Neutral Citation [2015] IEHC 443

THE HIGH COURT

COMMERCIAL

[2014 No. 595 J.R.]

BETWEEN

VODAFONE IRELAND LIMITED

APPLICANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

AND

THREE IRELAND (HUTCHISON) LIMITED

FIRST NOTICE PARTY

AND

METEOR MOBILE COMMUNICATIONS LIMITED

SECOND NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered 13th day of July, 2015

1. This is an application by the First Notice Party ("Three") seeking its costs against Vodafone Ireland Limited ("Vodafone") in these proceedings. The proceedings have been settled by agreement between Vodafone and the Commission for Communications Regulation ("ComReg"). Three is seeking its costs against Vodafone only.

2. These proceedings arise against the background of the acquisition by Hutchison 3G UK of Telefonica Ireland's (O2) mobile telecommunications business. The merger between Three and O2 was a commercial transaction which required European Commission approval.

3. In the proceedings, Vodafone sought to compel ComReg to discharge its statutory spectrum management function. It maintained that ComReg had failed to discharge its function of managing Ireland's radio frequency spectrum in accordance with law, that it must do so immediately by conducting a public review and consultation regarding the allocation of the mobile spectrum for compliance with the applicable statutory standards because the merger of Three and O2 had had what was described as a "*seismic*" impact on the regulatory environment of the mobile telecommunications sector in Ireland.

Chronology of events

1st October, 2013: A merger announced between Three and O2 which was then notified to the European Commission.

21st February, 2014: Vodafone initiate correspondence with ComReg regarding spectrum management.

28th May, 2014: European Commission clears the merger subject to certain conditions known as Commitments.

31st July, 2014: Vodafone sets out it post merger concerns and its contentions as to the legal basis for ComReg's obligation to manage radio spectrum and its duty to undertake a review of spectrum allocation pursuant to domestic legislation in the light of the European Commission's decision of 28th May, 2014.

26th September, 2014: ComReg internal staff analysis of Vodafone's note of 31st July, 2014, prepared.

13th October, 2014: Vodafone moves an *ex parte* application for leave to seek judicial review seeking, *inter alia*, to compel ComReg to issue a determination or otherwise indicate its substantive response to its submission dated 31st July, 2014.

13th October, 2014: High Court (Peart J.) grants Vodafone leave to seek judicial review.

14th October, 2014: ComReg responds to Vodafone's submission of 31st July, 2014 ("the contested decision").

14th & 15th October, 2014: Three's solicitors write to Vodafone's solicitors requesting copies of the statement to ground the application for judicial review, the grounding affidavit and the Order of 13th October, 2014. Documents not forwarded.

16th October, 2014: Three applies to High Court (Peart J.) seeking copies of the documentation in order that it may decide whether or not it should apply to be joined as a notice party. Peart J. indicated that if proceedings were not served on Three by 20th October, 2014, Three had liberty to bring an application to be joined in advance of the return date for Vodafone's Notice of Motion (25th November, 2014).

17th October, 2014: Vodafone's solicitors send a copy of the Statement of Grounds to Three's solicitors.

21st October, 2014: Vodafone's solicitors sent Three's solicitors the perfected Order of 13th October, 2014. Three issues a motion returnable for 4th November, 2014, seeking to be joined as a notice party.

14th November, 2014: Vodafone's solicitors write stating that they will contest the right of Three to seek costs of the proceedings if joined regardless of the outcome of the proceedings.

17th November, 2014: Three joined as a notice party to the proceedings.

25th November, 2014: Vodafone seeks liberty to amend the Statement of Grounds to challenge the contested decision.

26th November, 2014: Meteor Mobile Communications Ltd. ("Meteor") issues a notice of motion seeking to be joined as a notice party.

1st December, 2014: Order made joining Meteor as notice party and Vodafone given liberty to amend the Statement of Grounds.

9th December, 2014: ComReg delivers a statement of opposition and grounding affidavit which exhibits the 26th September, 2014, ComReg internal staff analysis of Vodafone's note of 31st July, 2014.

15th December, 2014: Three delivers statement of grounds of opposition and replying affidavit.

January – April, 2015: Exchanges of affidavits and expert reports between Vodafone and ComReg and one further affidavit of Three dated 9th March, 2015. Each party delivers written submissions in advance of the hearing.

16th June, 2015: Proceedings listed for hearing.

4. On 12th June, 2015, Vodafone's solicitors advised Three's solicitors of a resolution of the proceedings and mentioned the matter at the callover on 12th June, 2015. By letter dated 16th June, 2015, Vodafone's solicitors wrote to Three's solicitors confirming that Vodafone had agreed with ComReg that the proceedings would be struck out with no orders as to costs and that ComReg would publish an information notice concerning the proceedings within seven days from the date of the making of the order striking out the proceedings. That order was made on 16th June, 2015 and ComReg published an information notice the following day, 17th June, 2015, entitled:-

> *"ComReg and Vodafone Ireland Limited agreed to strike out Vodafone's judicial review proceedings [2014/595/JR], with no further order."*

The Information Notice is attached to this judgment in the form of a schedule.

