IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1151/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd June 2010

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS plc

Appellant

– v –

OFFICE OF COMMUNICATION

Respondent

- AND -

TMOBILE (UK) LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMTED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

_____

HEARING (DAY TWO)

APPEARANCES

Mr. Graham Read QC, Miss Maya Lester and Mr. Richard Eschwege (instructed by BT Legal) appeared for the Appellant.

Mr. Javan Herberg and Mr. Ewan West (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for Vodafone Limited.

Mr. Meredith Pickford (instructed by T-Mobile (UK) Limited and Orange Personal Communications Services Limited) appeared for T-Mobile (UK) Limited and Orange Personal Communications Services Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for Telefónica O2 UK Limited

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G Limited

_____

THE CHAIRMAN: Good morning.

MR. READ: Sir, yesterday I very briefly touched on the three principles in the draft determination which I had taken slightly out of sequence, and I thought it might sensible if I just briefly recapped on that again so that you saw they were actually new principles that were applied.

Can I ask you to go to BT1 at tab 7, and ask you to go to p.29. I would ask you to note para. 4.1 of the introduction which indicates that what this section is doing is setting out the analytical framework for how Ofcom is going to resolve the dispute.

Then if I can ask you just to look forward to para. 4.22 where it says: "Given the factors set out at 4.4 to 4.21 above, the arguments of the Parties …" etc, "… we consider that there are three key principles that are relevant in considering whether a payment in either direction is fair and reasonable", and those are the three principles that follow.

As I indicated yesterday, at para. 75 of Ofcom's skeleton argument they accept that the precise formulation of these principles had not been deployed before in one of its determinations.

Then perhaps to conclude this, if one goes to the end of that section at para. 4.55 there is a limited discussion about what I call the "determination 3" and how it relates to the six principles of pricing and cost recovery. The skeleton argument at para. 77 in fact recites what in effect 4.57 is saying, namely that the application of any of these principles the relevant circumstances can sometimes point in a different direction to the other principles, and there is a question of trade-off and facilities, etc, etc.

The point that BT makes is that it was not until the draft determination that those three determination principles, if I can call them that, were clearly set out; and in addition to that was the trade-off between the six ordinary costs,* etc, principles was actually made manifest. That obviously reinforces the point that in addition to the issue over whether there was a specific focus on NCCN 956, this was – also in the draft determination – the first time that those principles and the way that Ofcom was going to apply them actually operated.

Yesterday at the end of the day I had finished with taking you through Professor Dobbs' first report. Can I now move to a slightly different point but really to illustrate how the way that Ofcom ask you to exclude evidence in this case is really going to cause immense problems for the Tribunal when it actually has to consider this matter in January. Can I illustrate this with reference to Professor Dobbs' third report, which is in BT2, tab 18. First of all, I would just ask you briefly to look at para.2 of that because that sets out what I have

already told you was in BT's skeleton argument, namely that until 17th January Professor Dobbs was actually away and so he only actually started work on it on 18th January. I do make the point in connection with this, which is something that is made in BT's skeleton argument and indeed in its correspondence earlier, that of course in the PPC appeal it took Ofcom four months from service of the notice of appeal to obtain an expert, Mr. Bolt, in respect of one limited issue in that case. We do not in any way want to make a criticism of that, but we do say it illustrates precisely how it is not easy to simply get some form of expert at the drop of a hat, and that is obviously, we say, consistent that there, that in fact in the space of a very short days he was actually able to produce this report.

I would also like to mention in passing para.3 where you can see that there is an interweaving between the respective evidence of BT because he says there that he has had the benefit of seeing the two previous reports from Dr. Maldoom and the statement from Mr. Andrew Reid.

Then can I ask you to look at para.5 because this actually shows the core of what the evidence is addressing in Dobbs 3. You can see that in essence his conclusions are that :

> "… Ofcom was wrong to suggest in the final determination that there was no evidence that NCCN 956 charging tariff provided an incentive to induce retail price reductions of calls to 080 numbers. Moreover Ofcom could not show that NCCN 956 clearly provides an incentive to increase prices.
>
> (b) A proper economic analysis of NCCN 956 gives a strong indication that NCCN 956 incentivises retail price reductions."

So he is looking at it from two different angles. The first is, if you like, what Ofcom had at the time; and the second is the further economic analysis he continues with.

Section B is basically outlining what his initial work actually compromised of, and at para.18 – I should draw your attention to this – he is making clear that because of a lack of time to undertake analysis neither of his earlier reports did that to his own satisfaction and therefore he has conducted subsequent analysis.

As you can see from the next section, he first reviews Ofcom's conclusions and the point that he is making at the end of that section, which goes from para.20 to 27, is that what he is actually doing there is pointing to Ofcom's conclusions and, for example, in para.24 he is actually joining issue with Ofcom over its assertion that BT had not provided any evidence that NCCN 956 would not induce higher retail prices.

The problem that we foresee with this is that we do not see how that evidence can possibly be excluded, because what he is doing there is commenting on a specific finding in the final

determination which he says was wrong on the material Ofcom had prior to that final determination.

That is what we understand – even on Ofcom's case – to be one of the exceptional reasons they are talking about, namely where Ofcom introduces something in the final determination that the parties consider is wrong, and why it is wrong. We find extraordinary the suggestion that the whole of this report must be excluded, when really sections B and C are laying the framework for saying: "Look, Ofcom, you got it wrong even on the material you had before you". We simply do not see how that can possibly be excluded.

As regards section D, this does expand on his evidence, we accept that, because he is taking it a stage further, but it is a logical consequence of the joinder of the issue between BT and Ofcom, even as far back as 12th January 2010 – remember I took you yesterday to BT's submissions on that. What we say in this respect is that if Ofcom are right, and Ofcom say that this should be excluded, it does not mean that Professor Dobbs is not going to be called as a witness because on any view Professor Dobbs' first report ----

THE CHAIRMAN: Yes, Dobbs 1 is on any view in.

MR. READ: -- is on any view in and on any view Professor Dobbs is going to get called as a witness. That is going to create an absolute minefield in our respectful submission, because what happens when he is questioned about his analysis in Dobbs 1 and he says: "Actually, I know this is right because …" and refers to the material that is being adduced in Dodds 3. In this respect it is really quite critical to bear in mind – slightly ironic given O2's application in this respect but he is an expert witness and therefore his duty is absolutely to the court. He has to and, indeed, it says so quite clearly in the Tribunal's guidelines when making reference to CPR Part 35 he is there to help the Tribunal on matters within his expertise. Quite how, when we get to the hearing, and Professor Dobbs wants to justify his evidence in Dobbs 1, and the Tribunal wants to know why he has reached this particular conclusion, how it is going to be possible to say "No, Professor Dobbs, you cannot answer that question because that material has all been excluded." It makes a farce, in our respectful submission of the key point of why an expert is there before a Tribunal.

I would also like in this respect very briefly to take you to Dr. Maldoom's report which is at tab 19 in the same bundle.

THE CHAIRMAN: Is that to make the same sort of point?

MR. READ: It is simply to make two points in fact, perhaps I can just enumerate them rather than necessarily take you through ----

THE CHAIRMAN: Yes, paragraph references would be helpful and we can read them later.

MR. READ: It is s.2.1, in that section he deals with the fact that Principle 1 is not fundamental – this is one of the "determination 3" (as I call them) principles. So even though, if you recall yesterday, we saw that the original 12th January said "Principle 1 is accepted" by the time that one comes to Dr. Maldoom's report which was in, and is in, that is quite clearly making it clear that there is a dispute over Principle 1.

One of the slight difficulties we have with this is because it seemed to us yesterday that Mr. Herberg was directing all his fire on the fact that it was wrong for BT to be able to introduce all this additional evidence in respect of benefit to consumers, and effectively the third ground of BT's appeal, namely, ground 3(c). Dr. Maldoom's evidence, in Maldoom 3, is not only going to that, it is also going to Principle 1. So we are not quite clear from Mr. Herberg's discussions yesterday whether he is really saying that the whole of Dr. Maldoom's report has to go out because it was not evidence that was submitted before, or whether he is confining his attack solely to this issue about the consumer benefit, and therefore the rest of Dr. Maldoom's report that is actually dealing with expansions on Principle 1 is admissible or not.

MR. HERBERG: Maybe I should just clarify that because I would not like Mr. Read to be, as it were, not to be proceeding on the full basis. We are objecting to the whole of Dr.Maldoom's evidence as well. Part of the difficulty we have had frankly is understanding from the draft of the grounds of appeal exactly where the new evidence is relied on, but if the argument is that it is relied on on Principle 1 as well then we object on the same basis to the extent it is new evidence as we apprehend it is. The same principle applies.

THE CHAIRMAN: I see and you are not taking a parsing approach, you are saying the whole thing should be out.

MR. HERBERG: I will have to look separately at these few paragraphs of Dobbs 3, which I will address in reply, because there is a separate issue on them, and if necessary those five paragraphs could be admitted although we say they should not be, but we are not taking a parsing approach generally, we say it should all be out because it is all new as far as we see. Obviously there are individual paragraphs that do no more than say "This is what I have said in my first report", but those paragraphs are not relied on as we apprehend it, they are not going to the substance.

MR. READ: Sir, as this point about where the evidence will now fit in has now been raised by Ofcom we have actually prepared this document mainly in response to the T-Mobile and Orange's position, although to be fair they clarified the position a bit better today than we

had previously understood it. We have done an analysis of where paragraphs of Dr. Maldoom's third report are actually referred to in the notice of appeal because we say it shows virtually huge amounts of the reports are actually cross-referenced in the notice of appeal, so I hand that up and we will circulate copies around, it does not necessarily have to be looked at in detail, but it is just making the point that despite all the criticism of saying: "We have not actually identified the relevant paragraphs". If one takes, for example, the example of Dr. Maldoom, it is pretty clear, we say, that all these paragraphs have actually been properly tied in to the notice of appeal. But, as I say, the T-Mobile/Orange point – perhaps it would be unfair to aim it entirely at them but as that is the point Mr. Herberg has just raised, I thought it would be useful for you to have that document.

THE CHAIRMAN: Thank you.

MR. READ: Can I also then make the point that Mr. Herberg seems on the point of conceding, which is that if there is discussion about errors in Ofcom's final determination that it has raised for the first time where, for example, it has relied on Professor Dobbs' evidence and Professor Dobbs said they completely misunderstood the evidence, he is allowed to comment on that, and the same is true of Dr. Maldoom, and in instance of that is in para. 71 of Maldoom 3 (BT2 tab 21, para. 71) – I do not think we need to turn it up.

Those are all the specific examples I want to give on the evidence for the time being. I may have to come back to one or two little points when I carry on, but I will move on to the second limb of my structure, which is considering the statutory framework within which he must consider these applications, and also looking at the authorities in some depth.

Sir, you have obviously already looked at s.192 and s.195, it may be useful to have it open, because in a moment I will want to specifically look in more detail as it. As you recall it is at tab 3 in the first authorities bundle.

The first point that is absolutely fundamental, in our submission, to the whole approach and why Ofcom is in its approach is that it makes the assumption that there are distinctions drawn in the type of appeal before the Tribunal. Section 192 draws no such distinction. It is a compendious appeal process dealing with a number of different types of appeal, and those include in addition to the dispute resolution process, it includes, and you have heard me make these points before, market review appeals, and it includes breach of SMP condition applications and findings.

What we say is that it immediately shows the major fault line in Ofcom's case that there is some form of overweening principle involved here, because either Ofcom has to say that this principle is that the Tribunal should only look at the evidence actually before Ofcom

and that must apply across the board to 192; or it has to say that it is specific to the particular appeal that you are actually looking at. The problem is that there is nothing within s.192, or 195 because they obviously all flow from the same point, that actually suggests in any way the Tribunal to approach appeals in different ways from different types of appeal. The consequence of that is that although it was described as a "siren call", I think, at one point, to say, "Well, it could be said that this applies to all other appeals". Unfortunately, if there is a principle it does, and you cannot avoid that because there are no words in 192 to 195 that suggest in any way appeals from dispute resolution are to be treated differently from any other appeal. So he gains no assistance, in our respectful submission, from 192 to 195, in which case the major plank, we say, of his whole argument goes out of the water. The way he has to approach this is to say, "You have to look at the swift and basic process intended by the dispute resolution", and imply some form of distinction, restriction, wording, within 192 to 195 to say that the Tribunal must approach it on a different basis.

