THE HIGH COURT

[2011 No. 225 J.R.]

BETWEEN

TELEFONICA O2 IRELAND LIMITED

APPLICANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

AND

MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND BT COMMUNICATIONS IRELAND LIMITED

NOTICE PARTIES TO THE MOTION

JUDGMENT of Mr. Justice Clarke delivered the 11th October, 2011

1. Introduction

1.1 An issue as to the costs of the notice parties to a motion for inspection and discovery of documents has arisen in these proceedings in somewhat unusual circumstances. I have already given judgment on some of the issues which arose on that motion. See *Telefonica 02 Ireland v. Commission for Communications Regulation* [2011] IEHC 265 ("the previous judgment"). Parties are described in this judgment in the same way in which they were in that previous judgment.

1.2 However, there have been developments since the previous judgement, not least the fact that the substantive proceedings between O2 and ComReg have been settled by agreement of those parties. In those circumstances it seems to me to be appropriate to start by setting out a brief procedural history of the matters relevant to the cost considerations which arise in this case.

2. Procedural History

2.1 In the substantive proceedings O2 sought to challenge the fixing of an appropriate rate to be charged to telephone operators as the contribution of such operators to the emergency call service. An outline of the basis for that challenge is set out in the previous judgment. In the context of that challenge, O2 sought access to documentation relating to an agreement between the Minister and BT for the provision of emergency call services which was said to be relevant to the issues. That documentation was, it appeared, in the possession of ComReg. While ComReg had no objection in principle to disclosing the relevant documentation, both the Minister and BT objected to its production on the grounds of confidentiality. Thus, when an application for disclosure (in the form of inspection of some documents referred to in ComReg's statement of opposition and an application for discovery) was made, the court directed that the Minister and BT be notice parties to that application for it was the confidential nature of the arrangement entered into between the Minister and BT (and thus the confidential nature of some of the information that might be disclosed) that was put forward as the basis for the documentation not being disclosed. ComReg had earlier sought the views of the Minister and BT who had declined to agree to the disclosure of the relevant documentation on the basis of the asserted confidentiality to which I have referred.

2.2 For the reasons set out in the previous judgment, I came to the view that it would be appropriate to direct a modular trial in which the first module would be as to the standard of review which the court should apply in a case such as this. As pointed out in the previous judgment, my reasoning for coming to that conclusion was principally based on the fact that it was accepted by counsel on behalf of O2 that the materials whose disclosure he sought would only be relevant to the case in the event that he were correct in his assertion that, by virtue of the involvement of EU law issues in the case, a standard of review higher than traditional *O'Keeffe* irrationality (as per *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39) applied. It was accepted that if the traditional Irish standard of review was applicable then the materials sought would not be relevant. As I pointed out in the previous judgment I was faced, therefore, with a situation where what I was satisfied was potentially highly confidential information could be characterised as being only possibly relevant to a case with its relevance being at least in part determined by reference to a discrete issue of European law. In those circumstances it seemed to me that it was appropriate to direct a modular trial with the standard of review issue to be tried first for the result of such a trial would either lead to the relevant material being accepted as being irrelevant (in the event that O2 should lose) or would allow a more focused application of the jurisprudence relating to disclosure of confidential information (in the event that O2 should win).

2.3 However, before the modular trial to which I have referred came on for hearing I was told that O2 and ComReg had settled the proceedings on terms which were confidential between the parties and did not require any court intervention. In those circumstances the substantive proceeding are, as a matter of practicality, at an end. So far

as the costs of the substantive proceedings as and between O2 and ComReg are concerned, I must assume that the agreement reached between those parties deals with any question concerning those costs. However, the costs of the Minister and BT in appearing to resist O2's motion remain to be considered. Counsel for the Minister and counsel for BT suggest that those parties should be entitled to their costs.

2.4 There is one final complication. Counsel for the Minister indicated, quite properly, that he was unclear as to which of O2 and ComReg ought to be the target of his application for costs for, as he put it, he was unaware of "who had won and who had lost the settlement". In that context counsel for ComReg indicated that, in the event that I was, at the level of principle, persuaded that the Minister and BT were entitled to the their costs, she would wish an opportunity to consider whether further materials ought to be put before the court to assist the court in deciding as against whom any such costs might be awarded. That seemed to me to be an appropriate course of action to adopt. The issue which falls for decision raises questions about the costs of notice parties and, in the particular context of this case, notice parties to an individual motion who are not notice parties to the proceedings generally. I, therefore, turn first to the costs of notice parties.