5. Three said that the compromise was a private agreement between Vodafone and ComReg. Three was unaware of and did not participate in the negotiations leading up to the Settlement and is not privy to its terms. The hearing in relation to cost proceeded before me on the basis that the terms of settlement were as set out in the Information Notice of 17th June, 2015. Three brought this application seeking its costs in relation to participation in the proceedings as outlined above.

Submissions of the Parties

6. Three submitted that, in effect, Vodafone had withdrawn the proceedings. The reliefs sought (in the Amended Statement of Grounds) were:-

> (a) an order of *certiorari* quashing a decision of 14th October, 2014, whereby ComReg declined to conduct "*a public review and consultation*" of the mobile spectrum in the State in the wake of the merger;
>
> (b) a series of declaratory reliefs regarding a scope of ComReg's spectrum management function, including, *inter alia*, a declaration that ComReg had a power and an obligation to "*take appropriate measures*"; and
>
> (c) an order of *mandamus* compelling ComReg to discharge its function in a particular way by undertaking a review of the mobile spectrum allocation in Ireland.

7. Three submitted that the Information Notice records no concessions to Vodafone. It did not resile from the contested decision and the Information Notice is entirely consistent with, and affirms, the contested decision and the position adopted by Three and ComReg in the proceedings. It points to the fact that the matters referred to at para. 3 all relate to documents which were in the public domain or to the regulatory framework applicable to ComReg. At para. 5 of the Notice, ComReg confirmed matters which were already in the public domain and in particular, matters set out in documents from 2005 and 2011. It submitted that the Confirmations were not encompassed by the relief sought in the proceedings and could not be characterised as concessions to (or "*wins*" by) Vodafone.

8. It noted that ComReg maintained the decision set out in its analysis of 26th September, 2014, as follows:-

> *"ComReg does not consider, based on the facts within its knowledge, that there is any current need for intervention utilising its spectrum management powers…*
>
> *It would not be a good use of ComReg's resources to conduct a public consultation of the type envisaged by Vodafone…*
>
> *For the reasons outlined above, ComReg does not agree with Vodafone's contention that '[t]here are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures'…*
>
> *ComReg will continue to monitor spectrum usage in Ireland including usage of spectrum licensed to the parties to the Transaction. This would appear to be a reasonable and proportionate approach at this juncture."*

9. Three submitted that it had an obvious, immediate and significant interest in the contested decision and what it described as the wide ranging and invasive reliefs sought by Vodafone. If ComReg conducted a review of the mobile spectrum in the State in the wake of the merger and the decision of the European Commission, it is said that this would impact on their vital interests. It is said the very conduct of such a review would affect their interests and clearly there was a risk, in the light of the merger between Three and O2, that the spectrum awarded to the now merged entity might, in some respect, be reduced. The consideration paid by Three for the spectrum it acquired in the multi-band spectrum auction was an upfront fee of €51.137million and the consideration paid by the Three Group for O2 was in excess of €750million. Three submitted that the Court should approach the matter by asking first whether it was reasonable that Three was joined as a notice party to the proceedings and secondly, was the involvement of the notice party necessary, reasonable and proportionate to the interest which they sought to advance in the proceedings.

10. Three relied upon the decision of the Supreme Court in *O'Connor v. Nenagh UDC* [2002] IESC 42. In the High Court, Geoghegan J. had awarded the Notice Party, Dunnes Stores Ltd. costs against the applicant when he refused the application of the applicant for judicial review. The High Court held:-

> *"… I have no doubt at all that the Notice Party, Dunnes, should be entitled to their costs. It is true they were not named as Respondent originally but they had to be a Notice Party, they had to be in on the proceedings. They were absolutely entitled to be represented and to appear and to participate in the entire of the application. In my view, their interests were, in one way or another, at stake. I do not accept the submission at all that they should have simply relied on whatever arguments the Urban District Council put forward. I have no hesitation in granting Dunnes their costs against the Applicant."*

11. Denham J. stated:-

> *"A court gives great weight to the views of the learned trial judge. I am satisfied that the trial judge in this case applied the correct principles. I would not interfere with the exercise of his discretion. It is clear that:*
>
> *(a) whereas there was an element of public interest, the application as originally drafted sought specific remedies potentially detrimental to the notice party;*
>
> *(b) he notice party was a necessary party;*
>
> *(c) the notice party participated fully in the trial;*
>
> *(d) the notice party was an entirely innocent party and acted in good faith at all times;*
>
> *(e) the notice party was successful in the proceedings;*
>
> *(f) no compelling reasons have been established as to why costs should not follow the event;*
>
> *(g) the learned trial judge exercised his discretion in accordance with law.*
>
> *For the reasons stated I would not interfere with the exercise of the discretion of the learned trial judge."*