On this side we consider that to be heavily ironic given the way that Ofcom argued just a month ago that the construction of the Communications Act before you on the issue of whether or not there should be some restriction on the scope of the dispute resolution appeals. If you recall, BT was praying in aid the swift and basic process as a method for trying to derive an understanding of the earlier sections on dispute resolution, and Ofcom were making the point, as it proved quite rightly, that, in fact, you could not simply start construing those sections in the light of the fact that there was a swift and basic process. We say that is absolutely true here. If it is right there, it is right here. If you have very clear words in s.192 to 195 you cannot seek to subvert them or restrict them, or however you want to place the emphasis, by saying, "This is a swift and basic process, therefore it must have intended something different". We say that that is absolutely fundamental against Ofcom's argument.

We would actually say, in fact, the swift and basic process, the very fact there is a swift and basic process, reinforces the need for a proper appellate process. The trouble is that if it is a swift and basic process then not all the evidence may necessarily have been put before Ofcom by the time the matter is resolved, or Ofcom may not have fully discussed and extended the points that it actually wants to make in its draft determination or its final determination, and to deny an appellant in those circumstances the opportunity of being able to challenge that, or simply because there was not enough time to have garnered the evidence together, in our respectful submission, absolutely demonstrates why you need a

proper appellate process on the merits in order to deal with that problem. So, far from having anything supporting Ofcom's matter of principle it really works completely against it.

There is something of a double problem here because, on the one hand, Ofcom was saying there is no need whatsoever, or no right whatsoever, for anyone to introduce any fresh evidence on appeal because all that evidence should have been put before Ofcom at the time, yet at the same time Ofcom is saying, "You have to determine this within the four months process and we are going to shut you out if you do not provide it within that time". Mr. Herberg yesterday was emphasising, "You can ask for an extension or whatever and BT never did that in this case". The point is that there is actually a case going on at the moment, the 0870 and the 0845, where an extension has been asked for and it has been refused that there is a four month deadline.

THE CHAIRMAN: It certainly makes the decision of whether or not to extend in exceptional circumstances much more important if the evidence is confined.

MR. READ: Absolutely, and the problem with that is what that will actually generate, as I addressed briefly yesterday, is just a huge amount of satellite litigation as to whether or not the process should have actually been extended or not. In our respectful submission, you will end up with these types of application bogging down the Tribunal's hearing list for ever. One knows what is going to happen with this. The first thing that will happen is that Ofcom will be utterly bombarded with every conceivable point that could possibly dragged out in order to make sure that it was all before Ofcom at the time. Then, when a party claims that it needs more time, there is going to be a request for time, there is going to be an argument between Ofcom and that particular party about whether or not it needs to provide it. Then, if it is refused, you are going to end up with immediate grounds of appeal being issued and you are going to end up with immediate effective applications for a suspension of Ofcom's determination on the basis that there need to be exceptional reasons granted, etc, etc. It will be a nightmare.

Of course, we argue in this case in the context of BT and the MNOs. There are other communications providers in all this who may not have the resources that will allow them to garner the sort of material that even BT was able to garner with the limited time period – Professor Dobbs 1 and Dr. Maldoom. They will not able to do that. Yet Ofcom's argument is that those CPs are shut out from thereafter ever introducing new material unless they can come into this unspecified category of exceptional reasons or special circumstances or

however one goes on to define it. We say that that is simply not an approach that should be countenanced.

Can I turn to the second point which is about 192 to 195. Section 195 is unambiguous, it does say "an appeal on the merits", no words of limitation have been put in. There is obviously a contrast with other parts of the Act, the interrelated Acts, for example, s.179(4) of the Enterprise Act where the Tribunal hears appeals not on the merits, but applying JR principles. I will come back to how this sits with Lord Justice Jacob's comments in a little while, but the point I did want to make from the outset, and this is quite an important point, because it cuts very much against H3G's point, is that there is a considerable parallel between the Competition Act, and the way s.192 to s.195 of the Communications Act has been drafted, and we would respectfully submit that it is fairly clear when one compares these that in fact when the legislative draftsman came along with the Communications Act in 2003, having obviously to put into effect Article 4 of the Framework Directive, he actually drew upon Schedule 8 as his benchmark for drafting the Communications Act of 2003. Rather than ask you to keep you hand in two sections of the bundle, can I hand up a clean photocopy of the Schedule 8 of the Competition Act, so you can have that whilst you are looking at s.192 to s.195 of the Act. Can we just start with para. 2 of Schedule 8. There you see it makes clear that:

"An appeal to the [Tribunal under section s.46 or 47 must be made by sending a notice of appeal to it] within a specified period."

And if one compares that with s.192(3) one sees that it mirrors 192(3), that the "making of an appeal is by sending the Tribunal a notice of appeal", and if one looks at 192(4) you can see "The notice of appeal must be sent within the period specified." So para. 2(1) mirroring those provisions in the Communications Act.

If one then moves on to para. 2(2) says: "The notice of appeal must set out the grounds of appeal in sufficient detail to indicate …"

Then if I can ask you to look at s192(5)(b) you can see the same wording: "The notice of appeal must set out the grounds of appeal".

Then if one looks at 192(6): "The grounds of appeal must be set out in sufficient detail".

Then if one moves on to para. 2(a) you see it says - "The notice of appeal must set out the grounds of appeal in sufficient detail to indicate – (a) under which provision of this Act the appeal is brought". If one goes back to s.192(5)(a) one sees: "The provision under which the decision appealed against was taken."

Paragraph 2(2)(b) you can see that a requirement in the 1998 Act is:

"(b) to what extent (if any) the appellant contends that the decision against, or with respect to which the appeal is brought was based on an error of fact or was wrong in law and

(c) to what extent (if any) the appellant is appealing against the Oft's exercise of discretion in making the disputed decision."

Again, looking to s.192(6) you can see again the provisions are closely mirrored there. If I could then ask you to look at para. 3, you can see at 3(1):

"The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal."

Again, those directly mirror s.195(2). We then come to para.3(2), which is what I understood was the "anchor point" if I can call it that, of the argument Schedule 8 of the Competition Act is different to what the Communications Act is trying to achieve. What is quite clear from this when you compare it to s.193 to s.195 is that in both instances the Tribunal cannot order anything more than the original regulatory body could do. So, for example, if one looks in para. 3(2):

"The Tribunal may confirm or set aside the decision which is the subject matter of the appeal, or any part of it"

and then

"(d) give such directions, or take such other steps, as the OFT could itself have given or taken, and

(e) make any other decision which the OFT could itself have made."

So as with the Communications Act what is in effect being put down is the prevention on the Tribunal doing anything that the original regulatory body itself could not have done. The only distinction in all of this is the fact that the Tribunal itself under para. 3(2) can actually make the decision directly whereas under s.195(3) to (5) the Tribunal actually has to remit it to Ofcom. That is the only point of distinction but in reality it is not a point of distinction because the Tribunal can and has previously made very clear directions to Ofcom as to what it is going to do, so in effect Ofcom just becomes the rubber stamp. I will give you two examples of this: the TRD appeal itself, which is reported at [2008] CAT 19. This is the actual follow-up to the original TRD appeal itself when the Tribunal ruled on the judgment rates, and you will recall that the TRD case was all about whether there should be a blended rate or whether it should be a 2G rate. Ofcom's determination having been overturned, there was an argument about what rate should be set. The Tribunal eventually in that judgment said: "2G rate", it was sent back to Ofcom, Ofcom rubber stamped it.

The same thing happened in the MCT appeal, which was [2009] CAT 11. That was a disposal judgment and it was made absolutely clear what Ofcom had to do, so in reality it is a distinction without any substance at all, because the fundamental, we say, in all of this is the fact that the Tribunal can say quite clearly "The decision is wrong". It can then say what it thinks the decision should be and the only difference is between the fact that it can do it directly under para. 3(2) in certain circumstances or, indeed, it can remit it if it wants to, or it can remit it with a specific direction that that is what Ofcom does.

We say that even though it has not been drafted in exactly the same way it is a distinction without a difference.

I think probably at this stage I ought to deal with H3G's points on this, it is taking you perhaps slightly away but as I have started on the point I might as well finish it. What H3G suggest is that this is a radically different situation between the two Acts and therefore you cannot glean any assistance from the cases on what an appeal on the merits means under the Competition Act because it is so different to the Communications Act 2003.

The starting point for all of this is, in our respectful submission, the point that is take on this, namely, that there is a fine which is quite capable of being imposed under the Competition Act – it can be a 10 per cent fine – in reality that is a false point because as one knows if one goes to the provisions of s.94 onwards in the Communications Act. There is precisely the same opportunity for a fine. Perhaps I can just ask you, if you have the Grey Book to actually just look at this point. If one goes to the Competition Act at s.94, which is, in the most recent edition, p.851. I will not spend a lot of time on it because this is probably common knowledge to the Tribunal from previous arguments, but s.94 deals with breaches of SMP conditions. That goes through a series of stages that Ofcom can actually do in terms of specifying contraventions, and then it goes on in s.95 in the provisions for enforcing notification for the contravention of conditions, and in s.96 it provides for penalties and you can see there that the penalties are set out as to what Ofcom can actually notify, and then finally in s.97 one sees at 97(1):

> "The amount of a penalty imposed under s.96 is to be such amount not exceeding 10 per cent of the turnover of the notified provider's relevant business for the relevant period as Ofcom may determine it to be."

So exactly the same point as the Competition Act, there is a 10 per cent fine that can be imposed, and that is encompassed within the s.192 to s.195 process.

THE CHAIRMAN: Yes, of course, the force of that point turns on your earlier point, which I do not encourage you to repeat, that one size fits all.

MR. READ: Absolutely. I agree that that particular point is dependent upon the "one size fits all" argument, but I do make the point that there is nothing in s.192 to s.195 that draws any distinction, we say it is self-evident therefore that that is the case.

There was a considerable amount of I think it was discussion yesterday about the enjoinder of Article 6 of the ECHR. I just want to deal with this point very briefly because if I can ask you to look at the first *Napp*, that is the interim order, tab 13 in the bundle at p.26, para. 69 one can see the concession actually being made there – this is the concession that it is criminal for the purposes of Article 6(1).

> "As far as analogies drawn by Napp with criminal procedure are concerted, the Director concedes, in our view rightly that these proceedings are 'criminal' for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms."

But that was not the only point that was being made upon that, because it was being made very clear in the rest of that paragraph that:

> "However, it does not follow from that that an analogy can be usefully drawn with the procedure traditionally following a criminal trial in the Crown Court or on appeal to the Court of Appeal (Criminal Division). The administrative procedure before the Director is manifestly not a trial in that sense and does not follow either the criminal rules of evidence or criminal procedure."

- that is important when we come on to look at the issue about appeals on the merits because the appeal is not from a first instance court, it is from an administrative function and that is as true in the Competition Act as it is true in the Communications Act.

Certainly, if you look at the point I was just making about fines, the same process is absolutely true there, and it would be a very odd situation that if you were to have effectively the same point capable of being run under s.195 from an appeal from s.94 to 97, that you should not actually have the same type of appellate process going for any other appeal that is launched under it, and we say that fundamentally there is a very clear analogy to be drawn between the Competition Act cases on what an appeal on the merits is and on the other hand an appeal on the merits under the Communications Act.