3. Costs of Notice Parties

3.1 In the context of the costs of notice parties generally, I was referred to *O'Connor v. Nenagh Urban District Council* [2002] IESC 42. In upholding the decision of this Court (Johnson J.) to award costs to a notice party in those proceedings, Denham J., speaking for the Supreme Court, held that she would not interfere with the exercise of the trial judge's discretion. In so doing she noted a number of relevant points in the following terms:-

"(a) whereas there was an element of public interest, the application as originally drafted sought specific remedies potentially detrimental to the notice party;

(b) the 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."

3.2 Reference was also made to *Eircom v. Director of Telecommunications Regulations* [2003] 1 ILRM 106. In that case Herbert J. was faced with judicial review proceedings which had become moot by virtue of circumstances outside the control of both the relevant applicant and respondent. In those circumstances it was agreed between the applicant and the respondent that the proceedings as and between them could be struck out with no order as to costs. There had, however, been two notice parties joined, as a result of applications made by those notice parties, which parties claimed a direct interest in the outcome of the proceedings. In one case the applicant did not object to the joining of the relevant notice party without prejudice to any issue in relation to costs and in the other case had unsuccessfully opposed the joining of that notice party. Herbert J. was satisfied that both notice parties had a separate *bona fide* and material interest in the proceedings and had, therefore, a legal entitlement to be joined for the purposes of

vindicating those interests. It is important to note that Herbert J. went on to indicate that once joined those parties were, in his view, "at the very least obligated to set out the basis of their opposition to the application in the form of an affidavit".

3.3 While both *O'Connor* and *Eircom* were cases involving the costs of a person who was a notice party to the judicial review proceedings themselves (rather than, as here, notice parties to only a single motion arising in judicial review proceedings), it seems to me that some general principles can be gleaned from the judgments in those cases.

3.4 First, it is, of course, open to the court, in joining a notice party, to impose terms whether as to costs or otherwise. Herbert J. in *Eircom* placed some reliance on the fact that no terms had been imposed on the joining of the notice parties in that case. Second, it seems clear that the outcome of the proceedings (if the proceedings come to a normal conclusion) is itself material. Denham J., in *O'Connor,* noted that the notice party had been successful. On the other hand in *Eircom,* Herbert J. came to the view that it was not possible for him to express any view as to how the proceedings would have been determined in the event that they had not become moot.

3.5 There will, of course, be some cases where the notice party is, in truth, the defendant. For example, a District Judge who is the respondent to judicial review proceedings arising out of a criminal prosecution in the District Court will hardly ever become directly involved in those judicial review proceedings save in the wholly unusual circumstances where some personal allegation against the relevant District Judge is made. Likewise, arbitrators rarely become involved in proceedings seeking to set aside an arbitral award unless there is a personal allegation against the conduct of the arbitrator. In those types of cases the respondent is an adjudicator who has simply found for one

side or the other. The aggrieved party who brings judicial review proceedings names the adjudicator as respondent for it is to set aside the decision of that adjudicator that the proceedings are directed. However, the true opposing party is the other side of the case or matter which was subject to adjudication, for it is that opposing party which has benefited by the decision under challenge and it is that party who will, ordinarily, be expected to seek to justify the decision which it wishes to stand over. In such cases the substance of the situation is that the case is, in truth, one between the applicant and the notice party and, in the ordinary way, costs should follow the event treating the notice party as the true "defendant". The situation may be somewhat different where the respondent actively defends the proceedings. That leads to the third consideration which may be gleaned from the earlier jurisprudence.

3.6 As pointed out by Herbert J., 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.

3.7 Even where the notice party has something to add it is, in my view, incumbent on the notice party to consider whether their involvement necessarily justifies full representation in all aspects of the case. If their contribution is factual then it might be done by the filing of an affidavit. If there is one additional point which can, perhaps, best be made by a notice party, then there are ways in which the making of that point can be secured without incurring the full costs of the litigation.

