Neutral Citation Number: [2017] EWCA Civ 1873

Case No: C1/2016/3784

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Cranston
[2016] EWHC 2134 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2017

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HENDERSON
and
LADY JUSTICE ASPLIN

- -

Between :

EE LIMITED	**Appellant**
- and -	
OFFICE OF COMMUNICATIONS	**Respondent**
- and -	
(1) SECRETARY OF STATE FOR CULTURE, MEDIA AND SPORT **(2) VODAFONE LIMITED** **(3) TELEFÓNICA O2 UK LIMITED** **(4) HUTCHISON 3G UK LIMITED**	**Interested Parties**

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Lord Pannick QC, Philip Woolfe and **Stefan Kuppen** (instructed by **James Blendis at EE Ltd**) for the **Appellant.**
Pushpinder Saini QC and **Jessica Boyd** (instructed by **Ofcom**) for the **Respondent.**
Michael Fordham QC and **Emily Neill** (instructed by **Towerhouse LLP**) for the **2nd Interested Party.**
Thomas de la Mare QC and **Tom Richards** (instructed by **DWF LLP**) for the **3rd Interested Party.**
Tristan Jones (instructed by **Constantine Cannon LLP**) for the **4th Interested Party.**

Hearing dates : 10, 11 and 12 October 2017

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Approved Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by EE Limited ("EE") against the dismissal by Cranston J ([2016] EWHC 2134 Admin) of its claim for judicial review of the decision of the Office of Communications ("Ofcom") in September 2015 setting the annual licence fees for the 900 MHz and 1800 MHz bands of radio spectrum used for mobile communications. The decision resulted in increases in the licence fees charged to EE from about £25m to £75m per annum and for all mobile operators from approximately £65m to £200m per annum. The licence fees were fixed by Ofcom at these levels in compliance with a Direction made in 2010 by the Secretary of State for Culture, Media and Sport under the powers contained in s.5 of the Wireless Telegraphy Act 2006. The Direction is contained in Article 6 of the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010, SI No 3024 ("the 2010 Direction"). The issue on this appeal (as it was before the judge) is whether Ofcom correctly interpreted and applied the 2010 Direction and if they did whether, more fundamentally, the 2010 Direction, properly read, failed to comply with the relevant obligations imposed on Ofcom under both domestic and EU law.

2. Ofcom is the statutory body charged under the provisions of the Communications Act 2003 ("CA 2003") and the Wireless Telegraphy Act 2006 ("WTA 2006") with functions which include the management and licensing of radio spectrum in the United Kingdom. It is also the National Regulatory Authority ("NRA") for the purposes of the relevant EU legislation; in particular the Directives known as and comprising the Common Regulatory Framework ("CRF") for electronic communications. These include what I shall refer to as the Framework Directive (2001/21/EC) and the Authorisation Directive (2002/20/EC).

3. Radio spectrum describes the radio bands used to provide various forms of communication services including mobile telephones and wireless broadband. They are measured in megahertz (MHz) frequencies. 1000 MHz equals 1 gigahertz (GHz). Frequencies between 200 MHz and 3 GHz are considered to be the most valuable because they have what the evidence describes as good propagation characteristics and a large enough bandwidth to make them suitable for accommodating the quantities of information now in demand by the users of the internet.

4. In the 1980s and 1990s mobile operators were allocated the 900 MHz and 1800 MHz bands on what was essentially a first-come, first-served basis. Vodafone UK Limited ("Vodafone") and Telefónica UK Limited ("O2") obtained licences for 900 MHz spectrum in 1985, and in 1991 licences were granted for the 1800 MHz band, most of which is now allocated between EE and Hutchison 3G UK Limited ("Three").

5. From the 1990s onwards the 900 MHz and 1800 MHz bands have been used to provide second generation ("2G") mobile services but the licences for these frequencies have subsequently been liberalised in order to accommodate (in 2011) third generation ("3G") services and (in 2012-13) fourth generation ("4G") services, both of which use new forms of technology in order to provide high-speed data transfer.

6. This process of liberalisation began in 2007 when member states of the EU agreed to allow the 900 MHz and 1800 MHz bands to be made available for 3G services and to repeal Council Directive 87/372/EEC ("the GSM Directive") which had restricted the 900 MHz band to GSM (Global System for Mobile Communications) technology that was suitable only for voice and low-speed data services. As a result, Ofcom decided to release part of the 900 MHz band for 3G use but at a fee which would value the available band by reference to what it referred to as the opportunity cost of the spectrum. This means the value of the spectrum in question by reference to its best possible alternative use.

7. Broadly speaking, this is a form of market value in contrast to what is referred to as a "costs recovery" calculation based on the level of fees needed to recover the costs of running and administering the system. It is common ground that since 1998 when the Wireless Telegraphy Act 1998 came into force it was permissible for the Secretary of State (and now Ofcom as the regulator) to set licence fees at a level above costs recovery. The CJEU has also confirmed by its decision in *Telefónica Móviles España SA v Administración del Estado and Secretaría de Estado de Telecomunicaciones* (C-85/10) [2011] ECR I-1575 that the licence fees permitted by the Authorisation Directive may reflect the value and advantages of the use of the band to the licensed operator compared with other operators who are also seeking to use and exploit that resource: see *Telefónica Móviles España* at [27].

8. Ofcom therefore sets licence fees in accordance with what it calls Administered Incentive Pricing ("AIP") which requires the regulator to calculate the value of the spectrum by reference to various factors which include its opportunity cost or scarcity value. The power to set licence fees is, however, derived from Article 13 of the Authorisation Directive which provides:

> "Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property which reflect the need to ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive)."

9. Article 8 of the Framework Directive is in these terms:

> "1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.
>
> Unless otherwise provided for in Article 9 regarding radio frequencies, Member States shall take the utmost account of the desirability of making regulations technologically neutral and shall ensure that, in carrying out the regulatory tasks specified

in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities do likewise.