We are not just making that point as a matter of submission, I should say that because it is fair to say there are other rights that necessarily will engage on the merits and the approach that should be taken, because even if Article 6(1) does not engage necessarily as a criminal trial it certainly will engage as a civil trial and it certainly will invoke common law procedural fairness and natural justice. So trying to draw this distinction between two

obviously very similar Acts or very similar provisions within the two Acts really just does not work in our respectful submission. In any event, we say the matter is really put beyond doubt by the decision in the *H3G v Ofcom* case in the Court of Appeal, and I will ask you just briefly to look at that while we are on the point which is at the second authorities bundle. Just before you put that bundle away, my Junior is pointing out that I probably ought, while you have *Napp*, to take you to paras. 74 to 78 where it is making the point quite clearly there that I started to develop about it being an administrative procedure and, as she rightly draws to my attention – I was going to come back to this, but now we are here I might as well deal with it – as you can see in para. 75: "As regards the judicial stage …" it is very clearly drawing the distinction between the stages:

> "… we have already set out the provisions in the Act and the Rules which provide that the appeal is a full appeal on the merits conducted by reference to witnesses and documents, under the discretionary control of the Tribunal. The ample nature of that appeal seems to us to equate to that under consideration in *Lloyd v McMahon* where the House of Lords indicated that a court enjoying such a jurisdiction could in certain circumstances legitimately correct unfairness which may have occurred in the administrative procedure below without necessarily quashing the decision concerned.
>
> 76. In that connection we note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the Director but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all the relevant witnesses against him.
>
> 77. We doubt, however, whether exactly the same liberal approach to the submission of new evidence can be applied to the Director …"

That is a slightly different point. As I understand the way the argument is being put against us I do not think anyone on that side is disputing that the Competition Act cases on what an appeal on the merits is very clearly show that in fact you are entitled, and it is fully understood that new evidence can be admitted to address situations afterwards. It seems to us that the only point that is being really taken against us is to say: "Oh no, they are all cases under the Competition Act and therefore they do not apply."

We have set out in our skeleton argument quite a number of the cases and also the dicta that we rely upon for the Competition Act cases. I would not proposed unless I was really

pressed to spend a lot of time looking at those because you get the flavour of it very clearly from here and we say that they cannot make good on this distinction in any event, and so therefore that is the test that one applies.

THE CHAIRMAN: Yes, that is fine.

MR. READ: In that context can I finish up this point by asking you to look at the H3G case which is in authorities 2 at tab 27. This was one of the many H3G cases arguing about the SMP market condition that had been imposed on H3G and this one was in the Court of Appeal and it was on the relatively narrow point of effectively whether Ofcom had failed to take into account the ability of BT to use the dispute resolution process in order to give it countervailing buyer power, and that was the issue that was being taken in that case. Can I ask you to go to para. 94 where the precise point is listed out there, which is that the Tribunal concluded that although BT's SMP obligation had been taken into account it meant that it had to be ignored for the purposes of considering whether or not there was countervailing buyer power on BT so as to reduce H3G's significant market power, because it was a regulatory constraint and the modified Greenfield approach indicated that you should have excluded it.

Paragraph 95 sets out a summary of H3G's arguments, and I do not want to go through all of them, but if you look about two-thirds down the page there is a section within that paragraph that says this:

> "In any event, the Tribunal should not have decided otherwise, since Ofcom itself, prior to the appeal to the Tribunal from the MCT Statement, acted and reached its conclusion on H3G's SMP on the basis that the s.185 dispute resolution powers were to be taken into account in connection with BT's end to end obligation."

In other words, what they were saying was Ofcom's previous stance was not to ply their modified Greenfield approach therefore it cannot now, on an appeal to the Tribunal use that as a reason for rejecting the dispute resolution process. In other words they are saying that effectively Ofcom have taken this stance and Ofcom cannot, in effect, adduce another stance before the Tribunal. That is the context, when we come to para.97, the remarks are made about this particular point. Picking it up from the second sentence:

"I see no good reason why Ofcom should not have been entitled to change its position on the point at the stage of the appeal before the Tribunal. The appeal is an appeal on the merits."

Then it refers to *Freeserve.com v Director of General Communications* and *Freeserve* was a Competition Act case. In other words, they are using as an authority a Competition Act

case for indicating the approach that the Tribunal should take as regards new changed submissions.

> "The 2005 Decision did not preclude the Tribunal considering the matter. The 2005 Decision was essentially concerned with a different argument … In her skeleton argument Miss Rose relied on the decision in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* but that case does not seem to me materially to assist H3G. In that case the Director General of Fair Trading was not allowed to rely on certain new evidence to justify a finding by the OFT of abuse of a dominant position."

That was the point we picked up in the earlier *Napp* case, which is of course in that case it was the Director General that was trying to introduce fresh evidence, and the Tribunal was then saying there that that was a different consideration from where an appellant wants to introduce new evidence.

Then it goes on to add this:

> "The Tribunal acknowledged, however, that it had a discretion to admit new evidence and that the manner in which the discretion would be exercised would depend upon the particular facts and circumstances. The Tribunal did in fact decide to permit certain new evidence to be admitted. Further, the circumstances in that case were not analogous to the present dispute which concerns the correct legal analysis of a regulatory function."

We say that the Court of Appeal there is making quite clear that it is perfectly permissible when deciding what an appeal on the merits actually means to look at the Competition Act cases. No one suggested that in fact the analogy was a completely wrong one, despite the power of the advocates that were actually involved in that case.

H3G did not actually address this in oral argument, but at para. 23 of their skeleton argument seek to dismiss this by saying: "Actually the point was never argued", but with respect the point was directly in issue in reality because what was being said was that no one before the Tribunal could change the position, i.e. Ofcom could not change its position before the Tribunal from the position it had previously taken. The Court of Appeal reject that and we say that must be *a fortiori* where what a party is doing is not completely changing its stance, but simply seeking to add material that may expand slightly on the stance it has previously already taken. We say that this is very, very clear support for the proposition that when the Tribunal approaches an appeal on the merits it should do so on the basis of the Competition Act cases, and that is exactly analogous to the situation you

actually have here. If that is right then those cases absolutely make clear that it is perfectly permissible to admit new evidence. That is the point we very firmly draw from that. Indeed, in our respectful submission you only have to look at the similarity between the two acts to realise that that is obviously right in our submission.

PROFESSOR STONEMAN: Could I interrupt you? You may be going to address this later on, if so please say so. You actually said that your appeal is not just on the merits but it is *de novo*. Now, I am wondering whether you are going to address that later on. *De novo* to me means that you can start with a blank sheet of paper and ignore everything that has gone on before. Are you going to address that?

MR. READ: I was going to address it but I will take it now as a direct point. The trouble with all of this is that it is easy to get bogged down in semantics as to what "*de novo*" actually means. We have tried to make clear, I think it was in our letter what we are saying is that the Tribunal must assess the case at the point that it actually hears it and not in effect involve itself merely at an overview of whether the decision that Ofcom actually reached at the time, on the material at the time was one that it was proper to have reached, even though there may actually be subsequent material that shows it was completely wrong. BT is not contending that the Tribunal is essentially a duplicate body that can commence a completely new investigation, and that is certainly not what we meant when we said a "*de novo*" appeal. What we meant by a *de novo* appeal is that the Tribunal has to address the appeal afresh by looking at what is before it at the time, but it is still acting in an appellate function. Perhaps if I can give an illustration of this and it is a point that I am going to come on to in due course. Obviously when Ofcom is conducting a dispute resolution it is doing so in a regulatory function and has to do so in accordance with the obligations laid down under both the Competition Act and also the Framework Directive, and one thinks in particular about Article 8 which specifically mandates Ofcom when exercising any regulatory function to have in mind the benefits to consumers and effects on competition. I think you were taken to it briefly yesterday by Mr. Herberg. That is the function that is imposed on Ofcom at the time and that has been clearly held to result, as far as Ofcom is concerned, into it having to conduct its own regulatory investigation.

What I think it may well be difficult for anyone to argue at a later stage is that when the Tribunal conducts its review it has to go on some free flowing investigation into everything that it thinks it might actually have some impact on. What its concern is, is about the appeal and the material within the appeal rather than necessarily disappearing off into realms of a frolic of its own.

That is really why we agree that if it is *de novo* in the sense of a duplicate regulatory body then that is what could actually end up happening, but that is not what we are saying, and we think it is perhaps unfortunate. What we do not want to do is to end up ebign involved in an argument on semantics about what *de novo* means in this context. We hope it is now clear that what we are saying is that the Tribunal assess the matter as at the date it is before the Tribunal. Of course, there are limitations on the material that will be before the Tribunal because as the Tribunal correctly observed yesterday and I will come back to this, of course there are very clear limits on what parties can do, they have a time limit, for example, for lodging their notice of appeal and there are restrictions on them thereafter producing any new evidence, but I will come back to that.

THE CHAIRMAN: Section 195(2) makes it very clear that we cannot go on a frolic of our own because we have to decide matters by reference to the grounds of appeal.

MR. READ: This is the problem that we apprehend. It is an appellate process and an appellate process means looking at what is before the Tribunal. It does not mean the Tribunal can go off on a direction of its own. For that reason it is not a duplicate regulatory body because the regulatory body can, and indeed is required to go off on its own investigation.

I was going to deal with this when we got to the *TRD* appeal. The core feature of the *TRD* appeal, and in the earlier case, what is called *H3G Number 1*, was that Ofcom does not simply look at the dispute between the parties, it has to consider other matters. Obviously when you come to a grounds of appeal the issues are defined to that element.

THE CHAIRMAN: Quite, but is it not really the case that there is a chain. In the first place, the notice of appeal, as you have already pointed out, has to identify errors of fact, errors of law, wrong exercise of discretion. Those are set out in a notice of appeal, and those then define the debate that occurs before, and the Tribunal will say, yes, that is a good ground of appeal, no, that is wrong, and on that basis remit matters back to Ofcom for it to deal with, should any of the grounds be established.

MR. READ: Absolutely, and we do not dissent from that at all. We are not saying that you are a duplicate regulatory body. That is quite important point. I will come back to Lord Justice Jacob's comments in due course, but that really is quite important, we say, when you come to consider those comments.

Having gone slightly off course, can I now turn to some additional points on ss.192 to 195. I do not think we need to specifically look at it, but the first point that I want to make, and I have started making already, is that of course in dispute resolution Ofcom is acting as a regulator and therefore it has a role in ensuring that the material before it is not simply

confined to the position of the parties. I think it may be just useful to see the first *H3G* case, which is in the authorities bundle 1, tab 18. You will see that it is case that involved Mr. Nicholas Green, Mr. Peter Roth, as he then was, and Mr. Gerald Barling, as he then was, so one might say it was quite well argued. Can I just ask you to go to para.138, and in particular 138(b). At this point it is all part and parcel of the same argument about whether or not BT had countervailing buyer power, and there was an argument on clause 13 as to whether or not that provided some form of countervailing buyer power on BT's part – that is clause 13 of BT's standard interconnect agreement. When the Tribunal is considering they say at (b):

> "The second answer lies in identifying just what the clause 13 mechanism is."

The clause mechanism allowed for an appeal to the Tribunal.

> "[Ofcom] is not actually a full third party arbitral mechanism of the kind one sees in, for example, a rent review clause. The arbiter in clause 13 is the regulator. The regulator's powers are conferred and constrained by statute, and while Ofcom's are extensive they do not include the power to be a third party arbitrator. In truth, clause 13 does not invoke that latter sort of status. The sort of dispute that clause 13 contemplates is a form of interconnection dispute which Ofcom resolve as a regulator, not as a third party resolver. Its intervention would therefore be as regulator, and would be a form of regulation. It therefore falls to be disregarded, as a matter of principle, just as Ofcom's general presence as a regulator with a potential effect on the conduct of the putatively regulated person falls to be disregarded, for the reasons given above."

So it is making absolutely clear there that in the dispute resolution process Ofcom is acting as regulator, not as arbitrator. Certainly one of the points that O2 was making in its skeleton argument was, "This dispute resolution has got some form of arbitral function and therefore it would be wrong in effect to allow any new material to be introduced on appeal because it affects the private rights between the parties". We do not accept that for all the reasons set out in the Tribunal's judgment there.

Of course, two consequences flow from that. The first consequence is that if it is a regulator it is not prevented from actually taking other matters into account. It is not confined to the case that the parties themselves have put forward in the dispute. That is obviously quite important when one comes to consider whether or not the appellate process in respect of the dispute resolution process was ever intended to lay down a very strict limit on the evidence that could be involved. If you have a process that necessarily involves

going beyond what the parties have argued then it is an unduly restrictive situation to then expect that the appeal must necessarily be limited only to what was before Ofcom at the time.

