE CMA'S DEFENCE

15. In its Defence, supported by the first witness statement of Alasdair Smith, who chaired the CMA Appeal Group, the CMA contends, in summary, as follows:

Ground 1

(1) The costs regime under section 193A of the 2003 Act is not analogous to the *inter partes* cost regimes under Part 44 of the Civil Procedure Rules ("CPR") or Rule 104 of the Tribunal Rules. These costs regimes provide protection against the risk of liability for overspending on legal costs. The CPR provide for a system of assessment in which the burden is on the party seeking to recover costs to show that the costs have been reasonably and proportionately incurred. The Tribunal Rules provide that in making a costs order the Tribunal may take account of, amongst other things, any schedule of incurred or estimated costs filed by the parties and whether costs were proportionately and reasonably incurred.

(2) Section 193A is different from these regimes in aim and design. Unlike a litigant in civil proceedings, the CMA has no incentive to maximise its chances of winning the case by overspending. Nor is there any presumption that the CMA will recover the costs of making a determination; the power to recover costs is only to be exercised to the extent that an appellant is unsuccessful.

(3) The CMA is generally incentivised to operate efficiently. Under the government's 2015 spending review, the CMA has had to make savings of 7% in real terms over the review period. As an organisation it has committed itself, in its most recent Annual Plan, to managing its cases efficiently, transparently and fairly with leaner project teams and lower resource costs.

(4) It is therefore unsurprising that there is no equivalent provision in the 2003 Act requiring any kind of assessment of the CMA's costs and no burden on the CMA to establish that the costs it incurred were reasonable and proportionate before they can be the subject of a costs order. To the contrary, section 193A requires that the costs order sets out, first, the total costs incurred by the CMA in connection with the reference and, secondly, the proportion of those costs to be paid by each party to the appeal. The factors to be taken into account under section 193A(4) by the CMA in deciding the proportion of costs to be paid include the extent to which a party succeeded, the extent to which the costs were attributable to the involvement in the appeal of the party and the conduct of the party but they omit any reference to reasonableness or proportionality.

(5) The intention of Parliament is therefore quite deliberately that the CMA should exercise its broad judgment as to the appropriate proportion of its total costs, not that it should engage in the equivalent of a detailed assessment of its costs or anything resembling it.

(6) Despite its disavowal of the contention that section 193A should be treated as giving rise to a detailed assessment of costs, BT's case that the CMA should have provided details of such matters as how much time was spent overall by how many people in determining each reference question and how much time was spent in meetings as against time spent working on the determination of reference questions effectively amounted to a process similar to a detailed assessment. If this approach were correct, there would be a risk of the costs award under section 193A giving rise to disproportionate satellite litigation.

16. With regard to the specific cost items disputed by BT:

(1) The CMA accepts that the transcript costs of the remedies hearing were wrongly included in the total and is prepared to refund £481.95 in respect of these costs (this being the proportion of the fees charged to BT). The CMA is also prepared to refund £8,787.50 in respect of remedies work which was incorrectly not ascribed to that code, making a total refund of £9,269.45.

(2) The CMA stands by its inclusion of £408 being part of the fees for Counsel's advice on VAT treatment as the advice was sought in the context of BT's Appeal but would have wider application than to the present case alone.

17. The CMA rejects BT's assertion that any of the work for which it has charged was unnecessary or duplicative on the following grounds:

(1) The CMA's evidence is that Mr Jarvis did not duplicate work done by Mr Cooper. Mr Cooper's early involvement was confined to preparatory work mainly focused on preparation for and attendance at the CMC. The work carried out by Mr Jarvis and Mr Cooper did not overlap and each was performing tasks in relation to separate parts of the process. Nor could it be said that Mr Rock did not contribute substantively to the CMA's Final Determination.

(2) There is no basis for the suggestion that too many people attended CMA Appeal Group meetings. Consideration was always given to whether all or some of the case team were required to attend each of the meetings.