12. In *Eircom Plc. v. Director of Telecommunications Regulation* [2002] IEHC 72, the judicial review was overtaken by events and effectively became moot prior to trial. Two notice parties contended that their rights would be materially affected by the avoidance of the decision which was sought to be impugned by the applicant and the notice parties sought orders for costs. Herbert J. rejected the submission of counsel for the applicant that the applicant was entitled to proceed against the respondent alone and should not be fixed with the costs of parties whom it did not seek to join in the matter and whom, counsel argued, voluntarily sought to be joined in the application for judicial review so as to advance, or protect, their own interests. Herbert J. said that he should approach the matter by considering first whether the applications to be joined in the matter and secondly, whether the steps taken by them thereafter were reasonable in all the circumstances. He was satisfied that they each had a separate *bona fide* and material interest which was directly affected by the application for judicial review. The decision concerned the interim prices the Regulator directed the applicant to charge. It did not relate to their charges. Nevertheless, he held that they had a legal entitlement to be joined in the matter for the purpose of vindicating those interests. Once joined in the application, they were, at the very least, obliged to set out the basis of their opposition to the application in the form of an affidavit. He was satisfied that both notice parties had acted reasonably in seeking to be joined and he awarded them costs confined to costs reasonably and properly incurred in the preparation and filing of affidavits setting out the basis of opposition or verifying facts and alternatively or additionally, the Statement of Grounds of Opposition.

13. In *Telefonica O2Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 380, Clarke J. had to consider the costs to notice parties of motions brought in judicial review proceedings which proceedings were compromised but no provision was made for the notice parties' costs. Clarke J. stated at para. 3.6 of his judgment:-

> *"As pointed out by Herbert J.[in Eircom v. Director of Telecommunications Regulation], a party who has a legitimate interest to protect and who is, therefore, a necessary party to judicial review proceedings, will ordinarily be entitled to be joined. Likewise, such a party will ordinarily be required to at least take some steps to place their position on the record. It should not, however, be assumed that simply because a party has a right to be heard, that person is necessarily entitled to the costs of fully participating in the litigation most particularly where the party concerned does not really have anything substantial to add to the argument on the questions which the court has to decide. There is, in my view, a difference between being entitled to be heard and being necessarily entitled to the costs of being heard and, in particular, the costs of being fully involved in proceedings. It should not be assumed that a notice party who sits around for the duration of a lengthy judicial review hearing which is being fully defended by the respondent, is entitled to the full costs of such representation even though what is added to the case either in evidence, written submission, or oral submission, is marginal in the extreme. Each case needs to be judged on its own facts. It is, however, important to note that the mere fact that a notice party has an interest to protect does not necessarily justify doubling the costs of defending judicial review proceedings where the case made by both the respondent and the notice party is substantially the same. That argument applies with even greater force where more than one notice party may be involved."*

14. In determining whether or not to award either the Minister or BT or both the costs associated with the motions in question, he asked whether the manner in which they each involved themselves in the process was both proportionate and reasonable and whether they had their own individual arguments which were both separate from each other and separate from the arguments which ComReg advanced. He stated at para. 4.3:-

> *"There was not, therefore, in my view anything in either the joining of the notice parties, the position which they adopted in respect of the issues which arose, or the manner in which they advanced their case at the hearing which could lead to any view other than that their involvement was justified, necessary and reasonable. If the result of the 'event' was in their favour, then there would be no basis for depriving them of a full order for costs."*

15. Counsel for Three argued that this was the appropriate approach to be followed in this case.

16. The final case upon which Three relied was *Usk and District Residence Association v. Environmental Protection Agency* [2007]

IEHC 30. The judicial review proceedings related to a waste license granted by the EPA to the notice party, Greenstar Recycling Holdings Ltd. Clarke J. made it clear that the starting position has to be that ordinarily a party, such as the EPA and Greenstar, who successfully resists an applicant's claims would be entitled to all of the costs reasonably incurred. At paras. 5.2 – 5.5 of his decision, Clarke J. held:-

> *"5.2 As pointed out in Veolia, the default position is that all costs should be awarded to the successful party. Where that successful party is a defendant, respondent, or, indeed, a notice party who opposes an application, then that position should be departed from only where the court is satisfied that there are good grounds for taking the view that the costs of the proceedings as a whole (including any appropriate interlocutory applications) have been clearly increased by reason of an unreasonable position adopted by that successful party in respect of some issue which has not already been the subject of a costs order reflecting the relevant unreasonableness.*
>
> *5.3 For the reasons which I have sought to analyse above it does not seem to me that it can be said that either the EPA or Greenstar, on the facts of this case, have increased the overall costs of the proceedings in an unreasonable manner by any step or position which they took…The court should not attempt to assess such matters with the benefit of hindsight…In all the circumstances I do not see any proper reason to depart from the ordinary proposition that the successful party should be entitled to all costs appropriate to the defence of the proceedings.*
>
> *5.4 Finally it is necessary to deal with the discrete issue raised in respect of the costs of Greenstar. It seems to me that these proceedings are intimately concerned with the rights and entitlements of Greenstar. The challenge to the licence granted by the EPA to Greenstar has failed. Greenstar was, therefore, a party intimately involved in the defence of its legitimate interests in seeking to put forward arguments in support of the defence by the EPA of the challenge to the waste licence. The fact that the focus of the proceedings shifted, to some extent as a result of the exclusion of many of the grounds at the leave stage, to issues which were concerned with the consideration by the EPA of whether the proposal was BATNEEC, does not distract from the fact that that issue was intimately concerned with the manner in which Greenstar would operate the facility on foot of the licence. I do not see any basis, therefore, for taking any different view in respect of the costs of Greenstar to those of the EPA.*
>
> *5.5 I should, however, note that* ***there may well be cases where it would be appropriate for notice parties (who are not as intimately connected with the issues as in this case) to consider whether it is necessary to participate, or at least participate fully, in judicial review proceedings.*** *The mere fact that the party may have a sufficient interest so as to make it legitimate that they be placed on notice of the proceedings does not, of itself, necessarily carry with it an entitlement to that party to an unquestioned order for costs in the event of the proceedings being successfully defended.* ***The extent to which such a notice party may be entitled to some or all of the costs of successfully supporting the defence of the application, will depend on all the circumstances of the case and, in particular, the extent of the interest of that party in the issues which are the subject of the judicial review application and the extent to which it may be regarded as reasonable for that party, in those circumstances, to independently oppose the application.*** *Having regard to those principles it does not appear to me to be appropriate to diminish the entitlement of Greenstar to costs on the facts of this case." (emphasis added)*