The second point that one draws from that is that this is a truly administrative decision being conducted and not some form first instance hearing. That is quite important as well, because obviously when is looking at appeals, say, in the Court of Appeal you have already had one hearing. Mr. Herberg yesterday sought to draw a parallel with *Ladd v. Marshall*, but of course that is a false parallel because the situation is not the same. You have not had a proper first instance hearing. It is not the same appellate function. The very fact that it is a distinct and separate appellate function from an administrative decision, in our respectful submission, reinforces the point that an appeal on the merits under s.195 does not include any restraint on the power of the Tribunal fresh matters, provided it is served in accordance obviously with the provisions of the Tribunal Rules and the Act itself.

I would just like very briefly to take you to the second authority bundle at tab 36, which includes extracts from a book by, *inter alia*, Mr. Green, who you just saw in the previous case. It is on competition litigation, and at the second page there is a spec section dealing the authors' comments on fresh evidence. It says at 12.41:

> "There is no inhibition on the appellant attacking the disputed decision on the ground of new evidence (or any other ground), whether or not that evidence (or ground) was or could have been put before the decision maker before the decision was taken."

It cites there, as you can see, the *Napp* cases in support of that proposition. It makes the point obviously that if it is the decision maker wanting to introduce fresh evidence then the position may be different.

Then at 14.30 in the book:

> "**Approach of the CAT and other appellate courts and tribunals**. Where a court is considering an appeal from another court or tribunal, it will not ordinarily hear fresh evidence but it will typically allow the appeal where the lower court materially misdirected itself as to the appropriate burden and/or standard of proof. Where the CAT is considering an appeal from a decision of the OFT or a sectoral regulator, the situation is slightly different because the inferior body will not have conducted the sort of adversarial procedure expected in an independent court or tribunal. That body will instead have acted in the dual role of prosecutor and decision maker."

Of course, I fully accept that you can pick up on the word "prosecutor" and say it is not a prosecutor, but it is still acting as a regulatory investigator, so the point is still valid even if you supplement the different wording. We say that this, in reality, summarises the accepted position and that is the reason why, in fact, in our respectful submission, the Tribunal has never had to consider this point before. It is an extraordinary situation, in our submission, that the Tribunal is now being asked to consider this when in all the appeals that there have been previously been on dispute resolution nobody has batted an eyelid about new evidence being introduced, and the like.

The other point that I wanted to make is that obviously when one looks at the Common Regulatory Framework, and I do not think we need to turn up Article 4 of the Framework Directive, or indeed Article 6, it is of course clear that the regulator does not have to necessarily consult before reaching its conclusion under the dispute resolution procedure. Again, we say that that really reinforces the already clear concept that to have an effective right of appeal the parties must be allowed to introduce new evidence if material that was never really in issue between the parties comes to light. Again, it is all pointing, we say, in exactly the same direction, there is nothing inherent in ss.192 to 195 that suggests anything other than an appeal on the merits allows parties to introduce new material on appeal providing obviously it complies with the other rules contained within s.192 and the Tribunal Rules.

I do want to make the point that Ofcom of course anticipates in its argument these points by, in effect, saying there may be exceptional circumstances, there may be the situation where Ofcom has not consulted, or Ofcom has raised a new point, or whatever, and therefore you will end up with some form of exceptional circumstance. One only has to stand back from this and say, "Where does it actually say that?" There are plenty of places in either the Act or the Tribunal Rules where that could have been said. Indeed, it is interesting, because in various places the Act does specifically refer to exceptional circumstances. For example, in s.188(5), which is the dispute resolution powers, and if you remember – I do not know whether we need to turn it up because it is simply dealing with the determining of the dispute within four months save in exceptional circumstances. Likewise in Rule 8(2) of the Tribunal Rules, that again uses the phrase "exceptional circumstances". If Parliament had intended that an appeal on the merits should be confined to material save in exceptional circumstances, one might have expected that to have been made absolutely clear, if not in the Act itself, at the very least in the Tribunal Rules as to how the matter should be approach. We say that this is so vague a concept, so clearly unspecified in any of the

regulatory and statutory material, that it just illustrates how weak Ofcom's case is on over overweening principle that new evidence must be excluded.

I have obviously touched on this previously about the question that you will end up with massive amounts of satellite litigation over this point. There is another factor involved in all of this, which is that to have an effective right of appeal on the merits the parties do need to have certainty over what they can and cannot adduce. What Ofcom is now seeking to do is to introduce a massive area of uncertainty, whereas previously there had been a very clear understanding that new evidence can and will be admitted. Mr. Herberg yesterday was talking about the commercial importance of some of these decisions. We pose the rhetorical question, "How are you going to have commercial certainty if, in reality, you are going to end up with huge great arguments about whether or not there is an exceptional reason?"

A point my learned junior makes quite properly is that it would also be dependent on how the issues were framed by Ofcom. Part of the problem with all of this is that if Ofcom were actually, in essence, trying to, how shall I put it, stymie an appeal it would be easy to try and see whether or not the determination, or the draft determination, may actually contain less detail or contain certainly the slant, but it would certainly lead to big arguments, and indeed we have seen it in this case as to precisely what was within the scope of the dispute in the first place. If you are saying that you cannot adduce new evidence because that was within the scope of the dispute, you then end up with an argument about what was in the scope of the dispute in the first place. Of course, you have seen that already from this case by the points we have made earlier on.

The final point that I want to make on this, which I think I have already touched on so I will just emphasise the point, is the very fact that it is a swift and basic process, which suggests that Parliament did not intend that everyone had to submit everything beforehand.

Can I move to one final point on the Act before moving away from it to say this, one knows from s.195(2) that one has to specific matters of law, issues of fact and issues of discretion. The point that we would make on this is that we understood that Ofcom were effectively saying yesterday, and this was in response to questions from the Tribunal, that it only applied to issues of fact but also to errors of law, and if we look at p.25 of the transcript of yesterday where it says:

> "I would maintain that it is inherent in those grounds, it is most obvious perhaps on the discretionary case, but it is true also of errors of fact or, indeed, errors of law, that what the section was not doing was giving authorisation to someone to

> decline to participate, decline to take an opportunity to make submissions as to what the facts are, or indeed what the law is below, and simply keep its powder dry and lays it out for the first time on the appeal."

It seems from that that Ofcom's submission is that not only can you not introduce new evidence, you also cannot actually introduce new arguments on law, and that must be wrong. We would say that if there is an argument about introducing new evidence, i.e. that the Tribunal, when looking at the grounds of appeal, is not entitled to take into account any new evidence, there is nothing to distinguish that proposition from the proposition that it is also prevented from taking into account new areas of law. That simply cannot be right. That does seem to be the logic of what Ofcom are actually arguing is inherent in that principle, because in effect if it has not been put before Ofcom it means that it necessarily cannot be looked at by the Tribunal.

Can I briefly deal with the Tribunal's guidelines. Again, I do not think we necessarily need to turn them up, but there is, as I have already said, quite clearly a limit imposed on the parties' right to appeal, that it has to be the grounds of appeal, that it has to be material gathered within the two month period.

We say that that is entirely consistent with the Rule in 22(2), which of course says in terms that evidence not before the original decision taker can be admitted. We say that there is a consistency throughout the Tribunal Rules on this that it is clearly saying in terms, "The parameters are these, but new material can be introduced in the course of the grounds of appeal". That is also consistent, we say, with the guidelines themselves, because the guidelines, we say, are very clear on this point as well. Perhaps I can just ask you to turn up the guidelines, which are at tab 35 in the second bundle, and go to p.19, para.6.20, where it says:

> "In this respect, the role of the notice of appeal is essentially the same as the role of the application in appeals to the CFI from decisions of the EC Commission under Articles 81 and 82 of the EC Treaty. The two month period allowed under the 1998 Act for appealing to the Tribunal is significantly more generous than the period allowed for appeals to some other appellate tribunals to the Court of Appeal, precisely so as to give the appellant sufficient time to prepare a detailed written argument, and to assemble any evidence not already presented during the procedure before the OFT."

So it could not be clearer. All right, that is in respect of the Competition Act, but the same principle is absolutely true of the Communications Act as well, because it is the same two

month period, and it is making it absolutely crystal clear there that, in fact, new evidence can be presented.

If one moves to para.6.41:

> "As regards witness statements on issues of primary fact (eg as to whether a particular agreement or conduct took place or not) statements by witnesses on whose the appellate will rely should be furnished, wherever possible, with the notice of appeal."

So it is saying it should be with the notice of appeal.

> "The Tribunal will require an explanation if this is not done, particularly if the factual issues in question have already been raised in the procedure before the OFT."

So again it is countenancing more new material being involved. At 6.42 it is talking about experts' reports and the core to it is the annex to the application.

Can I then ask you to look at 6.44. Again it is making the notice of appeal the focal point for what material can and cannot be included. It is not obviously saying that extra evidence can thereafter never be introduced, but it is making clear that the cut-off point for the new material is at the two month specified period. If that is right, if that is the cut-off point, then it completely undermines the argument have Ofcom have been seeking to run on this.

I am conscious of the time, I think I will probably take until 12 o'clock, but I think that will give everyone time to have a proper chance of reply before we rise.

THE CHAIRMAN: That is a very helpful indication, thank you, Mr. Read.

MR. READ: Can I take you very briefly to the *TRD* appeal, which is in the authorities bundle, volume 2, which I hope is the bundle you have before you, at tab 23. Can I ask you first to look at para.55, and can I just briefly ask you to look at the witness statement that were called. You can see that one of them was Mr. Budd, whose evidence was by witness statement. He was an economist and he had been advising BT in its responses.

Likewise, one can also see that there was Dr. Geoffrey Haigh, who gave very technical evidence on mobiles, Mr. Timothy Keyworth, who was an external economics expert instructed, and Mr. Robert Jeffrey Richardson, who, as you can see, gave evidence on a number of aspects of BT's appeal, including BT's arguments – and I think I should highlight that when we come to Mr. Kilburn's evidence – that there was ample evidence to Ofcom showing that the proposed rates were too high, criticising the use of the gains from trade test – that was an economic test that Ofcom had employed, and so he was actually

making criticisms on it in his witness statement, and emphasising that BT did not perceive any advantage for its customers in terminating the voice call on 3G spectrum.

Can I then ask you to briefly look at 128 in the judgment, and I will not ask you to read it in any depth, but certainly note it, that you can see that Mr. Budd's evidence being dealt with here. The key point about this is that none of this material had been before Ofcom in the original final determination. This was all being put before the Tribunal without anyone suggesting that it was improper or wrong for the material to be put there. So you can see that, in fact, Mr. Budd is there trying to draw a very clear analogy over how the approach should have been to blending.

At para.143 you can see him again taking evidence from different countries, giving what we would say, or what O2 might say, is tantamount to expert evidence given in a witness statement, and likewise if one looks at 148 and 149, the same thing, giving very clear evidence about his conclusions on the costs of 3G termination at 4p per minute. We rely upon this extract as demonstrating very clearly the approach that the Tribunal has always taken to receiving witness evidence from individuals employed without any artificial argument about whether or not it is truly opinion evidence or whether, in fact, it amounts to some form of argument that needs to be excluded on those bases.

Can I now turn to a different point. You have been taken to these paragraphs before, but what is actually being suggested is that the Tribunal should not investigate the arguments at the heart of this appeal in any further detail because, in effect, you cannot have a complete opening up of the subject matter and it would be wrong to interfere because there may be different approaches in dispute resolution, and so on and so forth. That is at paras.80 to 83, which you were referred to yesterday. The core point is to read all of these paragraphs together.

> "[Ofcom say] that it would be inappropriate for the Tribunal to allow a complete opening up of the subject matter of the disputes going beyond the confines of the matters that had been raised by the parties in the course of OFCOM's investigations of these disputes."

One can see that at para.80. Then we go through 81 and 82, which I think were cited to you yesterday, but then at para.83 one sees the Tribunal's conclusions on this:

> "But the challenges raised by the Appellants in these appeals are more fundamental. It was not suggested by OFCOM that the points …"

not the evidence, the points –

> "… raised by the parties were points which it had not been asked to consider during the consultation process."