(3) The CMA rejects BT's assertion that it was not reasonable or proportionate to incur 31.52% of total costs before the formal order for reference had been made. It contends that there was every reason to have made good use of time before the order was made in order to familiarise itself with the complex background to the matter, the Notices of Appeal and evidence, to set up the composition of the CMA Appeal Group and to begin staff meetings in advance of the expected reference date of 17 November 2015. This was in accordance with the CC13 Guidance, which includes the following:

> "3.10 When an appeal that appears likely to lead to a [CMA] reference has been notified to the CAT, the [CMA] will identify staff to engage with the parties to the appeal and the CAT. During this stage the [CMA] will be ready to assist parties and the CAT as appropriate.
>
> 3.11 When it appears that a reference from the CAT is both likely and reasonably imminent, the [CMA] will start to plan its work. This will enable it to make submissions to the CAT as to the likely period required to conduct its determination (see paragraph 3.4) and to identify those technical issues with which it will need to become familiar. It will seek to set up meetings with the parties to discuss such issues; these arrangements will normally be made before the [CMA] has received a reference. The meetings themselves will normally be held shortly after or even before the reference is made."

(4) There was no reason to break off the preparatory work when the reference was later deferred to January 2016. The CMA also contends that it would not have been "considerably more efficient" to have awaited BT's core submissions before starting work. All of the pre-reference work would have needed to be done in any event. Moreover, the work consisted of essential familiarisation with Ofcom's Final Statement which had to be done in advance of the core submissions hearing on 15 January 2016.

18. In response to the complaint that the CMA Appeal Group was not in a position to assess the overhead rate charged, the CMA submits that this was the CMA's standard rate calculated to ensure that the CMA recovers the full cost of work undertaken, taking into account a variety of factors including direct staff costs, costs of the support functions and non-staff costs and is applied to panel members on the basis that support functions are equally applicable to their work as to staff members. There is therefore no basis for discounting the overhead rate.

19. As to the complaint that the CMA should have cross-checked with the costs of other regulatory appeals, the CMA submits that the costs of each appeal are different and not a useful point of comparison. In any event, BT's comparison with the costs of other appeals is incorrect. The alleged "burn-rate" of £250,000 per month is incorrect given that the CMA's costs were spread over a period of 8.5 months from October 2015 to June 2016, not just the three months between January and March 2016 as BT contends. The resulting burn-rate of £82,587 per month (including overheads) is not out of line with costs incurred in other regulatory appeals.

Ground 2

20. In response to the complaint that the CMA failed to keep separate costs accounts in respect of (i) work exclusively associated with the determination of BT's Appeal; (ii) work exclusively associated with the determination of TalkTalk's Appeal; and (iii) work associated with both Appeals, the CMA submits that, whilst it did not use separate codes on its time-recording system for each Appeal and for work which was common to both Appeals, it was nonetheless able to arrive at an appropriate apportionment of costs as between BT and TalkTalk based on its review of the case, an assessment of the amount of time staff had spent on the two Appeals and the CMA Appeal Group's discussion as to the appropriate apportionment. It therefore rejects BT's contention that it erred in law in apportioning the costs of BT's and TalkTalk's Appeals on the basis of an 85:15 split and contends that the adjustments claimed for by BT are factually unfounded.

BT'S REPLY

21. In its Reply, BT repeats its earlier contentions and further submits as follows:

(1) In order for effective consultation to take place in accordance with the CMA's own guidance, the CMA must provide adequate information to allow the consultee(s), i.e. prospective payer(s), to form their own assessment of the reasonableness and proportionality of what the CMA proposes to recover of its incurred costs.

(2) The CMA's position in refusing to allow detailed scrutiny of its decision as to costs is inconsistent with the intention of Parliament in granting a right of appeal on the merits to persons against whom section 193A costs orders have been made. That right of appeal presupposes that those persons should be in a position to identify errors of fact and/or principle.

(3) The fact that the CMA is incentivised to operate efficiently does not mean that every appeal will be run efficiently.

(4) It would not be unduly burdensome to expect the CMA staff and members to record brief details of work done on a daily basis and to provide fuller and better particulars of its costs.

(5) The CMA's current approach to section 193A decision-making in providing scant information at the consultation stage, is liable to encourage cost appeals. BT's concerns are shared by other companies in both the telecoms sector and other regulated sectors subject to similar cost recovery regimes.

(6) BT had a legitimate expectation that the CMA would follow its own published policy in the CC13 Guidance unless it gave BT reasonable notice in advance of its intention to do otherwise, allowing BT to make

representations on the implications of deviating from the established and published procedure.