3.8 However, as counsel for the Minister pointed out, this is not a case in which either the Minister or BT were notice parties to the proceedings generally. Rather, the involvement of both the Minister and BT was confined to the motion for inspection and discovery to which I have already referred. The focus of the costs application in this case has, therefore, to be that application rather than the proceedings generally. I, therefore, turn to the result of the inspection/discovery motion.

4. The Result of the Motion

4.1 It is necessary, therefore, to focus on the inspection/discovery motion rather than the proceedings generally for it is to that motion that the Minister and BT were joined as notice parties, and it is the costs of that motion that are the subject of this ruling. The

analysis conducted by Denham J. in *O'Connor* needs to be applied to the motion rather than the proceedings generally. Likewise, it is to the result of the motion rather than the proceedings generally that the principal focus of the court needs to be directed.

4.2 The first question is as to whether the involvement of the notice parties in the motion was reasonable. Given that the Minister and BT were joined at the suggestion of the court rather than as a result of their own application, it would be hard to gainsay the proposition that their involvement in the motion was necessary and reasonable. It may well be that either or both the Minister and BT might have sought to become involved had the court not taken the initiative. Be that as it may, the interests which they wished to assert were significant interests of confidentiality and were interests which ComReg did not share. In addition, insofar as it is relevant, it seems to me that there was a significant difference between the interests which, on the one hand, the Minister and, on the other hand, BT wished to assert. The commercial information was BT's. However, the Minister asserted a concern that the regime whereby an individual service provider would be appointed to conduct the emergency call system and bill all other service providers was one which could be impaired if there were excessive and unnecessary disclosure of aspects of the underlying business of the successful tenderer. On the facts of this case both the Minister and BT had something significant and separate to add to the position of ComReg.

4.3 I am also satisfied that the manner in which both the Minister and BT involved themselves in the process was both proportionate and reasonable. Both of those parties had, for the reasons which I have already set out, their own individual argument to make which was both separate from each other and separate from the argument which ComReg

advanced. Indeed, in fairness, it should be pointed out that the solution to the difficult situation with which I was faced came from my adopting a proposition which was first advanced by counsel for the Minister. 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.

4.4 While it is true, of course, to say that costs follow the event, that rule, in its strictest application, seems to me to relate to the issues which arise between the parties. It may, for the reasons which I have already sought to analyse, be necessary to depart from that rule in the case of notice parties in some cases. However, this case is not one of them. The notice parties involvement was, as I have pointed out, entirely appropriate. If O2's application had permanently failed, therefore, there would, in my view, be no basis for disallowing the notice parties full costs of their involvement. The complicating factor that arises in this case is that there was no final determination on the motion and such a determination is not now going to occur. In that context it is necessary to look at what the "event" was and why it cannot now be determined what the result of the "event" was likely to be. It is necessary, in that context, to return to the previous judgment.

5. The Previous Judgment

5.1 For convenience it seems to me that I should start by reiterating the conclusions which I reached at paras. 5.8 and 5.9 of the previous judgment which were in the following terms:-

"5.8 I have, therefore, come to the view that it is not possible at this stage to give a definitive ruling as to the standard of review which is properly applied in a case such as this. However, perhaps of even greater importance to the application with which I am now concerned, I have come to the view that there are a range of possible outcomes as to the precise basis on which the trial judge will consider it appropriate to review the impugned decision of ComReg. I do not believe that I can safely rule out, again at this stage, the possibility that at least some of the information sought to be disclosed in this application might be relevant to the court's consideration if the court were to take a more expansive view of the basis of review. In those circumstances, it would not seem to me to be appropriate to reject O2's application for disclosure at this stage. However, for the reasons which I have already sought to analyse, it seems to me that it would be disproportionate to allow O2 access to what is likely to be significantly confidential information at this stage against the mere possibility that some (indeterminate) part of that information might be relevant to the court's final determination, depending on the precise view which the court takes as to the basis of review.