We say the points exactly were the ones that they were being asked to consider. We say the points in this case were the question about consumer benefit and whether or not NCCN 956 – this is in BT's later evidence – would have actually incentivised a price rise or not. That was the point that was put in issue. We accept that the evidence subsequently has expanded on that for all the reasons I have shown you with Professor Dobbs' third report, but it is an expansion. The point was in substance argued before, and that is precisely the position here in para.83. Indeed, as you can see at the end of para.83, the Tribunal expressly left open the extent to which it needs to explore the further circumstances in which it is or is not appropriate to interfere with the exercise by OFCOM of its discretion. Although you were cited paras.81 and 82, you have to put it in the context of what the Tribunal actually decided.

Ofcom and Vodafone both seek to rely on parts of para.105 in the skeleton arguments in support of their case. This is the one that you were taken to yesterday when dealing with saying, "The dispute resolution process is not intended to be an overwhelming investigation into matters". One does have to put the context of that paragraph in what was said previously, and if one looks at para.102 you can see that BT's argument was:

> "… OFCOM had applied a rigid and immutable division between its dispute resolution powers and its wider regulatory powers for addressing SMP and that as a result OFCOM rejected all requests from the appellants to carry out a cost based assessment of the charges proposed."

At 104 one sees the Tribunal were holding there in terms:

> "OFCOM was wrong to disregard entirely the relationship between prices and costs in this case. There is an underlying assumption in the Disputes Determination that there is no middle ground between eschewing analysis of the relationship of price to cost completely on the one hand and a full investigation of costs of the kind carried out as part of the SMP market review on the other."

That is the context in which para.105 is indicated, and it is specifically about a cost based analysis – in other words, the sort of analysis that you might conduct on a market review, and that is precisely what para.105 is dealing with there.

This appeal is not about investigating in great detail whether or not what the lyric of a particular cost is or whether or not there ought to be discounts of this for, for example, 3G licences or whatever. There is none of that involved in this case. This is a discrete point

about whether or not there is consumer benefit or, put another way, whether there is, as Ofcom found, the potential for consumer detriment by the pricing structure in NCCN 956. So para.105 really does not say what they say it says.

There is a further point to this, that if one looks at para.105 as to how Ofcom should approach dispute resolution one sees that there is the point made that the parties:

> "… may also have an interest in ensuring disputes can be resolved rapidly and should tailor the information they provide and the level of detail to which they expect OFCOM to descend accordingly."

Then the next bit:

> "The second is that OFCOM is entitled to prepare in anticipation of disputes in relation to sectors of the market where it sees, from its overall monitoring role, that disputes may arise."

That is quite an important point in the context of this case. Although we fully accept that the precise charging structure in NCCN 956 was not previously before Ofcom, because it is a fairly novel way of actually pricing it, the question of whether any termination charges should be actually paid by the MNOs certainly has been well and truly before Ofcom over a long period. If one wants to see that, one can see that from the final determination itself. I do not think, unless you want me to, I will trawl through that, but perhaps I could give you the paragraphs.

THE CHAIRMAN: Yes, that would help.

MR. READ: It is para.2.42 to 2.61 in the final determination, which I think is at BT1, tab 2. If one looks at that one sees actually how there has been a history of issues over the whole question of 080 calls being free to callers and about how exactly the charging should be. Indeed, it concludes by saying in terms that Ofcom is intending to review this in an NTS review in due course. So this is not something that is completely novel that has arisen out of the blue. The question of charging in the context of 080 numbers has been something that has been around. Ofcom say, "If the parties therefore do not get all their material in before us that necessarily must be excluded". With the greatest respect, para.105 does not support the proposition that BT ought to dot every single I and cross every single T at that stage, even leaving aside the fact that we thought the scope of the dispute was something entirely different.

Can I conclude by very briefly looking at 177 to 180, because this deals with dispute resolution generally and it is a point that Vodafone make in their skeleton argument and which has been repeated in oral submission, namely that it is up to the party proposing the

variation to actually justify it. There is rather an interesting issue about all of this, which is that BT was entitled to, and indeed did, raise the prices under the contract. It was perfectly lawfully entitled to do that, but it was the mobile network operators who actually took the dispute to Ofcom, so there might be an issue about whether or not this actually applies to BT or applies to

T-Mobile, but I do not want to get bogged down in an argument about that, but if one looks at what 177 is actually talking about, it is actually talking about:

> "The onus lies on the party proposing the variation to provide to the other party and to OFCOM the justification for the change in the terms upon which the parties have hitherto been prepared to do business."

It is not actually saying, "and every single jot of evidence to support it must be supplied". BT says it has put forward the justification, the justification is that 080 calls are supposed to be free to caller, the MNOs are not making them free to caller, and therefore a proper distribution of the profits that are being made out of the callers needs to be considered. We say that we have fulfilled that.

If one then goes on and sees how this actually develops, this is the first stage in Ofcom considering the dispute because it then goes on to say in 178, the second sentence there:

> "OFCOM's first task is therefore to examine the reasons put forward for the proposed change in terms and decide whether they are justified. In considering this question OFCOM must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework directives …
>
> If it is clear that the reasons put forward do not support the change proposed, then the dispute may be resolved simply by upholding the rejection of the proposal by the recipient of the OCCN and ordering the parties to continue doing business on the terms and conditions that have so far applied."

That is if one can actually see very clearly from the outset that there is no validity to the change that is being proposed. It does not say that Ofcom can thereafter ignore any investigation if it thinks that there is some justification which it needs to investigate. Then it goes on at 180 to make the point:

> "Given OFCOM's role as a regulator, even if it decides that the arguments put forward by one side of the dispute are misconceived …"

you still have to go through the regulatory checklist. We say that if a justification has been put forward which leads in effect to a 120 page dispute determination there is more to it and

there is some justification there which Ofcom needs to investigate in proper depth. It cannot, in our respectful submission, simply ignore the point by turning round and saying, "BT has not provided all the relevant information". If that is right then it follows, in effect, that you must be able to have some form of appeal against a regulator's decision and you cannot simply say that any party that does not provide the relevant material is shut out. One would also ask the question: if this really was a justification for saying no new evidence can be admitted, then it looks to be one way. It looks to be that the party proposing the variation has to put it all in, but if one of the other parties does not, how does that operate? So there is nothing in these paragraphs that gives any support to the arguments put forward.

I think I just want to draw your attention to para.191. It is clear from that, in our respectful submission, that what the Tribunal was doing – and I referred you earlier to paras.102 and 105 and in particular 180 about whether or not Ofcom needs to actually investigate the matter and the extent to which the Tribunal considers it – was looking at the nub of dispute. It is not that the parties have to put forward every single point that is conceivable, it is that what needs to be looked at first and foremost is whether the points raised by the parties were points which it had not been asked to consider during the consultation process. If they are points that they were asked to consider during the consultation process, there is no bar on the introduction of new evidence. We say that, just as here, what the consideration of the points actually is is to look at the nub of the dispute. So we say the nub of the dispute in this case relates to how exactly the profits should be distributed, the revenue that is actually generated from the callers of the freephone numbers should actually be distributed. That was the nub of the dispute and therefore there is no reason why BT should have been precluded from producing the evidence that supports its case on that or undermines the points that are being put forward by Ofcom.

Can I now turn to *Vodafone*, which is the next tab, at para.25. This is an appeal under s.192. If one looks at para.35 in the judgment one can see that there are arguments, or discussion, about how exactly the appeal had to be approached. As you can see, there is reference to the *Hutchison 3G* case at para.36:

> "… [it] is to be decided on the merits. The test set out by the Tribunal in that case was whether OFCOM's analysis could stand up to 'profound and rigorous' scrutiny. This is not a judicial review test, it is more intensive. Vodafone accepted that OFCOM enjoyed a measure of discretion as to exactly how they conducted the [cost benefit analysis] and submitted that their appeal does not

amount to saying that there is only way that OFCOM could have carried out their analysis and that they were not entitled to deviate from Vodafone's preferred view."

There are then various discussions about the basis of the approach and then at 43:

"It is common ground, as indeed it must be, that the present appeal before the Tribunal is to be decided on the merits, as is required under section 195(2) of the Communications Act 2003. The wording of section 195(2) substantially mirrors that of paragraph 391) of Schedule 8 to the Competition Act 1998 in respect of appeals made to the Tribunal under section 46 of that Act. As to the exact standard an 'appeal on the merits' must meet in the context, we were referred, in particular, to two very recent judgments of the Tribunal …"

and so it goes on. In particular, at para.44 you see the quotation from the *H3G* case:

"… 'this an specialist court designed to be able to scrutinise the detail of regulatory decisions in a <u>profound and rigorous manner</u>.' …"

This went on appeal to the Court of Appeal, and no one challenged that the approach being adopted in this section of it is wrong. As you can see in para.46 at the end of that paragraph on p.21:

"However, it is still incumbent on OFCOM, in the light of their obligations under section 3 of the CA 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits …"

MR. WARD: Can I just interrupt to say that the case did not go to the Court of Appeal. There was no application for leave to the Court of Appeal, just for information.

MR. READ: I think my learned friend is right on that, because I think I have moved from an *H3G* case to a *Vodafone* case. The point I should have made is that the quotation at the top of p.20, the *H3G* case, that was appealed, I think, but that point was not taken. My learned friend is quite right, that this case did not go to Court of Appeal.

What we say obviously is that if you have a profound and rigorous scrutiny it really is inconsistent with the concept that Ofcom was saying that the Tribunal has to ignore any evidence that was not before Ofcom at the time. We say that all of this type of *dicta* simply supports our argument that there is nothing in ss.192 to 195 that in any way suggests that the Tribunal cannot admit fresh evidence.

Can I now turn to the *T-Mobile* case, tab 28, in the bundle? This point was touched on yesterday, but it is quite an important point when one seeks to understand the *dicta* of Lord Justice Jacob. If one looks at para.6, one sees that there was a narrow point before the Court of Appeal, which was simply this: are these matters to be raised by way of an appeal to the Competition Appeal Tribunal or must they go by way of judicial review? At first instance the Tribunal rejected the suggestion that, in fact, it should go to the Competition Appeal Tribunal, and there was a specific reason for that which was picked up, I think yesterday, which is at paras.46 and 46. There is a specific exclusion within s.192 of certain types of appeal, and those certain types of appeal include regulations under s.14. So the issue therefore became that this was an excluded appeal under the terms of s.192 because it fell within the s.14 regulations. Accordingly, the way that Article 4 got brought into the equation was effectively to say, "Oh, well, if we go by JR we will not have a sufficient appeal on the merits, so it will be non-compliant with Article 4 of the Framework Directive". That is how it got argued. If one goes back to para.10 one sees how those arguments were seen as a slightly bogus attempt to try and circumvent the very clear statutory preference of the Act in saying that certain things were excluded from appeals. As you can see at para.9, Lord Justice Jacob sets out in his judgment at the end, "The relevant parts of the legislation can be seen as a whole". When one goes to the annex which is at the end of that judgment one sees that Lord Justice Jacob did not set out s.195, which of course contains the appeal on the merits, and it also did not, in fact, set out any detail about 193 which, as you will recall, is the references to the Competition Commission in certain specified situations. When one eventually comes to look at para.31, I think one does need to treat the heavy reliance and inference that it is being introduced into this case for with a certain degree of caution because it really was not a point that Lord Justice Jacob was really considering. He was not, as his judgment shows, considering s.195 in this particular context.

Indeed, one has to say that one needs to be slightly wary because although he says that there is not a fully equipped duplicate regulatory body waiting in the wings – as I have already explained, we do not argue that point – but, of course, given that the Act actually provides for references to the Competition Commission he may perhaps, if he had addressed his mind to the specific section, 193, not have phrased it quite in the way that he has there. In any event, it does not derogate from what we are actually saying on this point, which is that the sole issue in that case was whether judicial review could provide an appeal on the

merits. At paras.19 to 20 one sees the very clear answer to this, that JR, as developed, has in fact allowed a specific method for dealing on the merits. I am reading from para.20:

> "… that the JR standard of review can does mould itself to any requirement imposed by other rules of law."

Again, really the whole context of this case was not on the point that you are being addressed, which is whether or not you can admit evidence that was not previously before the regulator. It simply was in there, and the whole question of what an appeal on the merits under s.195 actually meant never came up. So trying to place the reliance that the other parties do on para.31 simply does not, in our respectful submission, work.