(7) No part of the reference in BT's Appeal required the CMA to determine whether VAT should be charged on CMA staff and member costs in regulatory appeals. That question arises in relation to the CMA's exercise of its power under section 193A. It is separate and distinct from the substantive questions referred in BT's Appeal. Recovery of the costs of seeking advice on the charging of VAT is therefore *ultra vires*.

(8) The CMA is under a legal duty to take reasonable steps to ensure that a user of the CMA's appellate function does not pay for costs incurred in connection with another party's appeal. Requiring CMA staff and members to use CMA Direct to record details of their work is an example of such a step.

(9) The fact that the CMA's evidence confirms that much of the pre-reference work was spent on common tasks serves to confirm BT's case that an 85:15 split results in BT paying for costs which were incurred in connection with the reference in TalkTalk's Appeal.

22. By its Reply, BT also reduces the quantum sought in respect of the heads of claim referred to at paragraphs 10(2) and 10(5) above, such that the overall amount by which BT seeks to have the Costs Order reduced under Ground 1 (after taking into account the amounts which the CMA has agreed to refund) is £36,000.

DECISION OF THE TRIBUNAL

23. We set out some general observations concerning the operation of section 193A of the 2003 Act before addressing BT's grounds of appeal.

24. First, in view of its legislative purpose and the terms in which it is framed, we consider that section 193A requires the CMA to make a broad, soundly based judgment as to its total costs and as to the proportion of those costs for which the paying party is to be made liable but not that it should engage in a process analogous to a detailed assessment of costs under CPR Part 44 or Rule 104 of the Tribunal Rules.

25. The purpose of section 193A is to enable the CMA to recover for the public purse costs incurred by it in connection with an unsuccessful appeal. This purpose is therefore significantly different from that of the cost regimes in Part 44 of the CPR and Rule 104 of the Tribunal Rules which make provision for a party to civil litigation to recover its costs from another party. As noted by the CMA, a party to civil litigation may be incentivised to incur costs which are excessive and unreasonable, for example by embarking on a "win at all costs" strategy or in order to put pressure on another less well-resourced party to reach a settlement or (in the case of a party's legal representatives) to maximise fees.

26. Both the CPR and the Tribunal Rules therefore provide substantial protection to the paying party against the risks of being made liable for excessive costs. Part 44 of the CPR was originally introduced as part of the Woolf reforms to civil justice with the aim of tackling the problem of excessive costs and ensuring that a successful party recovers no more in costs than it was reasonable and proportionate for it to have incurred in all the circumstances of the case. CPR 44.3 lists factors to be taken into account in making a costs order and provides that costs which are unreasonably incurred or unreasonable in amount will not be allowed and that, where costs are assessed on the standard basis, only costs which are proportionate to the matters in issue will be allowed. The procedure for a detailed costs assessment under the CPR involves service of a bill of costs, the raising of points of dispute in relation to specific items and the determination of those points of dispute at hearing. Under the Tribunal Rules a similar approach is taken.

27. Unlike a party to civil litigation, the CMA has no incentive to inflate costs. It is not a party to adversarial litigation and its costs are only recoverable in the event of an appeal failing. It is therefore not surprising that there is nothing in section 193A equivalent to the costs assessment provisions in CPR 44 and Rule 104 of the Tribunal Rules. Section 193A simply requires the CMA to set out its total costs and to specify the proportion of costs to be paid by each party in respect of whom a costs order is made, taking into account, in particular, the extent to which OFCOM's decision was upheld, the extent to which costs were attributable to the involvement in the appeal of the party and the conduct of the party. An appellant can of course limit its potential exposure to a costs order by being selective with regard to the points taken on appeal. There is no requirement in the statute for the CMA to consider proportionality or reasonableness of costs.

28. If the CMA were required to carry out a detailed assessment of its costs, there is, as the CMA submits, a risk of the process and of any challenge to it becoming disproportionate in themselves and of giving rise to yet further costs.