Submissions of Vodafone

17. Vodafone submits that Three should not be entitled to any order for costs in these proceedings. It points to the fact that Vodafone chose for its own commercial reasons to be joined as a notice party. It originally did not accept that Three was a necessary party, however, Vodafone ultimately conceded that Three had a proper interest in proceedings:-

> *"I do not dispute that Three Ireland has a proper interest in these proceedings and ought to be heard as a notice party…*
>
> *… I would not dispute that Three Ireland would be affected by the kind of assessment which Vodafone believes ComReg is required to undertake."*

18. It submits that there is no principle that a notice party is necessarily entitled to its costs and that the award of costs is always in the discretion of the High Court as set out in O. 99, r. 1 of the Rules of the Superior Courts which provides:-

> *"(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

19. It submits that in truth, Three could have left all of the arguments in the case to be advanced by ComReg and that Three merely duplicated the arguments of ComReg. It therefore says that the involvement of Three in the judicial review proceedings was not necessary. It furthermore submits that its involvement was disproportionate in the circumstances.

20. Vodafone submits that there was a fundamental distinction between a case where an applicant is unsuccessful and a case where there is no judicial determination. It refers to O. 99, r. 1:-

> *"(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

Vodafone submits that where proceedings are settled between the parties that there is no "*event*" and therefore r. 1(4) cannot apply. They rely upon the decision of Laffoy J. in *O'Dea v. Dublin City Council* [2011] IEHC 100 at para. 6.1, where she stated:-

> *"…the first question the Court must consider is whether there has been an 'event' and, if so, what it was. As I understand it, 'event', as envisaged in the Rules, is a result which determines the dispute before the Court. Without expressing any definitive view on this point, in my view, what the Rules and the authorities envisage is a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event, such as an agreement of the parties in which the Court has not been involved. In this case, there has been no determination by the Court on the issues which came before it …. That being the case, the question which arises is what function the Court has in relation to liability for costs. The answer, in my view, is that it has none."*

21. Vodafone also relied upon the recent decision of Cregan J. in *Eircom v. Commission for Communications Regulation* [2015] IEHC

51. In that case, the proceedings (being a statutory appeal against a decision of ComReg) were compromised and Cregan J. held at para. 20 that:-

> *"…given that the proceedings have settled there is 'no event' which the costs shall 'follow'. Therefore in my view O. 99 r. 1(4) has no application."*

22. He stated that it seemed to him that as a matter of principle, fundamentally different considerations applied to cases which are settled and proceedings where the claim is abandoned or discontinued. In that case, the notice party argued that the compromise in that case was tantamount to an abandonment of the claim or a discontinuance of the proceedings. He held at para. 23:-

> *"Moreover, in my view, this argument of the notice party is to ignore entirely the fact that the settlement agreement in this case, like the settlement agreement in many cases, is agreed as a finely balanced exercise of concessions and reliefs, of advantages and disadvantages. It is inappropriate to select one feature only of the settlement agreement (i.e. the fact that Eircom agreed to withdraw its appeal) and to ignore entirely the other agreed terms of the settlement agreement."*

23. Vodafone argues that Three should not be entitled to an order for costs on the following grounds:-

> *(i) Three asked to be made a notice party.*
>
> *(ii) It was protecting its own commercial interests.*
>
> *(iii) It was not a necessary party to the judicial review.*
>
> *(iv) It was not concerned in the outcome of the proceedings in the way that an applicant for planning permission might be concerned in a challenge to a grant of planning permission for example.*
>
> *(v) Having a right to be heard did not mean that it was entitled to the costs of participating in the litigation.*
>
> *(vi) Three did not add anything new to the opposition to the application for judicial review that was not already advanced by ComReg.*
>
> *(vii) Three's participation was not proportionate in the circumstances.*
>
> *(viii) The proceedings were compromised and so there was no event within the meaning of O. 99, r. 1.*
>
> *(ix) The Court should follow the decision of Cregan J. in Eircom v. Commission for Communications Regulation on the basis that it was on all faces with this case.*