Of course, on BT's side we do not actually vehemently disagree with what he says because he says that you have got to look and see whether something is materially wrong. That is what BT says it has done.

I have made the point earlier, and I just reiterate it, that the first *Napp* case and the second *Napp* case, together with the *Freeserve* case and the *JJB Sports* case, which respectively are at authorities bundle 1/13, 1/14, 1/19 and 1/17, all demonstrate the same point, which is that the Tribunal can admit fresh evidence. We say it is simply a bad point unless you were to accept that the Competition Act is so different that you can glean no acceptance of those authorities and that you do not pay attention to the *dicta* that has actually specifically compared those cases when considering s.192 appeals, but I have gone through that already.

Can I now turn to a specific consideration of Ofcom's grounds of objection. Ofcom obviously objects to all of Dobbs 2 and 3 and Maldoom 2 and 3 and Reid and Richards on the fundamental basis that none of this was before them at the time.

The first point obviously we make, no general principle that material must be excluded. To the contrary, the rules and the statute and the cases made under them all point entirely in the opposite direction. There is nothing in the Act that supports it. Ofcom's arguments generally have the problem of having to invent these exceptional circumstances and categories, none of this stacks up, so no general principle.

The second point we make is that all the points that this evidence goes to were in issues before the final determination. Yesterday I took you through BT's 12th January submission and through the material in the experts' reports, and we say that has firmly put in issue all the points that BT is raising in its notice of appeal. All the evidence goes to is an expansion on those points and indeed in parts to deal with certain specific issues that Ofcom only raised in its final determination. I could go through all those points again, but I think you have those.

THE CHAIRMAN: No, I think we have those.

MR. READ: The next point that I want to make is that it is simply wrong to categorise that responsibility for providing the material all rests upon BT. This was a point that I was making earlier, that there is nothing in the *TRD* judgment that actually says that BT has to provide every single item in order to justify the variation. What it has to do is point out some justification as to why it says there should be a variation which Ofcom has to look at, but that does not mean that Ofcom does not go further and investigate the matter as a regulator.

The other point relating to this is that obviously we say the specific area of contention, namely whether there was a benefit to consumers or not, is not an area which BT is necessarily obliged to investigate on its own. There was some discussion yesterday about Article 8 of the Framework Directive and how wrong it was for Mr. Fitzakerly to have actually said the obligation is on Ofcom to investigate issues of consumer benefit. We say that Ofcom has got an obligation to investigate it. That is what Article 8 of the Framework Directive actually says, it is a regulatory task imposed on Ofcom. To try and use this as support for the argument that evidence must be excluded unless everyone has put everything in is really, in our submission, misconceived, because it ignores the fact that Ofcom, as regulator, has its own duty to investigate. It may come down to a matter of resource, as was discussed yesterday morning. It may mean that Ofcom has to put a bit more resource into it. In particular, it may mean that it has to actually to do what the *TRD* judgment said, which is to take steps before the dispute arises to monitor what is going on and have preparation for any disputes that are likely to arise.

The fourth point we make is that it is grossly unfair for BT now to be penalised when, prior to the draft determination, BT did not know what it should be addressing. In particular, we make the point again about NCCN 956 not being within the scope of the dispute, and certainly BT being led to the conclusion that it was only to do with any termination charge. BT first sees that point within its draft determination. BT then, within 18 working days, has not only put in submissions in response, it has also put in expert evidence, and in those circumstances we say that it would simply be wrong for BT to have its material excluded. We also say that you take into account other matters when you are considering the unfairness of it. One of those matters is obviously what happens in a situation where BT is trying to put more material in but it is actually rejected. You are back to this problem about exceptional reasons and, in our respectful submission, if there was a case for extending the time period it was this case because of the change in the scope of the dispute.

For that reason we say that Dobbs 2 and Maldoom 2 should in any event have been taken into account by Ofcom rather than summarily excluded.

Obviously we also make the point again that if you go down this route the real risk is that you are going to end up with hopeless satellite litigation as to what should and should not be in; and also you are going to have a horrendous mess at the hearing because obviously, for the points I have already made out, experts are going to be called and there are going to be serious problems as to what evidence they can give.

Finally, on proportionality can I just say this – and I made the point yesterday – obviously if Professor Dobbs and Dr. Maldoom are called to give evidence effectively their two previous reports are subsumed in their third reports. They are obviously there, you cannot hide the fact that they are there and we would anticipate that they would be before the Tribunal. That would be the normal thing one would expect where you have an expert giving evidence, that his material would be before the Tribunal, so that if anyone wanted to cross-examine on it or raise any point on it, it is there. That does not mean that you have got eight reports, as was being suggested.

It does raise the rather interesting question, of course, that if Ofcom were to be right, the MNOs in turn would be prevented, we assume, on Ofcom's argument from putting in any evidence in response to Dobbs 1 and 2. It is perhaps not surprising that the MNOs have perhaps been hedging their bets a bit more on this particular matter than their skeleton arguments necessarily suggest. That is not true of all of them, but certainly of some them.

Can I now turn to O2's application very briefly, and I will do this very briefly. The first point I make is that the way it was originally put, and I think I should ask you just briefly to look at this in their letter of 20th May, and it is in BT's skeleton argument, at B10 and it is their letter of 18th May and not 20th May as I just said. If one goes over the page, I will not spend a lot of time on this, but one sees at B the problems being put forward half way down the page. One sees the argument is being put, which is:

> "Mr. Richards cannot possibly have the requisite degree of independence of an expert witness. He is a B T employee and most likely therefore also a shareholder and a beneficiary."

That point, as we apprehend it, has actually now gone, but *per se* because he is a BT employee does not prevent him from giving evidence. As we understand the way it is now being put, it is now being put on the basis that he has not shown sufficient independence.

Then there is the second point raised there which probably is still live. Then there is the challenge in the final bullet point about whether he has the particular expertise. That again is a concession, this is:

> "Finally, the basis of Mr. Richards' expertise, for the purpose of these proceedings at least, is not obvious."

As we understood what O2 were saying yesterday, they were accepting that they are not challenging at the moment his expertise, they are simply challenging in effect his independence and ability to give proper expert evidence.

The cardinal point that we say is true about this is what para. 12.1 says in the Tribunal Guidelines, which is that strict rules of evidence do not apply before the Tribunal. For that reason, we say, it has been a very common practice before the Tribunal to put employee evidence in the form of a witness statement rather than necessarily put into a specific expert statement. You have seen that in the TRD appeal with Mr. Budd because I took you through that, and it is also true in the PPC appeal where you have Professor Myers giving a 100 page witness statement, that is mentioned in footnote 61 of BT's skeleton argument, where he has given a witness statement. Part of the reason for that is obviously that these witnesses may often be discussing evidence of fact as well as evidence of opinion. For example, Professor Myers discusses the network charge control in 1997, and the background to it which obviously is a factual matter and not an opinion matter, although it goes on in that particular statement to deal with other things. The key point is that where you have employees there is necessarily an overlap between matters of fact and matters of opinion.

That does not preclude them from giving expert evidence, but it does explain the approach we say that has previously been taken of putting the evidence into a witness statement, that one does not want to get hung up on strict rules of evidence, because that is what the guidelines say in terms one should not do, but it does mean that there maybe instances – particularly with the technical nature of the Tribunal's hearings – that in fact you do have cross over between fact and opinion. That does not actually stop people giving opinion evidence because it is quite common, in fact, for independent experts to actually give in the courts opinion evidence as well as factual evidence. If I can take an example, if one takes the rent review clause, which you may remember was referred to in the H3G case, in those cases you will appreciate that what the experts are trying to do is say what the rent should be for a particular property based on a number of comparables. They will often give

evidence of comparables they know about in order to put into the pot for reaching their opinion.

That is evidence of fact that they will give and they will also, in the course of that, make estimates of values because as you will probably appreciate with the rent review clause, for example, there may be rent free periods, there may be fitting out payments, and there may be a whole series of other devices where landlords effectively try and keep the headline rent high in order that when there is a rent review on another property they can say: "Look how high that was, it should be there", rather than looking at the true price. It is quite common – and I know this from personal experience – for experts to actually say in terms: "I estimate this value to be X", which is exactly what Mr. Richards has done in his statement when he has estimated the MNOs prices and the position they take. There is nothing unique or uncalled for in somebody giving evidence like that whilst still going on to give opinion evidence later on. It is a matter that can no doubt be cross-examined at a later stage, but it does not preclude an expert from giving that evidence. So we say that all of these points that are being made against Mr. Richards introducing facts, introducing estimates and that somehow prevents him from giving proper opinion evidence, is really completely flawed. It will be flawed in the context of a hearing in the High Court, but it is certainly, in our respectful submission flawed before the Tribunal where the para. 12 one makes quite clear strict rules of evidence do not apply.

THE CHAIRMAN: Is there any force in the point that a variation, such as NCCN in this case, has to be justified? Does that feed into the evidence that you are adducing before the Tribunal here?

MR. READ: We certainly accept – suppose we had put the whole body of Mr. Richards' expert's report into our notice of appeal it would be a very ungainly way of doing it, but supposing we had done that, we would say: "There is the justification for why we say you are wrong." If we had done it like that, that point could not be taken against us now in the form it is being taken here, so it does, in our respectful submission, support the proposition that you cannot simply exclude it on the basis that it is material that is irrelevant because it does not contain true opinion evidence.

We say it is perfectly legitimate for this material to be in. We are perfectly happy, if the Tribunal considers at the end of the day some form of opinion declaration and that may need to have some consequential adjustments to the witness statement itself. For example, there was criticism yesterday about para. 6 where Mr. Richards says "BT's argument is …" – it is not a very good point because if you go two paragraphs on to para. 8 he says: "I

suggest" so it is pretty clear it is his evidence, but he is making the point that this is BT's justification for taking the matter forward. So we do say it can be put forward on the basis of a justification for BT's change, but we also say that if there was any real technical argument about this that it is perfectly proper for Mr. Richards to effectively go away and adjust his report so that he makes clear what matters of fact he is relying on, what are estimates, and what is true opinion expert evidence. But it really is rather funny, because when one looks, for example, at Dr. Maldoom's third report there are sections there where he makes estimates and yet no one is saying in any way that is wrong. The answer to all of this is that ultimately it comes down to what weight the Tribunal should actually put upon the evidence in due course. It has nothing, in our respectful submission, to do with technical points about "that is fact", "that can be dealt with in the witness statement, but that is not, that is argument, that cannot be dealt with in a witness statement", and "that is opinion, it needs to be dealt with in an expert's report".

In reality the misunderstanding in O2's application is the simple fact that it really comes down to trying to take forensic formulaic nit-picking over the way the evidence is presented, which is precisely what the guidelines say the Tribunal avoids. What the Tribunal is concerned with is the weight of that evidence and not the formulaic approach that it actually should take.

Sir, unless there was anything further that is what we say about O2's application.

THE CHAIRMAN: No, that is very helpful.

MR. READ: Finally, I come to T-Mobile's application. Again, given the time, I will not take you specifically to it, we say the focus has contracted, because there seemed to be in the letter of 20th May a much wider focus on this point and that is actually why we have produced the Maldoom analysis that we handed up, just to show that actually there was quite a lot of material spread out throughout the grounds of appeal illustrating where exactly the evidence was being deployed. The focus now seems to be upon paras. 117 to 126 and it is fair to say that T-Mobile did highlight those specific paragraphs in their letter, but the letter did seem to us to go wider than that, but it is now confined, as we heard, to those paragraphs.

The difficulty with O2's suggestion is that they have picked upon those particular paragraphs without actually looking at the whole of the ground of appeal. I will try, very briefly, to take you through it but one does have to read the whole of Ground 3 of the notice of appeal in order to see how these things all fit together, and that is on p.39 in BT tab 1. This is the "Introduction" section, and if one just looks at para. 87, for example, BT says in terms:

> "In considering harm to competition to consumers of NCCN 956 Ofcom performed an incomplete analysis. Ofcom did not (as it was required to do) analyse the potential effects both positive and negative, on consumers and on competition of ***withdrawing*** NCCN 956, and across what timescale. It did not weigh those against each other and decide whether the positive outweighed the negative. Its analysis was superficial and incomplete, and this is discussed in sub-sections (c) and (d) below."