5.9 In those circumstances it seems to me that it is appropriate to leave over for the moment any question of disclosure and to direct a modular trial of the substantive judicial review hearing with the questions concerning the standard or basis of review and fair procedures to be determined first and all other issues to be determined, if necessary, at a second hearing. In addition, it seems to me that no disclosure should be ordered at this stage but that O2 should be given liberty to

renew the application for disclosure after the standard of review issue has been determined. It seems to me that it is the judge who ultimately has carriage of the substantive trial that should then address the question of whether any disclosure is appropriate for it is that judge who will, by that time, have reached a refined view as to the precise basis of review permitted, and who will be best able to decide whether any of the disclosure now sought is really likely to have a bearing on the case. Obviously if ComReg are correct in their assertion as to the standard of review then no disclosure is required. If, and to the extent that, O2 persuade the court to adopt a higher standard of review, then the court may have to balance the information which it considers to be relevant to such a review with the confidence asserted on this application (most particularly by BT and the Minister). However, at that time the court will have a much better view not only of the relevance of any of the material sought to be disclosed, but also the extent to which any such materials are likely to have anything more than a very marginal affect on the court's judgment. The court will, in those circumstances, be in a much better position to engage in the balancing exercise which is required by the authorities to which I have earlier referred."

5.2 In summary, I found that it was premature to determine whether disclosure should be allowed until the court had first had an opportunity to decide with some precision what the standard of review was and, in the light of the view which the court might come to on that question, the extent to which it might proportionate to require the disclosure of confidential information having regard to the materiality that that information might have

to the issues which would then fall for decision in the light of the court's determination as to the standard of review.

5.3 Those two latter questions will not now be decided. Because the case has settled, the court will not now decide on the standard of review. Neither will the court have to determine, in the event that the standard of review had been found to go beyond *O'Keeffe* irrationality, what level of materiality the information sought to be disclosed might have to the court's proper exercise of its review role so as to balance that materiality against the undoubtedly confidential nature of at least some of the materials whose disclosure was sought.

5.4 Just as Herbert J. was faced in *Eircom* with a situation where it was impossible to tell what the outcome of the judicial review in that case might have been, so also it is impossible for me to state with any clarity what the final result of 02's disclosure application would have been.

5.5 It was argued on behalf of, in particular, BT that the "event" has been found against O2 for it did not get disclosure. However, it seems to me that that is only half the picture. The previous judgment in express terms left open the possibility that O2 might get disclosure of some or all of the material sought but left over a final decision until after the first module, which had been directed, had concluded. While it is, strictly speaking, true to say that O2 did not obtain disclosure, nonetheless it is the case that disclosure was not refused but rather was declined at that stage on the basis that further consideration would be given after the first module had been determined.

5.6 It was also suggested that the model ultimately adopted (*i.e.* a modular trial with a revisiting of the disclosure question after the first module) could have been put up by

either or both of O2 and ComReg themselves thus obviating the need for the hearing on disclosure to which the previous judgment was directed. However, that again seems to me to be somewhat unfair to O2 and ComReg. As pointed out at para. 4.3 of the previous judgment, I was of the view that the ordinary course which these proceedings should have followed was a unitary trial of all issues including those concerned with the standard of review. In the absence of the disclosure questions which arose there would not, in my view, have been any real basis for splitting the trial. The question of a split trial only came into focus, therefore, as a means of solving the disclosure issues rather than as an appropriate procedure in itself. I do not think either O2 or ComReg can be blamed, in those circumstances, for not putting up a split trial as a possible course of action to be adopted.

5.7 However, the fact remains that the issue of disclosure will never now be finally determined. It, therefore, seems to me that a significant factor in the exercise of the court's discretion in this case therefore turns on the proper approach to a case which has become moot. I, therefore, turn to that question.

6. The Costs of a Moot Issue

6.1 A question can become moot for a whole range of reasons. It is impossible to be overly prescriptive as to the proper approach which the court should adopt for the range of factors that may be relevant are wide. However, it seems to me that a factor which is at least of some significance is an analysis of how it came about that proceedings had become moot. Sometimes (as was the case in *Eircom*), external factors over which the parties have no control render proceedings moot. In many such cases there may at least be an argument for the court making no order as to costs. It clearly would, at least in the

vast majority of cases, be an unacceptable use of scarce court resources for a hearing to have to go ahead to decide a moot issue simply for the purposes of deciding who should pay the costs. Indeed, given that all that will be at issue are the costs up to the time when the proceedings become moot, it would seem particularly foolish for parties to have to incur much more costs solely for the purposes of deciding who should bear the costs up to the point when the case became moot.