Discussion

A notice party joined on its own motion

24. Vodafone argued that the fact that the notice party in this case, Three, applied to be joined in the proceedings to protect its own commercial interests was a reason for refusing to award the notice party the costs. It was argued that it was not a necessary party in the sense that it was not mandated that it be a notice party such as occurs, for example, in judicial review proceedings brought under the Planning Acts. As a matter of principle, it seems to me, that if Three was a proper notice party to the proceedings (as was accepted both by McGovern J. when he made the order joining Three as a notice party and, in fact, by Vodafone, in the affidavit of Mr. Edward Traynor, sworn on 16th February, 2015), the fact it was obliged to apply to be joined should not be a factor held against it in the context of determining its application for costs. To hold otherwise would run the risk of that parties might institute judicial review proceedings deliberately omitting necessary and appropriate notice parties in the hope that they could somehow insulate themselves against exposure to proper notice parties' reasonable costs.

25. Ms. Barrington S.C. on behalf of Vodafone emphasised the fact that the notice parties in the authorities were referred to as necessary notice parties because they were required to be notice parties under the relevant statutory regimes which were the subject of the respective judicial review applications. I cannot agree with this argument. Where a statutory regime establishes that certain parties are necessary notice parties to judicial review proceedings, the inclusion of those parties as notice parties, in any proceedings brought under those statutory regimes, is mandatory and the proceedings cannot properly be brought unless those parties are named as notice parties. It follows that the description of notice parties who are joined in proceedings as necessary parties cannot be equated with the parties whom, by statute, are mandated to be notice parties proceedings brought under particular statutory codes. Further, in *Eircom v. Director of Telecommunications Regulation*, Herbert J. rejected the argument that the applicant was entitled to proceed against the respondent alone and should not be fixed with the costs of parties whom it did not seek to join in the matter and who voluntarily sought to be joined in the application for judicial review so as to advance or protect their own interest. It follows that the references in the authorities cited above to a notice party being a necessary notice party is not confined to mandatory notice parties. In my opinion, Three was a necessary notice party in these proceedings in this sense.

26. It was argued that Three was merely seeking to protect its own commercial interests. This, of course, is equally true for Vodafone. In the affidavit grounding an application for leave to seek judicial review an applicant must establish his *locus standi* to bring the proceedings. The deponent in these proceedings laid particular emphasis on the significant commercial investment of Vodafone in the telecommunications business and the mobile spectrum in telecommunications in the State, in particular. I see no distinction between the commercial interests of Vodafone and the commercial interests of Three in this regard. Three stated that it was vitally concerned with the possible outcome of both a decision to review the mobile spectrum by ComReg and any possible actual review of the spectrum by ComReg. The courts have long recognised that it is legitimate for notice parties to protect and defend their commercial interests in judicial review proceedings. The fact that this is so is no reason to refuse a notice party an order for costs which it would otherwise be appropriate to make.

27. It was argued that there is a clear distinction between the right of a notice party be heard in a judicial review application and whether or not it is entitled to the costs of its representation. This is clearly correct. A notice party is not automatically entitled to its costs simply because it has a right to be heard in the proceedings. In this regard, it is to be noted that the solicitors for Vodafone wrote to the solicitors for Three on 14th November, 2014, stating:-

> *"…our client believes that there can be no circumstances in which your client could properly seek to recover any costs it might incur in the proceedings against our client or indeed against the respondent, regardless of the outcome of the proceedings. In the event that your client is joined to the proceedings as a notice party, we will accordingly use the previous correspondence and this letter in support of a submission to the Court at the determination of the proceedings that your client's participation should be at its own cost in any event."*

28. This letter is in no way to be equated with a *Calderbank* letter, where the applicant, Vodafone, initially did not join Three as a notice party to the proceedings, and initially opposed its intention to apply to be joined and finally accepted that it was a proper notice party. It was not written with a view to facilitating the attempt to settle proceedings. It was done to discourage a competitor from intervening in litigation which it was hoped would ultimately lead to a decision of commercial advantage to Vodafone and commercially damaging to Three. I do not believe that this letter should be given any weight in the Court's exercise of its discretion on the matter of costs.

29. For these reasons, I believe that the fact that Three sought to be joined as a notice party is not of itself a reason to refuse it an order of costs in these proceedings and neither is the fact that it was protecting its own legitimate commercial interests, a ground of itself for refusing it the costs of the proceedings.

Was it reasonable to join the notice party?

30. The first question which the Court must ask was whether or not it was reasonable that Three be joined in this case. In my opinion, it was, and in fact it has now been accepted by Vodafone that it was reasonable that they be joined as a notice party. Three had a very substantial commercial interest in its mobile telecommunications business within the State. The reliefs sought in the judicial review did not directly impact upon the rights of Three (such as a challenge to the grant of planning permission or of an EPA license to a developer might directly impact upon a notice party), nonetheless, it is quite clear that Vodafone's purpose and intent in seeking a review of the mobile spectrum by ComReg was with a view to ultimately securing a reduction of the spectrum to which Three is currently entitled. Whether that is appropriate or not is solely a matter for ComReg and my observation is not to be taken as a criticism of Vodafone in this regard. However, Three's current allocation from the mobile spectrum is a very significant and valuable asset in the context of Three's business and I believe it cannot, in all the circumstances, be said that it was not reasonable that Three be joined as a notice party.