29. Second, with regard to the standard of review to be exercised by the Tribunal of a section 193A costs order, the existence of a right of appeal under section 192 presupposes that a costs order may be challenged on the basis of an error of fact or law or the wrongful exercise of discretion by the CMA. Section 193A does not, in our view, entitle the CMA to make a costs order in relation to costs that were incurred unreasonably or unnecessarily. However, in common with its established approach to appeals on the merits under section 192, the Tribunal will give due weight to the views of the CMA, as a body with considerable experience of managing and staffing telecoms appeals and similar projects, as to its assessment of its total costs, the reasonableness of those costs and as to the proportion for which the paying party should be made liable. The Tribunal will not interfere with the CMA's assessment of these matters merely on the basis that the party can suggest other ways of approaching them. As noted by the Tribunal in *T-Mobile (UK) Ltd and others*

v Ofcom [2008] CAT 12, §82, in a different context but in terms that are equally applicable to this case:

> "It is ... common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause."

30. Moreover, it would not be appropriate for the Tribunal to seek to direct the CMA as to how it should manage its internal operations with regard to matters such as project planning, staff deployment or record keeping. It is not generally the function of the Tribunal to supervise the operations of regulators; *Floe Telecom Ltd v Ofcom and another* [2006] EWCA Civ 768, §36.

31. Third, with regard to disclosure, although section 193A does not require the CMA to provide any more detailed information about its determination than the total amount of its costs and the specified proportion for which the paying party is to be made liable, we consider that it would be good practice for the CMA to provide, at the consultation stage, details of how it has calculated its total costs and the proportion of the costs to be paid pursuant to the order, provided that this can be done without imposing a disproportionate burden on the CMA. Provision of this information would be consistent with the CMA's professed aim of transparency, it would enable parties to comment on the proposed order at the consultation stage, as envisaged by the CMA5 Guidance, on an informed basis, it would potentially lead to the identification and resolution of issues at the consultation stage and thereby reduce the likelihood of costly and time consuming appeals. It may also bring to light errors in the CMA's calculations, as happened in this case.

32. With regard to the extent of the disclosure which the CMA should give, we consider that it would be appropriate for the CMA to disclose, at the consultation stage, the sort of information eventually provided by the CMA in response to BT's requests after the instigation of this appeal, that is to say:

(1) Details of the names, grades and cost recovery rate for each of the staff and panel members who worked on the references together with the number of hours worked and a brief description of the issues on which each staff and panel member worked.

(2) The travel and subsistence costs incurred in the references.

(3) A breakdown of fees charged by contractors, consultants and Counsel.

(4) Direct costs.

(5) An explanation of how the CMA's overhead rate has been calculated.

33. We now turn to BT's grounds of appeal. Contrary to BT's submissions under Ground 1, it was not, in our view, incumbent on the CMA to make available to the CMA Appeal Group at the time it made the Costs Order, or to disclose to the paying party, details of precisely how much time was spent by staff members on particular questions, how many people attended meetings and whether it was reasonable to attend. That level of detail would be appropriate in the context of a detailed costs assessment but not in the context of a section 193A costs order.

34. With regard to the disputed heads of costs, we find as follows.

(1) Remedies work: We are not persuaded that BT is entitled to any further refund in respect of preliminary remedies work beyond the sums of £481.95 and £8,787.50 which the CMA has agreed to pay back. We accept the CMA's evidence that the preliminary remedies work was bound up with work on the merits of the reference questions and that it has made a fair apportionment of the costs.

(2) Counsel's fees: It appears from the CMA's letter dated 4 October 2016 that Mr Hill's advice was sought in the context of the costs to be charged under the Costs Order rather than as a cost of the reference

itself. We therefore consider that the CMA should refund the sum of £408 to BT.

(3) Alleged duplication or over-staffing: We are not persuaded that Mr Cooper's replacement by Mr Jarvis involved any duplication, given their distinct roles as explained in Mr Smith's witness statement. Nor do we consider that the CMA was wrong to charge for Mr Rock's time spent on preliminary reading. It does not follow from the fact that Mr Rock was moved off the project before the Final Determination that he made no contribution to that determination. We accept the CMA's evidence that careful consideration was given to the numbers of staff attending meetings and that there was no over-staffing,

(4) Costs of work carried out before January 2016:

(i) Following the Tribunal's ruling on 29 June 2015, classifying certain of BT's and TalkTalk's grounds of appeal as specified PCMs, the Tribunal was required under s.193(1) and related Tribunal Rules to refer these grounds to the CMA for determination. It was originally anticipated that the reference would be made at some time between mid-September 2015 and mid-October 2015, then 17 November 2015; as explained in paragraph 4(7) above, the reference was deferred and was finally made on 5 January 2016. Once a matter is referred, the CMA is subject to tight time constraints, normally requiring it to determine the matter within four months, in this case within six months (Rule 117 of the Tribunal Rules). It is therefore entirely understandable that the CMA should carry out extensive preparatory work before the date of the reference.