National regulatory authorities may contribute within their competencies to ensuring implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:

(a) ensuring that users, including disabled users, elderly users, and users with special social needs derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

3. The national regulatory authorities shall contribute to the development of the internal market by *inter alia*:

(a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

(b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;

(d) cooperating with each other, with the Commission and BEREC so as to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia*:

(a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);

(b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the

availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

(c) contributing to ensuring a high level of protection of personal data and privacy;

(d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;

(e) addressing the needs of specific social groups, in particular disabled users, elderly users and users with special social needs;

(f) ensuring that the integrity and security of public communications networks are maintained;

(g) promoting the ability of end-users to access and distribute information or run applications and services of their choice.

5. The national regulatory authorities shall, in pursuit of the policy objectives referred to in paragraphs 2, 3 and 4, apply objective, transparent, non-discriminatory and proportionate regulatory principles by, *inter alia*:

(a) promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;

(b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;

(c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition;

(d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non-discrimination are preserved;

(e) taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within a Member State;

> (f) imposing *ex-ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled."

10. In addition to the obligations imposed on NRAs by Article 8(5), Article 7(1) also states:

> "In carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the utmost account of the objectives set out in Article 8, including in so far as they relate to the functioning of the internal market."

11. An NRA like Ofcom which is charged with the function of setting licence fees in the manner envisaged by Article 13 of the Authorisation Directive is not therefore tasked with a straightforward calculation of market value based, for example, on a real auction of licences in which the various mobile operators are permitted to bid against each other for the available spectrum. Although the NRA is entitled to and will ordinarily calculate the fees on an opportunity cost rather than a cost recovery basis, it is expressly required by Article 13 to take into account the Article 8 objectives such as promoting competition and investment in new technology which may in its calculation of the licence fee require some qualification of the price. There is, of course, an argument that some of these considerations, if they call for a discount in the fee by reference to what the mobile operator would be prepared to offer for the licence, are likely to have been factored into any actual bid for the licence and do not therefore call for further adjustment of the fee by the regulator. But these are matters for the expert judgment of Ofcom and the other regulators and questions of methodology lie outside the scope of this appeal.

12. AIP based fees for the 900 MHz and 1800 MHz bands were first introduced in 1999. A report commissioned in 1996 had recommended that fees be increased by a factor of 10 to take account of opportunity cost but the Government chose to set what were annual licence fees ("ALFs") at only half of that amount and to phase in the increase over a period of three years. Ofcom took over the function of setting fees from the Department of Trade and Industry in 2004 but decided to maintain existing fee levels for a further period of three years to await the forthcoming changes consequent on the liberalisation of the 900 MHz and 1800 MHz for 3G use which I described earlier. In September 2007 it gave notice of its intention to release part of the 900 MHz band for 3G use and to hold an auction for the 2.6 GHz band licences. It made clear that the AIP used in the calculation of licence fees would "reflect" the opportunity cost arising as a result of liberalisation and would take account of the prices offered in any bids for the available licences.

13. The Government was concerned about delay in the implementation of the liberalisation of spectrum in the UK. By January 2009 there had already been litigation in the form of an application for judicial review against Ofcom by T-Mobile (now part of EE) which challenged Ofcom's decision to award licences for the newly available 2.6 GHz band without first determining its policy on the liberalisation of the 900 MHz and 1800 MHz bands and this had led to a postponement of the auction for the 2.6 GHz licences. The Government published an Interim Report on 29 January 2009 (Digital Britain: The Interim Report) which spoke of the need for a

comprehensive programme to secure the full potential of the new digital technology for the benefit of the country and of the UK having hit a temporary road block due in part to the disputes between Ofcom and the mobile operators:

> "It is in the public interest for this impasse to be resolved speedily – either through a voluntary industry wide consensus with Ofcom that respects the principle of an equitable competitive start (the preferred option as it will be the fastest solution) or the government would support an imposed process. The government believes that time is of the essence."

14. The industry was given until April 2009 to agree a way forward, failing which the Government would intervene to impose its own modernisation programme. The Interim Report recognised that the re-organisation of the 900 MHz and 1800 MHz bands to accommodate 3G use and its expansion into the 2.6 GHz band would have an effect on pricing in that AIP would be adjusted to reflect the increased value of the spectrum to users. But the process of liberalisation would also involve a consideration of existing fixed term licences and whether they should be extended possibly indefinitely to encourage investment by the current mobile network operators.

15. Parallel to these initiatives by the Government, Ofcom was pursuing its own programme of consultation on spectrum liberalisation. In a consultation document published in February 2009 it set out its proposals for a new regulatory framework to accommodate spectrum modernisation that would apply if there was not an agreed industry solution in place by the Government's April deadline. This included allowing the 900 MHz and 1800 MHz bands to be used for 3G technology and for licences to become tradable. Ofcom also intended:

> "To review the level of Administered Incentive Pricing (AIP) applying to the 900 MHz and 1800 MHz spectrum so that in future it reflects the full economic value of this spectrum post liberalisation, so as to encourage its efficient use."

See paragraph 1.8(d) of the Executive Summary.

16. The thinking behind this is further explained in [8.32]–[8.35] of the consultation document:

> "8.32 At the same time, our analysis of the impact of the use of different frequencies on the costs of providing 3G services suggests that we may need to revisit the differential in AIP between spectrum in the 900 MHz and 1800 MHz bands.
>
> 8.33 Therefore, while not directly related to our choice of method to liberalise licences for the use of these frequency bands, we believe that it would be appropriate to review the level of AIP payable on these licences, in the light of these developments, at or around the same time as liberalisation.