6.2 However, where it is not possible to have any real view on which side would have won, there is, nonetheless, a potential for injustice to either side. A plaintiff or applicant may have launched proceedings only to find that, through no fault of that party and not arising out of any factors which could reasonably have been anticipated, the case has now become moot, will have incurred costs which it will not be able to recover in pursuing proceedings which, on one view, it might reasonably have been entitled to progress until external factors rendered it moot. Likewise, from the perspective of a defendant or respondent, such a party may have had to incur costs in defending proceedings until they became moot in circumstances where it might well have been that the proceedings could have been successfully defended and thus all costs incurred ordered to be paid on the basis of a costs order. In at least many cases the equity of both parties' position will be much the same. Neither party nor the court will know who would have won. The only way of finding out who would have won is to run the case, but that would involve much additional expense on the part of the litigants and a waste of valuable court time. On the other hand not running the case leaves the court with no particular reason to favour either plaintiff/applicant or defendant/respondent and the making of any costs order, in those

circumstances, might well seem unfair to the party who was required to pay costs arising out of litigation where they may well have been in the right.

6.3 That analysis seems to me to lead to a view that a court should favour making no order as to costs in proceedings which became moot in the absence of other significant countervailing factors. However, that analysis is based on a situation where the case becomes moot by reason of factors entirely outside the control of the parties. It seems to me that somewhat different considerations apply where the reason (or at least a significant contributory reason) to the proceedings becoming moot derives from the actions of some but not all of the parties to the case.

6.4 While there is no reported decision on the matter, such an approach was taken by the Supreme Court in dealing with the costs of *Murray & Anor v. Commission to Inquire into Child Abuse* [2004] 2 I.R. 222. Those proceedings involved a challenge to the stated intention of the Commission to make individual findings in respect of specific allegations of abuse involving individuals who may have been deceased or where there were other reasons which might have impaired the individual concerned from being in a position to defend the accusation. The proceedings were successful in this Court (see judgment of Abbott J. cited above). An appeal was brought to the Supreme Court by the Commission. Before the appeal came on for hearing a new policy was determined on by the Commission as a result of which it was no longer the stated intention of the Commission to make specific findings in most of the individual cases which were the subject of the litigation. In those circumstances it was accepted by all concerned that the issues raised in the challenge and which were the subject of the appeal to the Supreme Court were moot. However, it also had to be accepted that the reason why the issues had become

moot was because of a change of policy on the part of the Commission and in those circumstances the Supreme Court felt that the appropriate order as to costs was that the plaintiffs should obtain the full costs of the proceedings.

6.5 It seems to me, therefore, that a significant factor to be taken into account in the exercise of the court's discretion as to costs in proceedings which have become moot is to analyse whether it can reasonably be said that the actions of any relevant party have rendered the proceedings moot. If that be so, then that is a significant factor to be taken into account in the award of costs. The situation with which the court is then faced remains one where, in the absence of trying a moot case, the court will not know who would have won. However, the situation of any party who was not involved in rendering the issue moot, in not being able to establish that their side of the case was right, has resulted not from any action which that party took or, indeed, from some entirely external event over which no one had any control, but rather from actions taken by their opponent. That is a factor which ought weigh significantly in favour of the grant of costs to the party who was not involved in the action which led to the proceedings being moot. This remains the case even where, as here, there were entirely understandable reasons why the parties took the actions – settling the case – which they did.

7. Application to the Facts of this Case

7.1 In applying those considerations to the facts of this case, it is important to keep in mind that the focus is on the motion rather than the action. For the reasons already analysed, there was no result or "event" to the motion. Rather, a final decision was postponed until the first module had been determined. The final decision will now not be made. It cannot be ruled out that O2 might have secured disclosure of some or all of the

materials sought. Equally, it cannot be ruled out that for one of a number of reasons, O2 might have failed to obtain such disclosure. There is, therefore, no real "event", so far as the motion is concerned, for the event was not finally decided.

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 emphasized 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. In the light of the submission made by counsel on behalf of ComReg, I am persuaded that it would be appropriate to give ComReg an opportunity to consider whether it can and should put further materials before the Court in order to assist the Court in deciding as against whom that order for costs should be made.

8.2 In summary, I will, at this stage, determine that both the Minister and BT are entitled to their costs as against either or both of O2 and ComReg, but leave over the question as to the entity or entities against whom the order should be made to further argument.