(ii) Mr Smith has set out in his witness statement details of the work of planning and familiarisation carried out by the CMA in the period from October 2015 to January 2016 in anticipation of the references in the Appeals. We are not persuaded that it

would have been more efficient for the CMA to wait until receipt of the core submissions before carrying out the work which it carried out pre-reference. We note in particular that the questions to be referred had been settled as between BT and Ofcom by 17 November 2015 and that the reference would have been made at that juncture but for the administrative considerations outlined above. We also note that, on 2 September 2015, BT had filed an Amended Notice of Appeal, distinguishing between the specified PCMs and the non-specified PCMs in accordance with the Tribunal's ruling of 29 June 2015 and the subsequent case management directions (see paragraph 4(5)(ii) above). We accept the CMA's evidence that the work needed to be done in any event and in advance of the core submissions hearing on 16 January 2016 and that not to have completed this work until later would have put pressure on the timetable for the determination of the reference questions and diminished the value of the core submissions hearings.

(iii) We do not consider that BT had any legitimate expectation that the CMA would not carry out any substantive analysis before receiving the parties' core submissions. BT's concept of the scope of the planning and familiarisation work envisaged by the CC13 Guidance (quoted at paragraph 17(3) above) is, in our view, unduly restrictive.

(5) Overhead rate: The issues raised by BT are as to whether the overhead rate applied by the CMA was reasonable and whether the CMA should have applied the full rate to the CMA's part-time members or whether it should have applied a lower rate. We are satisfied that the CMA's calculation of the overhead rate took into account relevant factors and that the decision to apply that rate to members' costs, on the basis that support functions such as IT, human resources and office accommodation were available to and used by them, was justified as

part of the CMA's broad judgment of its costs, notwithstanding that the part-time members may have made less use of these facilities than full-time staff members.

(6) Cross-checking: We do not consider that there was any duty on the CMA to cross-check the costs of the references with the costs of other regulatory appeals, each of which will impose different demands on staff and give rise to different external costs. In any event, based on Mr Smith's evidence we do not consider that, spread over the period October 2015 to 13 June 2016, the CMA's rate of expenditure was out of line with its rate of expenditure on other regulatory appeals.

35. With regard to BT's second ground of appeal, it was not, in our view, necessary for the CMA, for the purpose of making a valid section 193A costs order, to keep separate, detailed costs accounts of (i) work done on the BT Appeal; (ii) work done on the TalkTalk Appeal; and (iii) work associated with both Appeals. For the purpose of making the broad, soundly based judgment required by section 193A, it was, in our view, sufficient for the CMA to arrive at an appropriate apportionment of costs by reference to its assessment of the time spent on the BT Appeal, taking into account individuals' responsibility for specific reference questions, including work common to both Appeals and work specific to each Appeal, and the CMA Appeal Group's overall assessment of an appropriate apportionment. It was not, in our view, necessary for the CMA to use separate project codes for the two Appeals in order for it to arrive at a valid assessment. Moreover, as noted in Mr Smith's witness statement, even if separate codes had been used, it would have been necessary for staff/panel members to estimate how much time to allocate to each project where the work undertaken was common to both Appeals or related to meetings at which both Appeals were discussed, which would have led to additional work and would not necessarily have been accurate.

36. BT's criticisms of the CMA's apportionment of the costs are not, in our view, well founded. We accept the CMA's evidence that the costs incurred prior to the reference were fairly allocated, taking into account the extent to which the

reading-in at an early stage was common to both Appeals, and that BT's assumption that 75% of the CMA's costs in January 2016 were incurred in relation to hearings relating to both Appeals equally is factually incorrect. The allocation of costs was a matter on which the CMA was in a position to form its own judgment and we are satisfied that its judgment was soundly based.

37. For these reasons, and save in relation to the sums which the CMA has agreed to repay (£481.95 and £8,787.50), and the sum of £408 in relation to Counsel's fees, we unanimously dismiss BT's appeal from the Costs Order.

Andrew Lenon Q.C.
Chairman

William Allan

Professor Colin Mayer C.B.E.

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

Date: 2 June 2017