> 8.34 When we do so, we will use the best information available to us at the time as to the opportunity cost of the spectrum. We expect this to include the results of economic modelling, analysis of the costs of alternative means of delivering mobile and other services, and the results of spectrum auctions completed up to that time.
>
> 8.35 This should include the results of the 2.6 GHz auction that we expect to hold within the next few months, and could also include the results of any auction for released 900 MHz spectrum, and for the cleared digital dividend spectrum, if completed by then. These auctions should provide a good indication of the market value of the spectrum being awarded at that time, but it must be recognised that the spectrum being awarded may have both advantages and disadvantages relative to 900 MHz and 1800 MHz spectrum, and that the specific circumstances of the auctions may mean that auction prices are not a true reflection of long-run opportunity costs. For these reasons we expect to use the results of such auctions as one input to our decisions about the future level of AIP, but not to be entirely determinative."

17. The Government had by this time appointed an independent spectrum broker ("ISB"), Mr Kip Meek, to examine ways of solving the problem of delay caused by the disputes between Ofcom and the mobile operators. The ISB published his report in May 2009 in which he set out a package of proposals that would, he said, achieve the Government's objectives more quickly than through the regulatory approach open to Ofcom. His proposals included:

> "Liberalising the 2G spectrum in the hands of the existing users to ensure that spectrum bands do not become fragmented and that decisions on which technologies to deploy are not rushed; but revising administrative incentive pricing (AIP) to reflect the full economic value of this spectrum."

18. It is clear that by this time there was no material difference between the position of the Government and that of Ofcom in relation to AIP for spectrum licences. Both considered that as part of the liberalisation of spectrum to accommodate 3G and later 4G technology it was appropriate to set licence fees in a way which recognised and took into account the full economic value of the rights granted. The position of the Government was not to criticise Ofcom for the delays caused by challenges to its regulatory decisions but rather to consider whether the liberalisation of spectrum with its concomitant increase in the level of licence fees would be achieved more quickly by exerting direct pressure on the industry. In the Final Report on Digital Britain published in June 2009 the Secretary of State indicated that the Government was minded to adopt the recommendations of the ISB and to press ahead with a spectrum modernisation programme under which the existing 2G mobile spectrum would be liberalised in the hands of its existing operators and further spectrum would be made available to existing and new operators for use in providing 3G services. The existing licence holders would have their licences made indefinite in order to incentivise

investment in the infrastructure necessary to deliver high-speed broadband on a much wider basis. In relation to how this was to be achieved, the Report at [36] said:

> "While some details remain to be verified before the Summer, the Government will make a final decision on whether to direct Ofcom (if so, we intend to consult in September on the form of a Direction to Ofcom, to give the regulator the greatest possible legal certainty to effect these proposals)."

19. Although I will need to return to this in more detail later in this judgment, it is convenient to explain at this stage what [36] of the final Report was referring to. The provisions of CA 2003 and WTA 2006 are intended to transpose the CRF into domestic law. Section 3 of CA 2003 sets out in detail a list of the objectives which Ofcom is required to secure in carrying out its functions. These include the optimal use of the spectrum for wireless telegraphy (s.3(2)(a)); the availability of a wide range of electronic communications services throughout the UK (s.3(2)(b)); the promotion of competition in relevant markets (s.3(4)(b)); the desirability of encouraging investment and innovation (s.3(4)(d)); and the furthering of the interests of consumers in respect of choice, price, quality of service and value for money (s.3(5)). Most, if not all, of these considerations can be identified within Article 8 of the Framework Directive but, for completeness, s.4(2) of CA 2003 expressly provides that in respect of their functions relating to the management of the radio spectrum:

> "It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly)."

20. Section 5 of CA 2003 conferred a power on the Secretary of State to give directions to Ofcom in certain specified circumstances. So far as material, it states:

> "(1) This section applies to the following functions of OFCOM—
>
> .....
>
> (b) their functions under the enactments relating to the management of the radio spectrum that are not contained in that Part.
>
> (2) It shall be the duty of OFCOM to carry out those functions in accordance with such general or specific directions as may be given to them by the Secretary of State.
>
> (3) The Secretary of State's power to give directions under this section shall be confined to a power to give directions for one or more of the following purposes—
>
> (a) in the interests of national security;

(b) in the interests of relations with the government of a country or territory outside the United Kingdom;

(c) for the purpose of securing compliance with international obligations of the United Kingdom;

(d) in the interests of the safety of the public or of public health.

21. The power contained in s.5 of CA 2003 was therefore a very limited one but the provisions of CA 2003 were supplemented by WTA 2006. Section 3 provides:

"3. Duties of OFCOM when carrying out functions

(1) In carrying out their radio spectrum functions, OFCOM must have regard, in particular, to—

(a) the extent to which the electromagnetic spectrum is available for use, or further use, for wireless telegraphy;

(b) the demand for use of the spectrum for wireless telegraphy; and

(c) the demand that is likely to arise in future for the use of the spectrum for wireless telegraphy.

(2) In carrying out those functions, they must also have regard, in particular, to the desirability of promoting—

(a) the efficient management and use of the part of the electromagnetic spectrum available for wireless telegraphy;

(b) the economic and other benefits that may arise from the use of wireless telegraphy;

(c) the development of innovative services; and

(d) competition in the provision of electronic communications services.

(3) Subsection (4) has effect in the case of OFCOM's radio spectrum functions, other than their functions under sections 13 and 22.

(4) In the application of this section to those functions, OFCOM may disregard such of the matters mentioned in subsections (1) and (2) as appear to them—

(a) to be matters to which they are not required to have regard apart from this section; and

(b) to have no application to the case in question.

(5) Where it appears to OFCOM that a duty under this section conflicts with one or more of their duties under sections 3 to 6 of the Communications Act 2003 (c 21), priority must be given to their duties under those sections.

(6) Where it appears to OFCOM that a duty under this section conflicts with another in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances."

22. Section 3(5) therefore expressly preserves and gives priority to Ofcom's duty to perform its functions in accordance with the Community objectives identified in Article 8 of the Framework Directive. As in CA 2003, s.5 of WTA 2006 also contains a power for the Secretary of State to give directions to Ofcom about the carrying out of its radio spectrum functions. So far as material, it states:

"(1) The Secretary of State may by order give general or specific directions to OFCOM about the carrying out by them of their radio spectrum functions.