So we are making it pretty clear there what our central attack on Ofcom's analysis actually is. One then needs to look at the difficulty that BT feels it has, which is in para.88, where we make the point that Ofcom's analysis is not always easy to follow. But there is then quite a long number of paragraphs, three pages, where effectively BT sets out in some detail what it is about the determination that BT is actually complaining about and one can see, for example, in para. 94 there is the complaint about how Ofcom rejected the material, and then in para. 95 various matters are laid out there.

Sub-section (b) really deals with the question of the burden that was put on BT, but then we come to sub-section (c), with para. 102, and you can see there that BT again is making the point very clearly that what BT is complaining about is the analysis has not been conducted correctly, it is highly superficial, and in particular – as one sees from para. 103 – the conjectures that we say they actually came out with are wrong in paras. 103 and 104.

One then goes on through the rest of this section. At p.105, for example, complaint is made about the assumptions that the MNOS are profit-maximising, and so we see there specific reference to Mr. Richards statement, and again in the second part there, at footnote 130 Mr. Richards' statement is referred to again.

Then we come to the points being made on the specific Dobbs 1 and Dobbs 2, and it was in that context that one then comes to para. 116 which makes clear that Ofcom's conclusions that:

> "BT could not demonstrate that NCCN 956 would benefit consumers and avoid distortion of competition is effectively based on two premises … BT's contends that Ofcom's analysis is flawed."

In other words, it is very clear in our respectful submission that BT has laid the trail for saying what it is in BT's matters it challenges, why it says it challenges those and then it specifically turns to the additional evidence in Maldoom 3, Dobbs 3, Reid and Richards in order to say: "and yet further this is wrong", so it is not right just to fasten on section (d) at 117 without also having had a considerable overview of the previous point. I do make the

point that it is very clear from the Tribunal Guidelines that what is essential for the Tribunal is that it be seized in writing from the outset with the substance of the case on appeal, and that is the guidelines at 6.19. It also has to be succinct, and that is made clear in para. 6.49, the basis is probably a 20 to 30 page ground of appeal.

The critical issue in our respectful submission is can the Tribunal succinctly see the substance of the case that is being advanced on the appeal. We say when you analyse those paragraphs it is quite clear it is "yes". This is not some one line reference that is involved here, it is a quite detailed exposition of why BT is criticising Ofcom's result, why it says it got the conjectures wrong, and where it says the material is to actually deal with it.

The fact that we have referred at that point to the material in the experts' reports in our respectful submission is completely sufficient because the Tribunal gets and understands what the substance of BT's case is. The problem with the H3G case is that that case was actually dealing with a new argument that was being introduced by amendment and there was a one line response. That is completely different to what we are facing here, so to try and suggest that the comment made in that context is applicable to this case is unreal. I will not take you to the paragraphs but just ask you to note them. We say if you look at paras. 6 to 9 and then compare them with paras 82 to 87 it makes it clear that the key point was there was a completely unparticularised pleading which, in essence, was trying to introduce a new case through the back door.

We say that that is an end to the matter; we pleaded it succinctly and there is no need for any of the additional material that T-Mobile asked for. It is, in our respectful submission, a formulistic approach which we suspect would not have been made were it not for the fact that this hearing was going to take place in any event. We do say it is interesting that at the end of the day Ofcom is not taking this point, because if there was any real value in it you can assume that Ofcom would be screaming: "We cannot understand your case; what is your case?" and they do not do that.

Finally, there is Mr. Kilburn's statement, and I really think at this time I am not even going to address it because, quite frankly, it has not been addressed properly before you in oral argument. You can see the paragraphs themselves, they are very short paragraphs. We say this is exactly the sort of thing that is normal in a witness statement before the Tribunal, it is not citing huge great long matters of importance. The point that you have just made about there needing to be some justification for BT's case, well he is setting out what he says the justification was at various points. In any event, if one actually analyses the 20 paragraphs that are complained of it really is, in our respectful submission, a nit-picking point that is

being taken here. It is something that the Tribunal at the end of the day should deal with properly at the final hearing by giving whatever weight it feels or does not feel necessary to it.

I would just reiterate that the points we make about this are set out in paras. 62 to 67 of our skeleton argument and they do not really seem to have been manifestly challenged before you today so I will not say anything more about that, I think you can form your own opinion on the 20 paragraphs and whether it is truly necessary to exclude them for the purposes of fairness of this appeal.

Unless there is anything further, I am sorry I have trespassed over my 12 o'clock deadline, but those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Read. Mr. Herberg, I would like an idea of how long you are going to be so we can rise for a few minutes just to discuss timing.

MR. HERBERG: Yes, sir, I am trying to reconcile the competing imperatives of speaking slowly enough and covering the extensive submissions that have been made. I think I will be less than an hour but certainly I would struggle to finish by 1 o'clock. There are a number of matters that I need to cover.

THE CHAIRMAN: Not more than an hour?

MR. HERBERG: Not more than an hour.

THE CHAIRMAN: And the interveners, any indications there?

MR. WARD: Sir, depending on what Mr. Herberg says I think I might have three very, very short points, so five minutes at the most.

MR. PICKFORD: Sir, not more than five minutes.

MR. KENNELLY: The same for me – I may have nothing to say at all because Vodafone are making very similar points to the ones we are making.

THE CHAIRMAN: I am grateful.

MR. O'DONOGHUE: I am in very similar position myself.

THE CHAIRMAN: That is very helpful, we will rise for two minutes and discuss the way forward.

(Short break)

THE CHAIRMAN: Mr. Herberg, you can have up to one hour, that should straddle the need to speak more slowly and cover all your points. So far as the interveners are concerned, we would invite the opportunity of written submissions by, say, 11 o'clock tomorrow morning if you have anything to say. We are very happy with nil returns – let me emphasise that – but if there are points that you wish to take, rather than taking up a further half hour and

pushing us into this afternoon we would prefer to do it that way if there is no objection. Mr. Herberg?

MR. HERBERG: Sir, I am grateful. Can I start off with what was said to be the confusion between the issue of principle in this case and the so-called case specific reasons for inclusion/exclusion of the disputed evidence. We say there is absolutely no confusion or "vacillation" as it was also put, on Ofcom's part at all. Its position has been consistent throughout.

In essence there are two different types of argument with which we say the Tribunal has to deal on this application. The first argument arises from the very first paragraph of BT's notice of appeal where, as you know, it is asserted that this is a full *de novo* appeal on the merits. We have heard a refinement about what *de novo* means, but there is still an absolute point of principle arising from that proposition whether put like that or whether modified in form so as to suggest that the appeal can be on the basis of new evidence and new arguments. That is an issue of principle which we do invite the Tribunal to decide, there is a need for clarity. As I have submitted it affects not only whether the evidence to which we now object goes in, but it may fundamentally affect what arguments are permissible on the substantive appeal.

As you know, sir, we say that an appeal under s.192 from a 185 determination is not a *de novo* appeal, but it is an appeal from Ofcom's determination, from the evidence and the arguments that were before Ofcom to decide whether the decision of Ofcom at the time was flawed by error of law, error of fact, or erroneous exercise of discretion. I will come back in a moment to the points made on those grounds of appeal – error of law, error of fact, erroneous exercise – and how they interrelate, or do not interrelate to the wider scope of appeal contended for by BT.

The second argument, or type of argument, which is in play on this application, the so-called case specific arguments, is quite separate, it concerns whether there is good reason to admit what we say is fresh evidence pursuant to Rule 22.

It is common, indeed universal, even where it is absolutely clear that appeal rights are limited, limited even more than in this case, even in a normal civil appeal which is not fully on the merits, but it is absolutely clear that there is typically always this power to admit fresh evidence invested in the Appeal Tribunal. The reasons for doing so are well familiar, they are not exotic or speculative, effectively where a party is not able with due diligence to have adduced relevant evidence below for a number of different reasons that may be the

case, then there is power in the discretion of the Appeal Tribunal to admit that evidence if it feels it is right to do so.

The reason that Ofcom has addressed the case specific arguments as well as the general 'in principle' arguments is simply because BT is raising them. BT is saying on the one hand "This is a *de novo* appeal, we can put this in of right, we do not have to justify it", and on the other hand it is also saying "You should have extended time", it is making case specific arguments as to why it could not reasonably have been expected to put the evidence in below. So we obviously have to address whether the evidence should be admitted on both grounds. Those who invite you to decide this case on the specific reasons, as some of the interveners invited you, and that is what I described as the "siren call", not what Mr. Read suggested, those made that suggestion ignore the fact, we say, that the issue of principle arises in any event, and would have the potential, as I say, to reassert itself at the hearing even if the evidence were admitted.

Sir, I should also tell you that it is highly likely to arise in further references to this Tribunal in the future that are in progress – either an appeal from a s.185 determination, or from other appeals which engage s.192. We say in short that this is a point of principle which needs resolution, it is fundamentally unsatisfactory that there is any doubt as to the scope of this type of appeal and Ofcom therefore asks the Tribunal for clarification either way.

Sir, it is suggested by my learned friend that to decide the appeal as Ofcom contends would be then to give rise to an enormous risk of satellite litigation in relation to the Rule 22 exercise of discretion. A catastrophic situation is painted of lots and lots of applications like this on every appeal to the Tribunal. We say you should take that with more than a pinch o salt. It is not a prospect that you should in any way countenance or, still less, be frightened of. Once there is clear guidance as to the nature of the appeal and, as we say, the limited nature of the appeal rights, all will know where they stand. In the first place, parties engaged in the time limited four month dispute resolution process will know that they have to get their arguments and their evidence in at that time. They will not be able to say, as BT may or may not have done in this case, "It does not matter if it is a bit difficult to get the third reports in in time, we can get it in on the appeal". It does not form part of my submission that that was BT's reasoning process but one can easily see how it would be the case if the appeal jurisdiction is as they suggest, it will be a continual process we say, a temptation for dispute resolution participants to be able to say: "Look, we cannot get it in now, let us get Ofcom's decision then we an attack this on appeal, we can put the evidence in then."

So all will have clarity, the parties will make sure what they want to rely on and what they want to argue, and the situation will then be clear on appeal. There may be cases where there is objection that new evidence is admitted, and the Tribunal will then have to take a decision but it is one of the features of robust case management that sometimes these questions arise at a procedural stage, and there should not be any need for this length of elaborated hearing, which is really substantially addressing the question of jurisdiction which is an in principle determination.

We invite you not to be unduly influenced by that prospect and, indeed, we would say that if you were influenced by that prospect, certainty and avoidance of satellite litigation would be being bought at far too high a price. There is an important issue of principle as to the Ofcom decision making process and as to the extent to which Ofcom's decision may be undermined or sidelined by an expanded appeal process, such as is contemplated by BT. That is far more important than considerations as to whether the Tribunal may, on occasions, have to decide whether to allow fresh evidence in on an appeal or not.

Can I turn to that fundamental issue as to Ofcom's role and what we say would be the very dangerous sidelining of that role by the arguments that BT makes. BT made the point and we agree, although we draw something very different from them, that Ofcom on a 185 determination is acting as a regulator, not as something equivalent to a private law adjudicator, it is acting as a regulator. It has to have regard to its regulatory duties, including its s.3 duties and its other duties. We also agree that Ofcom is entitled to and can take matters into account or arguments into account which were not advanced by the parties. We are not saying that they are strictly limited to having to weigh up the arguments of the dispute resolution participants. But that does not provide good reasons, as Mr. Read said it did, for saying that the parties should then be entitled to run fresh arguments or fresh evidence on the appeal; it simply does not follow, it is a *non sequitur*. The parties will, during the dispute resolution process, see Ofcom's reasoning in a draft determination and, indeed, before that in the course of the process. If Ofcom is advancing arguments or taking matters into consideration which were not put forward by them they will see it and have a chance to comment on it. Of course, if they were genuinely taken by surprise by something substantially new, that might well be the ground for the safety valve of Rule 22 to be exercised in any event and for new evidence to be allowed on the appeal. But typically they will see Ofcom's arguments and they will have the opportunity to deal with them there and therefore there is no absolutely no reason, because Ofcom has that wider role, that they ought to have new bites at the cherry on the appeal before the Tribunal.