31. That being so, as was made clear in the judgment of Herbert J. in *Eircom v. Director of Telecommunications Regulation*, it was necessary that the notice party deliver its opposition papers and a replying affidavit. Vodafone argued that it was not necessary that Three participate fully in the proceedings as it was not seeking to advance any arguments which were not already being advanced by ComReg. Three's involvement, in the circumstances, should not have extended to duplicating the defence advanced by ComReg. In order to deal with that point fully, it would be necessary to effectively hear the entire case which this Court is not in a position to do on an application for costs. However, I note that in his submissions Mr. Collins S.C., on behalf of the Three, pointed to the fact that Three was in a position to adduce evidence which was available only to it and which was relevant to matters which had been raised between the applicant and the respondent in relation, *inter alia*, to spectrum hoarding and the percentage usage by various mobile phone operators within the State of various parts of the spectrum and the impact upon Three of its compliance with the conditions, referred to as Commitments, in the decision of the European Commission when it authorised the merger between Three and O2.

32. The test I have to apply is as annunciated by Clarke J. in *Usk* and by Finlay Geoghegan J. in *Treasury Holding & Ors v. The National Management Agency & Ors* [2012] IEHC 518 where it was stated at para. 18:-

> *"The approach envisaged by Clarke J. … nevertheless, appears to me to properly apply to KBC on the facts of this application. Rather than commencing from any prima facie entitlement to costs, it appears to me that it must be a matter for the Court to consider, having regard to all the circumstances of the case, including, in particular, the extent of the interest of the notice party in the issues which are the subject matter of the judicial review application, and the extent to which it may be regarded as reasonable for the notice party, in all the circumstances of the case independently to oppose the application to determine whether an order for costs in its favour against an unsuccessful applicant should or should not be made."*

Was the involvement of Three once it was joined as a notice party necessary, reasonable and proportionate to the interests which they sought to advance? In my judgment, the manner in which Three engaged in these proceedings was not inappropriate. This was not a case of a notice party attending for the duration of a lengthy judicial review hearing which was fully defended by the respondent and then seeking to recover the full costs of such representation in circumstances where its addition to the case was marginal in the extreme, as was contemplated by Clarke J. in *Telefonica O2 v. Commission for Communications Regulation*. Three's involvement was not confined to a minor role. It was involved centrally in the case. Its participation was neither unnecessary nor disproportionate. It was accepted that its position was fundamentally different to that of the other notice party, Meteor, who was far less likely to be impacted negatively by the outcome of either the judicial review itself or the spectrum review (if conducted) and therefore, a comparison with the stance adopted by Meteor was not really helpful or appropriate.

33. Had this been a case which had proceeded to trial and which had been successfully defended, I would have no hesitation in awarding Three its costs as against the applicant. However, that is not what has occurred in this case. The proceedings have been compromised. The question therefore becomes, in light of the settlement of the proceedings by Vodafone and ComReg, what orders should the Court make in respect of Three's costs?

Compromise of proceedings

34. In *Eircom v. Commission for Communications Regulation*, Cregan J. stated that there was a difference in principle between proceedings which have been settled by agreement between the parties – even if the decision being appealed against remained in tact – and other proceedings where the claims were abandoned or discontinued. At para. 25 he stated:-

> *"It seemed to me that, as a matter of principle, fundamentally different considerations apply to cases which are settled."*

35. His judgment continued at para. 35 *et seq*. as follows:-

> *"35. This settlement agreement – as all settlement agreements do –simply records the agreed settlement terms and (naturally) not the reasons behind the decision of each of the parties to settle the proceedings. Therefore it would be both inappropriate and unwise for a court to speculate on any of the reasons which might bring either or both parties to the realisation that the proceedings should be settled. Moreover it is clearly in the interests of the parties – and indeed in the interest of the administration of justice – that complex commercial proceedings are settled between parties*

wherever that is possible…

37. Moreover the court should also consider the regulatory context in which this appeal was brought. Whilst the decision under review remains intact, a similar decision may have to be made in subsequent years by Comreg and it may be the case that issues emerged in the running of this case which gave both parties an opportunity to reflect on matters afresh. Clearly it had this effect as the parties agreed to settle the proceedings rather than pursue them to a court decision. In a complex regulatory regime such as the telecommunications regime the court should have regard to the fact that some regulatory decisions may have to be made on an annual basis or must be revisited every number of years. In those circumstances it is possible that parties might agree to settle proceedings and to leave a regulatory decision intact in order to fight the battle in a different way on a further occasion.

38. Whilst it was of course reasonable for the notice party to seek to be joined as a notice party to the proceedings, it does not follow as a matter of logic that it is therefore entitled to its costs when those proceedings are subsequently settled.

39. The question then becomes one of principle as to who bears the risk of a notice party's costs in cases where proceedings settle. Much depends on the circumstances of the case."