.....

(3) An order under this section may require OFCOM to exercise their powers under the provisions mentioned in subsection (4)—

(a) in such cases,

(b) in such manner,

(c) subject to such restrictions and constraints, and

(d) with a view to achieving such purposes,

as may be specified in, or determined by the Secretary of State in accordance with, the order.

(4) The provisions are—

.....

(b) sections 12 to 14; and

(5) This section does not restrict the Secretary of State's power under section 5 of the Communications Act 2003 (c 21) (directions in respect of networks and spectrum functions)."

23. Section 12 which is included within the scope of s.5 contains provisions governing charges by Ofcom for the grant of licences. There is therefore no doubt that the Secretary of State may give Ofcom directions in respect of the charging of licence

fees but one of the primary issues on this appeal is whether and to what extent the giving of such a direction is capable of displacing the duties imposed on Ofcom by ss. 3 and 4 CA 2003 (which are preserved by s.3(5) WTA 2006) or those imposed directly on Ofcom as an NRA by Article 8 of the Framework Directive.

24. In October 2009 the Government published its consultation on the possibility of giving a direction to Ofcom under s.5 of WTA 2006. The paper explained, by reference to the ISB's report, that the Government wished to implement a package of proposals for the liberalisation of the spectrum bands which would encourage delivery of high-speed mobile broadband on a more universal basis whilst maintaining competition in the UK market. Licences were to become tradable and indefinite but they would be subject to revised licence fees which reflected their full economic value and provided an appropriate return for tax payers. In paragraph 3.13 the paper sets out the regulatory framework within which Ofcom operates and also the power of the Secretary of State to give a s.5 direction. It then refers to the delays encountered by Ofcom due to the regulatory challenges I referred to earlier:

> "3.14 Release of spectrum has therefore been delayed, with little clarity as to when resolution will be reached, and little certainty that future spectrum releases might not also be subject to challenge. It was the combination of these challenges and the resulting uncertainty that promoted the Government to seek a possible alternative solution.
>
> 3.15 The Government has decided that the most effective way of implementing these proposals, and therefore delivering its policy objectives, is through a Direction. Having decided to intervene, and decided that it should support this package of proposals, it would not be sensible to ask Ofcom to consider implementation. This is because Ofcom would be required to meet their statutory duties and there is no guarantee that the outcome of this would be a full implementation of the proposals. In the Digital Britain Report the Government stated that it saw the proposals as an integrated package and so it is using the power of Direction to ensure that they are delivered as a package."

25. The consultation exercise revealed a variety of responses to the proposals for the liberalisation of the 900 MHz and 1800 MHz bands in the hands of existing licence holders. Some responses expressed concerns about competition. Others questioned whether it was possible to set licence fees so as to reflect full market value. In [16] and [17] of its response to the consultation on a direction published in March 2010 the Government set out its intentions:

> "16. The Government is still of the view that liberalisation of 900MHz and 1800MHz in the hands of the incumbents as part of an overall package represents the best approach to dealing with the 2G refarming issue that has been a major hindrance to progress in managing and making spectrum available. The Government will therefore direct Ofcom on this basis. The Government will also direct that these licences be made

> indefinite, subject to revocation with 5 years notice for spectrum management reasons. Ofcom will be directed to use their powers to amend their trading regulations to make these licences tradable. These licences will be subject to a condition which requires the licence holders to comply with a process of creating contiguous spectrum blocks, known as defragmentation.
>
> 17. Finally an important element that will contribute to the balance referenced above is the revision of licence fees for this liberalised spectrum. Liberalised licences in the 900MHz and 1800MHz bands would have an enhanced value and the circumstances in which the fees were originally set would no longer apply. The Government will therefore direct Ofcom, consulting as required, to revise these fees to reflect the full market value of the spectrum, taking into account a number of factors including the amounts bid for spectrum in the combined auction. This revision will take place after the combined auction."

26. The procedure for making a direction is set out in s.6 WTA 2006. The Secretary of State is required to consult Ofcom and other interested parties before making the order (s.6(2)) and must then lay a draft of the order before Parliament for approval by the affirmative resolution procedure (s.6(4)). The draft statutory instrument was laid before Parliament in March 2010 but progress was delayed by the general election. The Government then published a revised draft direction together with an impact assessment which was laid before Parliament in July 2010. The impact assessment describes the potential obstacles to what has been called the refarming of 2G spectrum to deliver 3G services and explains that the Government had decided to use the direction procedure to avoid further delay.

27. The impact assessment is important because it recognises that the liberalisation of spectrum including spectrum pricing on an AIP basis would be progressed by Ofcom even without a s.5 direction:

> "Under this option, the Government would leave it to Ofcom to address these issues through the normal regulatory process. Even in the absence of a Direction, Ofcom would still take action on a number of wide ranging issues relating to spectrum management.
>
> For example, it would still be required to liberalise 900MHz under the EU GSM Directive and the 1800MHz in accordance with the draft Radio Spectrum Committee decision. Liberalisation means that specific technology and usage restrictions will be relaxed to allow mobile network operators to use these spectrum bands to deliver 3G services as well as 2G. At the same time, Ofcom would make these licences indefinite and tradable. It would also set revised licence fees to reflect the full economic value."

28. The main difference between doing nothing and leaving matters to Ofcom as opposed to giving a direction was timing:

> "Under Option 0, Ofcom would have to decide how best to implement the above EC legislation. Given the large number of issues which Ofcom would need to consider, and the widely differing views of various stakeholders, this could entail further consultation and could result in a further delay of between six to nine months before action is taken.
>
> Under Option 1, specific action on these issues would be taken earlier. This would enable the potential benefits to businesses and consumers associated with universal coverage in 3G and next generation mobile services and the transition to next generation high-speed broadband services to be brought forward."

29. On 11 August 2010 EE threatened the Secretary of State with possible action in the form of an application for judicial review challenging its proposed directions. Its letter complained about a lack of proper consultation and raised competition issues about the proposal to liberalise 900 MHz spectrum in the hands of existing licensees. The letter makes reference to the requirements of the GSM Directive and also to Article 8 of the Framework Directive in relation to the need to promote competition. There is a challenge to the adequacy of the consultation process on the draft direction but no complaint that the Secretary of State is acting *ultra vires* in promulgating a direction which may prevent Ofcom from carrying out its regulatory function of setting licence fees in accordance with its obligations under Article 8.

30. In the end, no proceedings were commenced by EE and the 2010 Direction was made on 20 December 2010 and took effect ten days thereafter. The 2010 Direction sets out in the form of a series of directions to Ofcom the proposals to liberalise the 900 MHz and 1800 MHz bands; to vary existing licences for those bands including making them tradable; and to make regulations for the carrying out of an auction of licences for the 800 MHz and 2.6 GHz bands. In relation to licence fees, Article 6 of the 2010 Direction provided:

> "(1) After completion of the Auction OFCOM must revise the sums prescribed by regulations under section 12 of the WTA for 900MHz and 1800MHz licences so that they reflect the full market value of the frequencies in those bands.
>
> (2) In revising the sums prescribed OFCOM must have particular regard to the sums bid for licences in the Auction.
>
> (3) OFCOM must prescribe sums by regulations under section 12 of the WTA for 2100MHz licences which are varied under article 5(3) so that they reflect the full market value of the frequencies in that band."

31. Following the making of the 2010 Direction, Ofcom varied the spectrum licences for the 900 MHz, 1800 MHz and 2.1GHz licences and made them fully tradable: see the

Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011. It also completed the 4G auction. By March 2013 it had therefore implemented the Government's package of reforms in accordance with the direction save for the revision of licence fees. These were the subject of a consultation exercise which lasted from 2013 to 2015 and culminated in the making of the Wireless Telegraphy (Licence Charges for the 900 MHz frequency band and the 1800 MHz frequency band) (Amendment and Further Provisions) Regulations SI 2015: 2015 No. 1709 ("the 2015 Regulations") which set out the relevant licence charges. Although EE has challenged the valuation methodology employed by Ofcom in calculating the fees, that is no longer an issue between the parties. What is in issue is Ofcom's admitted failure to have regard to what I shall call the Article 8 considerations in setting the amount of the fees.

32. In response to the consultation paper on fees, a number of mobile operators said that Ofcom should carry out an impact assessment of their proposals to raise fees to reflect market value unless it could demonstrate that the setting of fees at their full economic value was necessary to promote the optimum use of the spectrum and would not adversely impact on the other objectives set out in Article 8 of the Framework Directive. This was rejected by Ofcom in a further consultation paper of 1 August 2014 and again in its final decision on the consultation published in September 2015:

> "1.22 … because we did not have any discretion to decide whether or not to set [annual licence fees] at full market value, since we had been directed by the Government to do so and we were required to implement that direction."

33. EE therefore commenced proceedings for judicial review of Ofcom's decision to set licence fees at this level as implemented in the 2015 Regulations. In [30] of its statement of grounds, EE contends that by reason of its interpretation of the meaning and effect of the 2010 Direction Ofcom has deliberately left out of account any considerations other than the market value of the spectrum in question including the Article 8 considerations.

34. Ofcom has taken the same position in the judicial review proceedings as it did in 2015 in its response to the consultation on fees. It contends that the 2010 Direction permitted it no margin of discretion in the setting of licence fees and that had its only purpose been to require Ofcom to consider market value as a relevant although important consideration in setting the fees then it would have served no purpose. That process would have been achieved by allowing it to continue along its regulatory path in accordance with the provisions of CA 2003 and the CRF: Option 0 in the Government's impact assessment referred to at [28] above.

35. Ofcom's case is that it acted in accordance with its obligations under the 2010 Direction and that the procedure was EU law compliant because, insofar as the UK was required as a member state to act in accordance with the provisions of Article 13 of the Authorisation Directive, those steps had been taken by the Secretary of State when formulating his proposals for an implementation package in the consultation exercise culminating in the 2010 Direction. Ofcom also takes the point that the legality of what has been done should have been tested not by reference to the 2015 Regulations, but back in 2010 in relation to the making of the 2010 Direction itself which, on EE's case, was not compliant under EU law insofar as it required Ofcom to set fees without regard to anything but market value.

36. In a judgment handed down on 26 August 2016 Cranston J dismissed EE's application for judicial review. He held that Ofcom was correct to interpret Article 6 of the 2010 Direction as requiring it to set licence fees at full market value. The use of the word "reflect" in Article 6 was explicable in terms of there being no true market on which to base the calculation of value in the absence of an auction in which rival mobile operators bid against each other. Ofcom was therefore required to produce an equivalent result which "reflected" the prices that would have been realised in such a market:

> "86. That interpretation is strengthened since Article 6 of the Direction compelled Ofcom to revise annual licence fees so that they reflected full market value. In other words, the Secretary of State required Ofcom to achieve a specific outcome, reflecting full market value, and there was no scope for it to take into account considerations which might have resulted in its setting licence fees either below or above full market value. I simply cannot see how that language can be read as a direction to Ofcom to dilute market value by taking account of other considerations.
>
> 87. Dictionary definitions of the word *reflect* in other contexts, or use of that word on other occasions and in other Ofcom documents are, in my view, of no assistance. On ordinary principles of interpretation, effect must be given to the word as it is used in Article 6. Had the Secretary of State intended to direct Ofcom merely to take market value into account, conferring on it a discretion to set fees at other than market value, he would have used language more along the lines of Article 6(2) – "must have particular regard to" – not the unambiguous language he did use, that Ofcom was to set fees reflecting full market value."