36. In that case, Cregan J. was influenced by the fact that the notice party applied of its own motion for its own commercial interest to be joined as a notice party to the proceedings and for that reason, he felt that it must run the risk that the proceedings might settle without reference to it and its costs. He concluded that it would be unjust and unfair to award the costs of the notice party against Eircom.

37. In reaching this decision, the judgment of Clarke J. in *Telefonica O2 v. Commission for Communications Regulation* had been open to him, where at paras. 7.2 – 8.2 it was stated:-

"7.2 The motion is now moot. However, the reason why it has become moot is because of the actions taken by O2 and ComReg in settling the proceedings. It should be emphasised that the settlement of litigation is a desirable end in itself and parties should neither be criticised for nor discouraged from resolving their differences. Be that as it may, it may remain the case that there are loose ends which are not necessarily disposed of as a result of the settlement of litigation. There may, for example, be other parties to the litigation generally, whose position needs to be considered. In the ordinary way, one might expect that where some but not all of the parties to a case agree to settle their differences, the settlement will make some provision for how the position of any non-settling parties are to be dealt with. While not strictly speaking in that latter category, this case is one where, at the time of settlement, there was outstanding the question of the costs of both the Minister and BT of their involvement in the motion. In the absence of O2 and ComReg having agreed, as part of their settlement, as to how they are to approach those costs, then the Court must deal with them as best it can.

7.3 It seems to me that the balance of justice favours the award of costs to the Minister and to BT. For the reasons already analysed, the involvement of those parties was necessary, reasonable and proportionate to the interests which they sought to advance. The manner of their involvement was not such as added in any inappropriate way to the costs of the motion with which I am concerned. No final result of that motion was determined and will not, for the reasons set out, now be determined. However, the reason why BT and the Minister have been deprived of the opportunity of satisfying the Court that they were entitled to resist the motion from the beginning is because of the settlement of the proceedings generally. To take but a simple example, if the result of the first module had been to the effect that the standard of review went no higher than O'Keeffe irrationality, then it is clear the motion for inspection/discovery would necessarily have failed. In those circumstances, and having regard to the involvement of the notice parties, it is difficult to see how they would not have been entitled to their costs. However, we will now never know what the result of the first module might have been. It would seem to me to be a greater injustice to deprive the notice parties of their costs in circumstances where they might well have achieved a situation of winning the motion, thus entitling them to their costs, where the reason why we will never know whether they would have won has been the settlement of the proceedings between O2 and ComReg.

7.4 While it remains true that O2 might equally have been successful in obtaining some disclosure which was resisted, it is O2's own action in settling the proceedings which has created the situation whereby we will never know whether O2 would have succeeded. On that basis, the equities are not, in my view, equal.

8. Conclusions

8.1 It follows that the Minister and BT are entitled to their reasonable costs of participating in the motion."

38. I, of course, agree with and endorse the observations of both Clarke and Cregan JJ. that the settlement of litigation is a desirable end in itself and that parties should neither be criticised nor discouraged from resolving their differences. The issue really is: what is to happen to what Clarke J. described as the "*loose ends which are not necessarily disposed of as a result of the settlement of the litigation.*" As has been accepted by all judges who have dealt with these issues, costs are ultimately a matter for the discretion of the court in these circumstances. Weighing everything in the balance, it seems to be that Three acted reasonably and proportionately and it had a legitimate commercial interest of very great import at risk either directly or indirectly in these proceedings. It was not afforded the opportunity of arguing its case and thus of achieving a result on foot of which it could then seek an order for costs in the usual way. This is because of the actions of Vodafone and ComReg. I in no way wish to discourage these parties from settling complex regulatory litigation in the Commercial Court. However, they reached a settlement without any reference to Three at all. It seems to me therefore that they did so in the knowledge that there was a risk that Three might apply for its costs and that this was a risk they were prepared to take. I am reinforced in this view in the light of the contents of the letter from Vodafone's solicitors of 14th November, 2014, quoted at para. 27 above. In all the circumstances, it seems to me that a greater injustice would be done to deprive Three of their costs. The fact that Three participated in the litigation of its own volition for its own reasons does not, in my opinion, tip the balance of justice so far as to deprive Three of its reasonable costs in participating in the proceedings up to 12th June, 2015, and the costs of this application.

SCHEDULE

1. "On 12 June 2015, Vodafone and ComReg agreed to strike out judicial review proceedings [2014/595/JR] in which Vodafone had challenged the way in which ComReg has conducted its spectrum management role, and in particular how

it conducted its role in the context of the 2014 acquisition by Hutchison 3G UK Holdings Limited ('Hutchison') of Telefónica Ireland Limited ('O2 Ireland') ('the Merger'). An outline of the key facts of these proceedings is contained in Annex 1 to this Information Notice.

2. In essence, Vodafone brought the case because it did not believe that ComReg had exercised its spectrum management function in the context of the Merger. ComReg, for its part, maintains that it has at all times been mindful of its statutory functions, duties and obligations and, in this regard, prior to the Merger, in the context of the Merger and in the aftermath of the Merger, it has exercised, and continues to exercise, its spectrum management role appropriately, in the context of all spectrum bands including those at issue.