37. The judge also rejected EE's arguments that if Article 6 fell to be interpreted in the way it was understood by Ofcom then it would be required to act in breach of its obligations under domestic and EU law to have regard to the Article 8 considerations in setting licence fees. Although s.4(2) of CA 2003 and s.3(5) of WTA 2006 expressly impose on Ofcom a duty to act in accordance with the Article 8 consideration when setting licence fees, the judge held that those provisions had to be read as subject to the power of the Secretary of State to give a s.5 direction which has the effect of overriding those duties:

> "92. Nothing elsewhere in domestic legislation leads, in my judgment, to a different conclusion. I accept Mr Saini's submission that the 2006 Act is the *lex specialis* in relation to Ofcom's duties as regards the radio spectrum. The limited powers for the Secretary of State to give directions to Ofcom contained in section 5 of the 2003 Act cannot hobble the wide power to give directions under section 5 of the 2006 Act. Ordinarily section 3 of the 2006 Act limits Ofcom from disregarding the matters set out there in fixing fees, but that does not affect the Secretary of State's powers in section 5.

> Section 3(5) of the 2006 Act, giving priority to Ofcom's duties under the 2003 Act, applies only when it appears to Ofcom that a duty under section 3 itself conflicts with those duties. It does not apply to Ofcom's duty under section 5 to comply with directions given by the Secretary of State.
>
> 93. Thus as a matter of domestic law, once the Secretary of State has given a direction under section 5, Ofcom's duties under provisions like section 4 of the 2003 Act and section 3 of the 2006 Act are replaced by its duty to comply with it. In passing I note that in my view Ofcom published in its August 2014 consultation, and its 2015 statement, an adequate statement pursuant to section 7 of the 2003 Act, explaining why it was not issuing an impact assessment of the 2015 decision."

38. In relation to the position under EU law, the judge considered that it remained open to the Secretary of State to act conformably with Article 13 of the Authorisation Directive if he took into account the Article 8 and other relevant considerations when formulating the 2010 Direction:

> "96. First, Article 13 of the Authorisation directive imposes obligations on Member States, not NRAs, to ensure fees reflect the need to ensure the optimal use of spectrum, and are objectively justified, transparent, non-discriminatory and proportionate, and take into account the objectives of Article 8 of the Framework directive. I cannot see that it makes any difference if, as Telefónica submitted in its closing written submissions, Article 13 contemplates that it is the NRA which, as a matter of practice, ultimately imposes licence fees.
>
> 97. Similarly, the obligation in Article 8(1) is on Member States. In this case it was the Secretary of State which determined the basis on which fees were to be set, the UK as the Member State having provided for that possibility in section 5 of the 2006 Act. In other words, Ofcom's discretion was lawfully constrained and it was left with the task of implementing the Secretary of State's policy decision. The burden of complying with the Article 8 obligations was with the Secretary of State and, absent any challenge to his decision, Ofcom had to treat it as lawfully made and comply with it. Certainly the obligations in Article 8(2)–(5) of the Framework Directive are imposed directly on NRAs but, given the machinery of decision-making the UK employed, the obligations in Article 8(2)–(5) did not bite."

39. As explained earlier, there was no challenge to the legality of the 2010 Direction at the time when it was made nor is or could there be a challenge as part of these proceedings as to whether the Secretary of State has adequately or at all taken into account the Article 8 considerations. The Secretary of State has been joined as an interested party but not as a defendant and she has not participated in the proceedings. If the judge is right about the meaning and effect of Article 6 of the 2010 Direction

but it was open to the UK under Article 13 to repatriate the Article 8 considerations as a matter for decision by the Secretary of State rather than by Ofcom, then EE's application for judicial review must fail. It must also, I think, follow in that event that any challenge by EE to the legality of what was proposed would have been limited to the Secretary of State's own consideration of Article 8 and should have been brought, if at all, when the 2010 Direction came to be made. If, on the other hand, EE is right and the 2010 Direction was not compliant with either domestic or EU law insofar as it required Ofcom to set licence fees without itself acting in accordance with the Article 8 considerations then it may be necessary to consider Ofcom's argument that a challenge on those grounds ought to have been made to the 2010 Direction rather than to its own decision to set the licence fees in accordance with the Direction.

The meaning of the 2010 Direction

40. As already indicated, this turns on the use of the word "reflect" in Article 6 of the 2010 Direction. As a matter of language it has a variety of meanings. A mirror reflects light by throwing it back without absorbing it. One can reflect on a problem by giving it careful thought and consideration. The judge thought that it meant something like reproduce or represent. Mr Fordham QC who appears for Vodafone, one of the interested parties, says that it should be read as meaning "set by reference to" or "based on". Mr Saini QC for Ofcom accepts that if this or something equivalent is the correct meaning then his client has misinterpreted Article 6 of the 2010 Direction and will need to reconsider the licence fees it has set.

41. All of the meanings I have referred to are linguistical possibilities. But as with any case of statutory interpretation it is necessary to identify the relevant context in which the word is used and the problem or issue to which it was addressed. The judge's view which Mr Saini seeks to uphold was heavily influenced by what he regarded as the purpose of the 2010 Direction: namely to achieve a specific outcome which was the fixing of licence fees at full market value. It would be inconsistent with that objective for Ofcom to be able to depart from a full market value by setting the fees by reference to other considerations such as those adumbrated in Article 8. This is essentially the same argument as that relied on by Ofcom in its grounds of resistance, namely that there was no point in making the 2010 Direction if it was intended to do no more than to require Ofcom to follow its regulatory pathway in accordance with Article 8. It would have done that anyway.

42. On this basis the judge rejected as at all relevant the various documents such as consultation papers emanating not only from Ofcom but also from the Secretary of State in which the word "reflect" appears. Mr Fordham took us to a number of these. One can find it used in Ofcom's 2009 consultation document (see [15] above) where the purpose of the new regulatory framework for the 900 MHz and 1800 MHz bands is stated to include the review of AIP so that it "reflects the full economic value of this spectrum". Similar statements can be found in Ofcom's response to the consultation exercise published in December 2010 which refers to the new regulatory framework being used as a guide to setting AIP fees "based on the opportunity cost of the spectrum used" and includes a glossary of terms in which AIP is defined as:

> "Administered incentive pricing – setting charges for spectrum holdings to reflect the value of the spectrum in order to promote optimal use of spectrum".

43. There is nothing in Ofcom's own consultation documents to indicate that its use of the word "reflect" was intended to exclude the Article 8 considerations as a material factor in the setting of licence fees. AIP would be based on an assessment of the opportunity cost provided by the liberalised bands of spectrum but it would still be necessary for Ofcom to consider other regulatory factors in deciding how to apply its calculation of AIP when determining the level of fees. A useful summary of how Ofcom approaches its duty under Article 13 of the Authorisation Directive to secure the optimal use of spectrum when setting licence fees can be found in its December 2010 policy statement on setting AIP spectrum fees where it says:

> "3.14 In practice, subject to the considerations given in paragraphs 3.19 – 3.20, we consider that optimal use is more likely to be secured for society if spectrum is used efficiently, that is to produce the maximum benefits for society. We consider that efficient use of spectrum means that:
>
> - spectrum is allocated and assigned to those uses and users that will provide the greatest benefits to society as a whole;
> - individual spectrum users economise on their use of spectrum so there is no 'wasteful' use or underutilisation of spectrum; and
> - spectrum becomes available over time for new and innovative services, where these are of sufficient value to society, and more generally to accommodate changes in technologies and consumer demand for services that rely on spectrum.
>
> 3.15 If these conditions are met, society will obtain the maximum possible output (measured by value) from the limited spectrum resource. The value that society derives from spectrum encompasses both the value that individual consumers gain from the goods or services that they obtain commercially and wider social, cultural or economic benefits.
>
> 3.16 In the commercial sector, the users and uses that can generate the greatest benefit to society are normally those who value spectrum more highly. The fact that they are prepared to pay the highest price for spectrum normally indicates their ability to use it more productively in order to satisfy commercial demand for downstream services. Consequently, their decisions are, in general, more likely to lead to highest benefits for society.

> 3.17 In the public sector, similar principles apply. The providers of public services buy their inputs such as property, energy, equipment and labour from markets, in competition with commercial operators. How much they are prepared to spend on particular inputs can be taken to indicate the value they expect to generate for society from those inputs.
>
> 3.18 We discuss the particular case of wider social benefits which are not reflected in, or proportionate to, individual users' value of spectrum in principle 6, from paragraph 4.213 to 4.240.
>
> **Cases where securing efficient use may not always be optimal**
>
> 3.19 Given our belief that efficient use will promote maximum benefits for society from the use of spectrum, we aim to identify fee levels that will promote efficient use. However, we also need to consider the interests of particular groups in society, as set out in our general duties (and as required under our duty to conduct an Impact Assessment including an Equality Assessment). Put simply, if efficient use can only be secured at a significant cost to a particular group of citizens or consumers, then while securing that increase might be efficient, it may not be optimal.
>
> 3.20 We would therefore consider the potential impacts on particular groups of citizens and consumers (as required by our general duties) before making fee proposals for consultation."

44. The use of the term "reflect" is not confined to Ofcom. The word is used in Article 13 of the Authorisation Directive (see [9] above) the French text of which uses the verb "*tenir compte*" (take account of). It also features in the Impact Assessment published by the Secretary of State in connection with the making of the 2010 Direction which I deal with in [27]-[28] above. That recognises that Ofcom could still set revised licence fees "to reflect the full economic value" and therefore reproduces the definition of AIP adopted by Ofcom in its own policy statement. It is, I think, therefore difficult to read Article 6 as anything but the adoption of the same definition of AIP using "reflect" in the same sense. The judge was, I think, wrong insofar as he held that "reflect" should be given a different meaning. The difficulty, as it seems to me, is whether this is really conclusive of the issue between the parties.

45. AIP, as I have already explained, is a formula for assessing the value to be attributed to spectrum based on opportunity cost. It is not and cannot be a calculation which takes into account the relationship between opportunity cost (and therefore value) and the impact that fees set at that level would have in relation to competition or individual users of the system: i.e. the Article 8 considerations. As Ofcom explains in its policy statement, those factors have to be taken into account after the calculation of AIP when deciding how to apply the AIP to the setting of licence fees. The issue

therefore in relation to Article 6 of the 2010 Direction is whether the requirement to apply the AIP in the setting of licence fees should be read (by necessary implication) as excluding the obligations which would otherwise exist for Ofcom to carry out the second stage of the exercise described in its policy statement. In this connection, it needs to be borne in mind that Article 6 is only one feature of a composite package of spectrum reforms which the 2010 Direction was intended to introduce. Based on the recommendations of the ISB, the Direction implements through Ofcom the release of 900 MHz and 1800 MHz spectrum for 3G services and varies the terms of the existing and future licences to make them indefinite and tradable. There has been no challenge to these aspects of the reforms and Ofcom was required to revise the existing regulations so as to set licence fees that "reflect the full market value" of the frequencies in the 900 MHz and 1800 MHz bands. The 2010 Direction is silent as to whether that exercise should be performed without regard to the Article 8 considerations.

46. Ofcom has assumed that it should be read as maintaining such an exclusion because otherwise the Direction was unnecessary. But that, I think, overstates the position. It is clear from the Secretary of State's impact assessment that the Government was concerned to ensure the implementation of the totality of the reforms proposed by the ISB and not simply the setting of licence fees by reference to AIP. As it says in the impact assessment:

> "Government intervention through a Direction to the regulatory body, Ofcom, is deemed necessary to avoid further delay. Acting now will help accelerate the process of releasing existing and new spectrum, and thereby progress towards universal coverage in 3G and next generation mobile services and the transition to next generation high-speed broadband services.
>
> ...
>
> By laying this Direction, the UK Government aims to bring forward the benefits to businesses and consumers associated with universal coverage in 3G and next generation mobile services and the transition to next generation high-speed broadband services. It should also serve to ensure that the degree of competition, and similarly investment, is safeguarded, particularly following the merger of T-Mobile and Orange on 1st March 2010."