3. In particular, ComReg assessed the Merger from a spectrum management perspective and continues to monitor spectrum use in Ireland (including as it may be affected by the Merger) in accordance with its relevant statutory functions, duties and obligations. In summary:

- *ComReg has put in place a regulatory regime to ensure and incentivise efficient spectrum use. In particular ComReg, via the spectrum licensing regime, put in place various specific ex-ante measures to ensure on-going efficient use of spectrum in the relevant bands and in particular coverage and roll-out obligations and the payment of upfront spectrum access fees and ongoing spectrum usage fees;*

- *ComReg continues to monitor and supervise compliance by all of the MNOs with the conditions attached to their respective licences, including those identified above;*

- *ComReg continues to monitor and supervise compliance by all of the MNOs with the provisions of the Regulatory Framework; and*

- *ComReg regularly meets with the MNOs to discuss relevant matters such as market trends, deployment of new technologies, coverage levels etc.*

4. ComReg would observe that, in the carrying out of its spectrum management function, a public review in respect of concerns expressed by an undertaking is unlikely to be undertaken in circumstances where there is no prima facie basis for it.

5. ComReg also takes this opportunity to confirm that:

- *administrative matters concerning the spectrum divestment aspect of the Commitments will be addressed by ComReg at the appropriate time (e.g. if and when the commitment to divest spectrum is likely to be exercised) and will depend on what is proposed by the relevant parties in accordance with the terms of the Commitments. These matters cannot be addressed until this time;*

- *ComReg will soon publish its consultation on its spectrum strategy statement, which will set out its current thinking on matters relevant to the effective management and efficient use of the radio spectrum generally (including, making available additional spectrum rights, award process matters including competition-based spectrum caps (having regard to existing spectrum holdings) trading of spectrum rights, duration of spectrum rights, conditions attached to spectrum rights, collaboration between wireless operators and publication of information concerning radio spectrum);*

- *ComReg will publish this summer its proposals for the award of rights of use in the 3.6 GHz band, as outlined by ComReg in Information Notice 15/14; and*

- *ComReg expects to publish its response to Consultation 14/65 concerning the liberalisation of the paired terrestrial 2GHz spectrum band later this year.*

6. Finally, in the interests of contributing to an open market, ComReg sets out at Annex 2 to this Information Notice key correspondence and other material relating to this matter.

Annex: 1 Outline of Key Facts

- *On 1 October 2013 Hutchison notified the European Commission, pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EU Merger Regulation'), of the (then proposed) Merger. The European Commission then commenced an investigation into the Merger ('the Merger Investigation').*

- *ComReg extensively engaged with the European Commission in relation to the Merger Investigation.*

- *On 28 May 2014 it was announced that the European Commission had decided to approve the Merger, subject to certain commitments ('the Commitments').*

- *From February 2014 Vodafone interacted with ComReg in relation to the Merger in the form of correspondence, meetings and phonecalls. During this interaction Vodafone asked that ComReg take certain positions in the Merger Investigation, outlined its interpretation of the radio spectrum management legislation and repeatedly, and in various ways, contended that ComReg must take certain actions in relation to the exercise of its radio spectrum management powers in the context of the Merger.*

- *Throughout the engagement with Vodafone, ComReg remained unclear as to the precise nature of Vodafone's request, the basis for the request and the basis for ComReg taking any such action. Therefore, on 11 July 2014 ComReg wrote to Vodafone and suggested that Vodafone submit a document setting out comprehensively the*

precise nature of its concerns.

• On 31 July 2014 McCann FitzGerald solicitors, on behalf of Vodafone, sent ComReg a letter, to which was attached a document entitled 'Spectrum Accumulation arising from the Hutchison/O2 Merger in Ireland: Observations on ComReg's Obligations and Powers' ('the Observations Document'). The Observations Document, amongst other things, contended that 'There are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of [the Merger] and consider whether it is necessary to take appropriate measures'. Vodafone indicated that it considered that such a review should be undertaken in conjunction with a public consultation.

• On 26 September 2014 ComReg finalised an analysis of Vodafone's Observations Document entitled 'ComReg's Analysis of the Observations Document'. This document, which was made available to Vodafone in December 2014 subsequent to the institution of the proceedings, contained a detailed analysis and indicated that 'In the absence of a basic case suggesting that there are concerns relating to spectrum management (with a cogent legal and factual basis), it does not appear that there would be any point in seeking views in relation to the issues raised' and concluded that 'For the reasons outlined above, ComReg does not agree with Vodafone's contention that 'There are sufficient grounds for ComReg under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures'.

• On 13 October 2014 Vodafone sought and was granted leave to bring the judicial review proceedings. These proceedings focused on compelling ComReg to respond to the Observations Document.

• On 14 October 2014 ComReg sent Vodafone a letter replying to the Observations Document. In this letter ComReg indicated to Vodafone that it would not be conducting a public review and consultation of the type requested by Vodafone and gave detailed reasons for this conclusion. In arriving at this conclusion, ComReg took full account of the Observations Document and assessed the Merger from a spectrum management perspective in the context of the Observations Document."