47. The passages from the impact assessment quoted in [27] and [28] above confirm that the existence of possible regulatory challenges to various aspects of the reforms were likely to cause delays which the Government wished to avoid. But it is much more difficult to derive from the assessment any clear indication that once the package of reforms was in place Ofcom was to have no regard to the Article 8 considerations, and therefore no discretion, in the application of AIP to licence fees.

48. I am not therefore convinced that this question can be determined simply by attempting to identify the meaning of the word "reflect" whether by reference to the impact assessment and other consultation documents or otherwise. Although as a

matter of ordinary language I am inclined to read it as meaning "based on" or "by reference to", the background material is inconclusive. Ofcom's view that it should be read as meaning "represent" or "constitute" still leaves open the question whether that meaning of the word necessarily excludes any consideration of the wider issues listed in Article 8. That requires a consideration of the 2010 Direction in its full legislative context which is likely to inform the meaning to be given to Article 6.

Vires

49. It seems to be common ground that delegated legislation such as the 2010 Direction should, if possible, be interpreted in a way that avoids a conclusion that it is *ultra vires* the parent statute: see *Raymond v Honey* [1983] 1 AC 1 per Lord Wilberforce at page 13. Although the Authorisation Directive imposes on member states the obligation to ensure the freedom to provide electronic communications networks and services (Article 3) and to facilitate the use of radio frequencies by granting rights to use the system (Article 5), the Directive contemplates that these functions will be carried out by NRAs such as Ofcom and imposes direct duties on such authorities in respect of the carrying out of those functions. The judge was right to observe that Article 13 of the Authorisation Directive refers to member states but it does so in terms of allowing member states to authorise NRAs to impose licence fees in accordance with Article 8 of the Framework Directive. The obligation on member states is to ensure that fees are set in compliance with those conditions. This is re-inforced by Article 7(1) of the Framework Directive which requires NRAs to take utmost account of the Article 8 objectives.

50. The United Kingdom has implemented these provisions by delegating the function of setting licence fees to Ofcom under s.12(2) of WTA 2006. In recognition of this, the provisions of CA 2003 were amended (see s.405(1)) so as to include the function of setting licence fees within the provisions of s.4(2) of CA 2003 and to impose on Ofcom an express statutory duty to act in accordance with Article 8 of the Framework Directive when setting fees. This is re-inforced by s.3(5) of WTA 2006 which requires Ofcom to give priority to its duties under s.4(2) over its duties under s.3 of WTA 2006.

51. Lord Pannick QC for EE submits that there is nothing in either the WTA 2006 or in the CRF which permits a member state to remove a regulatory function from an NRA. In the United Kingdom the function of setting licence fees has been delegated to Ofcom by primary legislation and, absent clear words, that position cannot be changed by subordinated legislation in the form of the 2010 Direction. By the same token, the 2010 Direction cannot have been effective to remove from Ofcom the duty imposed on it by s.4(2) of CA 2003.

52. The general principle is not in dispute and the question of *vires* really turns on s.5 of WTA 2006. Does it empower the Secretary of State to repatriate to himself the function of setting licence fees in accordance with Article 8 and, if so, did the 2010 Direction have this effect?

53. Section 5 of WTA 2006 allows the Secretary of State to give directions to Ofcom "about the carrying out by them of their radio spectrum functions". These include the power to set licence fees which is contained in s.12 (see s.5(4)(b)). Although s.5(3) allows a direction to require Ofcom to exercise its powers "in such manner" as the

Secretary of State specifies (s.5(3)(b)), what it does not do is to transfer to the Secretary of State the function of exercising the s.12 power. Lord Pannick submitted that had it purported to do so that would have been a breach of the provisions of the CRF and, in particular, Articles 3 and 3a of the Framework Directive which require member states to guarantee the impartiality of NRAs and requires them to act independently. But it is not necessary to resort to EU law. The power to give directions is in respect of the exercise by Ofcom of its radio spectrum functions. The Secretary of State was not thereby empowered to exercise those functions himself nor did he purport to give himself that power by the 2010 Direction. It is phrased in terms of requiring Ofcom to exercise its powers so as to implement the package of reforms including directing Ofcom to raise the licence fees.

54. The question therefore arises whether s.5 authorises the Secretary of State to direct Ofcom in exercising its s.12 powers to ignore the duties imposed on it by s.4(2) of CA 2003 and s.3(5) of WTA 2006. In my view, it does not. Parliament has imposed those duties on Ofcom (compatibly with Article 8 of the Framework Directive) to be performed "in carrying out" its radio spectrum functions. It did not obviously contemplate or in my view authorise the performance of the Article 8 duty by someone who was not the regulator and who was not carrying out the relevant function to which the duty relates. In the absence of clear words, the s.4(2) duty is to be treated as non-delegable and there is nothing in s.5 of WTA 2006 which in terms allows the Secretary of State to relieve Ofcom of the statutory duties which Parliament has expressly imposed on it. The language of s.5 is entirely neutral.

55. For these reasons, I reject the judge's analysis of s.5 as a *lex specialis* and, for the same reason, I decline to read Article 6 of the 2010 Direction in a way which would render it *ultra vires* WTA 2006. In my view, the word "reflect" should be read in the sense contended for by Lord Pannick and Mr Fordham with the result that Article 6 does not exclude the Article 8 considerations from Ofcom's determination of the licence fees. In these circumstances, it is not necessary to consider a conforming construction of Article 6 on *Marleasing* principles still less issues of disapplication. The 2010 Direction can be given a meaning under domestic law which is also EU compliant. My conclusions on this issue also make it unnecessary to consider the argument that the proper occasion for judicial review was when the 2010 Direction was made. Ofcom has failed to give effect to the Direction as properly construed.

56. I would therefore allow the appeal.

Lord Justice Henderson :

57. I agree.

Lady Justice Asplin :

58. I also agree.