Indeed, we suggest absolutely the opposite. The point is that Ofcom is intended under the legislation to be the primary regulator. It has been given the role by Parliament of taking the primary decision in the four month speedy process in the s.185 to s.191 procedure. It is intended by Parliament that it will be taking decisions on disputes in the exercise of its regulatory judgment as well as its adjudicative judgment of the submissions between the parties. The Tribunal's role is to hear an appeal from that regulatory and adjudicative judgment, it is not plainly to act again – and will probably be echoing Lord Justice Jacob's role – as a dual regulator, as a co-ordinate first instance regulator.

We say there is a very real danger if BT's submission of principle is accepted that the role of the Tribunal will be widened so that unavoidably it takes decisions on matters of substance where Ofcom has not exercised its role as a first instance regulator, and in a moment I will seek to illustrate how in this precise case that danger arises. We say that the Tribunal's role is absolutely clearly set out by the provisions which you are well familiar with and I will not take you back to, requiring the appeal and the notice of appeal to be tied into identifying errors of fact, errors of law and errors of discretion. All of those focus back on Ofcom's decision and reasoning and identifying errors made by Ofcom in its decision making process.

Mr. Read seeks to take account of that and avoid the sting of that by saying "It is all right, on our formulation we are still attacking Ofcom's decision on various grounds, we are just doing it on the basis of new evidence." But we say that that simply does not work. Once one allows as a matter of principle, as opposed to exceptional cases where it is justified a party to attack the decision on the basis of entirely new evidence and new arguments the Tribunal is inevitably put in the role of having to consider the position based on matters on which Ofcom has not expressed a view because the matters were never put before it.

If I can illustrate, perhaps, in crude terms, how that applies in relation to the new evidence in this case. We say that the overall nature of BT's evidence before Ofcom on the matter of incentives can be put in this way: effectively BT's evidence, including the first reports of Professor Dobbs and Dr. Maldoom, was to the effect that there are incentives to reduce as well as to increase retail prices where a pricing structure of the sort put in place by BT is introduced. They go so far as to say that there may well be an overall incentive to reduce retail prices if a pricing structure of this sort is put in place. That is, as it were, the sum total of the expert evidence put in below – Dobbs 1 and Maldoom 1.

The nature of the fresh evidence is very different. Of course it is still located under the same general rubric of the nature of the incentives and how strong the incentives are to

reduce retail prices, but they are now making a very different argument; what they are effectively saying is that BT's specific pricing structure as contained in NCCN 956 will have the effect of incentivising mobile operators, call originators, to reduce retail prices based on specific expert analysis that they now put forward. That is an argument, we say, which is very different in nature, it is certainly not the same points that were argued below – to pick up para. 82 of the TRD decision – the suggestion was made that this was really all the same as the TRD case, the same points were being argued, and perhaps that can be illustrated by looking at how BT introduces this section of its notice of appeal. The section on which it effectively relies heavily on the new evidence was introduced by para. 116 which my learned friend took you to towards the end of his submissions a few minutes ago. One looks at the nature of the attack, it says:

> "As explained in sub sections (a) and (c) above Ofcom's conclusion that BT could not demonstrate that NCCN 956 would benefit consumers and avoid distortion of competition is effectively based on two premises"

And they identify them, (1) and (ii). Then they say:

> "Without prejudice to BT's contentions set out in sub-section (b) above that this placed an unfair burden on BT, BT contends that Ofcom's analysis is flawed."

What is being said firstly is that Ofcom's conclusion that BT could not demonstrate that NCCN benefits consumers is flawed, but it may well be that Ofcom was actually nearly right at the time on the evidence before it that BT could not demonstrate that it would benefit consumers, leaving aside the burden of proof I would assume for a moment that the burden of proof is on BT, it may have been absolutely right, there may be nothing flawed in Ofcom's conclusion that BT could not at that time on the material evidence before it demonstrate that the pricing structure would benefit consumers. What they are now saying is: "Look at all this new evidence and argument as to the specific pricing effects we can now show that it is flawed". So they are not actually doing in para. 117 et seq what they say they are doing in para. 116. They are not showing that the conclusion at the time was flawed, what they are saying is that based on all this material it is wrong to say that NCCN will not benefit consumers. BT may have been absolutely right at the time to say that BT cannot demonstrate it, because they have not demonstrated it. That illustrates first of all the difference between the two approaches and it also demonstrates why it is that Ofcom's primary regulatory role is in danger of being seriously compromised or sidelined if the wider appeal regime were to be blessed by this Tribunal, because Ofcom has not had an opportunity of concluding that BT cannot demonstrate that on the basis of all the new

evidence. There were new complex and detailed lines of argument put forward in the fresh material which Ofcom has had absolutely no opportunity of engaging with up to now. It simply would not make sense, the Tribunal would not be looking, if it allows in this evidence, at whether Ofcom was right to conclude in its decision that BT could not demonstrate that the change would benefit consumers, that would not be the exercise being done.

The first reports of Maldoom and Dobbs, which is what were being relied on, are almost said to be irrelevant by my learned friend. It would be looking at a completely different exercise on the appeal. We are looking at now whether the Tribunal in its view considers that the charge would benefit consumers based on new evidence, and we say that is not what the Act intended, but we say it would be a dangerous departure because Ofcom's role would thereby be sidelined. The situation would be far worse once the appeal ambit had been clarified in the way that it has been, because it has to be accepted that until now there has been some regulatory uncertainty as to this issue and on the whole the parties have tried to put the whole of their cases to Ofcom because there has been the risk that they might be shut out on appeal no doubt. There has certainly been an issue. Once it was clear, and clearly enunciated by this Tribunal the parties were at total liberty to put in new evidence and new arguments on the appeal, as long as in some way they could be said to be attacking or engaging with the decision below. It would raise a much wider concern as to the extent to which parties would avail themselves of that, not put arguments to Ofcom, and then elaborate and make much more complicated appeals from s.185 determinations by reference to new arguments and new evidence.

Can I go back to the issue of principle? I made the point as to the issue of principle and the distinction between that and deciding the case on specific reasons. Can I deal shortly with the interrelationship with other routes of appeal and the extent of this appeal? As I hope I made plain in opening, we only invite the Tribunal to decide on the ambit of s.192 appeals from s.185 determinations.

Mr. Read says it is clear that s.192 applies across the board, the standard must be the same in all cases. We say that you do not need to determine that issue. It is plain that s.192 is seeking to reflect Article 4, I will come on to that in a moment as a separate point, but Article 4 requires merits to be duly taken into account, and that at least in principle clearly opens up the possibility that different appeal routes from different types of decision might allow the merits to be differently taken into account, duly taken into account in different steps.

We do not effectively say that BT is necessarily wrong in saying that the ambit of the appeal that you set in this case maybe the same in other cases, we certainly reserve the right to argue that in future appeals in due course, that the same restricted ambit of appeals as we say applied in relation to appeals from s.185 determinations is more generally applicable. Indeed, some of the arguments which I have advanced to the Tribunal, for example those relying on the wording of the appeal provisions of the Act itself, and the rules, will of course be applicable on other s.192 appeals as well. Some of those arguments are going to be more generally applicable, but we do recognise that there are other arguments which are more 185 specific, namely those relating to the swift and basic nature of the dispute determination process. So we say there is no need to decide this case beyond the dispute determination appeals and without having heard the full argument on other grounds of appeal as to whether there are relevant points of distinction it would probably be unwise to range more widely.

What we do not accept, because there may be some applicability to be considered in the future as to the ambit of appeals from s.185 determinations to other grounds of appeal, that there is any reason not to determine s.185 at this point, or that there should be caution about deciding as Ofcom contends.

THE CHAIRMAN: I see that, but I think Mr. Read's point was more that in deciding the matter regarding the dispute resolution appeals one is inevitably drawn into making the same decision in respect of other appeals simply because s.192(1) does not distinguish between the different routes, it applies the same criteria to all of the s.192(1) decisions, hence my "one size fits all" description.

MR. HERBERG: We say that that is not an issue that you need to decide today. It may well be in a future case that Ofcom would want to make an argument of something to that effect of saying that there is no good reason to distinguish this right of appeal from rights of appeal in other cases, so I am certainly not saying that it is wrong, that there is no read across. What I am saying is that there are potential arguments that when you read the wording of s.192 and look at the ambit of the appeal, it cannot be said that because the wording is the same it is impossible that the nature of the appeal cannot also take into consideration the decision being appealed from the wider context, Ofcom's role and other matters. There is at least the scope for parties who wish to, to seek to argue in future cases on appeals from other types of determinations, other types of decisions, that there are relevant distinctions which should be taken into account so that the appeal right should not be treated as the same. The mere fact

that the same statutory provision operates does not mean that the standard has to be automatically the same in every case; I go no further than that.

As I say, that is reinforced by the fact that the Directive from which the obligation proceeds is flexible, and this may relate back to your point, sir, that there may be more flexibility in how one interprets s.192 because it proceeds from a transposition of the Directive, and because the Directive is so obviously catering for flexibility it would not be right simply to regard this in itself a question of statutory analysis of s.192 in the abstract; these words must mean the same in different cases, full stop – that is the end of the story. The fact that the Directive is in the background does potentially, at least, introduce another element to the argument.

What we do not accept, to be clear, is the point which Mr. Pickford for T-Mobile made, which was that s.192 may impose a different, i.e. more searching degree of scrutiny, than that required by Article 4. He is effectively arguing, as I understood it, that s.192 has, at least in some situations, gold plated Article 4. That, sir, we do not accept, we say there is absolutely no warrant for this. I addressed it shortly in opening, as did Mr. Kennelly for Three.

I am not going to repeat the submissions on that, but you may recall that Mr. Kennelly gave you some references in case the point was raised which he said went against the proposition that s.192 did any more than transpose Article 4. I think I took you to *T-Mobile v Ofcom* [2008] CAT 12 at para. 81 and I will not take you again to that. Mr. Kennelly also referred to *Hutchison v Ofcom* [2005] CAT 39, para. 25, again I will not take you to that, sir, but there is a statement there that says s.195 implements Article 4.

The one which I would take you to very shortly because it is a slightly more substantive point is the sequencing decision, *T-Mobile v Ofcom* [2008] CAT 15 at para. 33, I think that is in the second appeal bundle at tab 24. Tab 18 is the *Hutchison* decision.

Can I take you to para. 33 of the *T-Mobile* decision? I do not need to take you to the facts because it is the passage where the Tribunal refers to:

> " … two passages in the explanatory notes accompanying the 2003 Act once enacted. The first was a passage introducing Chapter 3 of the Act which concerns disputes and appeals. The notes say:
>
> > '400. The appeals mechanisms in the Act have been devised to meet the specific requirements of Article 4 of the Framework Directive."

- a clear statement.

> ‘Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision of OFCOM or the Secretary of State which relates to networks or services or rights of use of spectrum must have the right of appeal on the merits against that decision to an appeal body that is independent of the parties involved. The Act therefore sets out a mechanism for appeal on the merits to the Competition Appeal Tribunal (CAT) against any decision’ …”

Then para. 34:

> “This is important in two respects, say the appellants. First, it shows that the author of the Notes Interpreted Article 4 in the same way as the appellants now urge upon the Tribunal, namely as requiring a ‘right of appeal on the merits’. Second, it shows that the intention of section 192 was to provide an appeal to the Tribunal in respect of decisions falling within Article 4.”

Pausing there, sir, we say the explanatory notes themselves are helpful, they show absolutely clearly an intention of transposing, and no suggestion of anything more than that. I should in fairness take you over the page to para. 38 which, at first sight, might appear to undermine what I am submitting to you, but on proper analysis does not.

> “38. The Tribunal does not consider that the Explanatory Notes can bear the weight placed on them by the appellants. With all due respect to the author of the Notes, we do not regard the paraphrase at paragraph 400 as to the effect of Article 4 to be helpful in construing what Article 4 actually requires. Further, we do not consider that it should be relied on as an indication that it was the consider view of the Government at the time that a full appeal on the merits before the Tribunal was the only proper implementation of the Article 4 rights. On the contrary, we accept Ofcom’s submission that the reference in paragraph 416 to two kinds of decisions which are not to be appealed to the Tribunal, only one of which was a kind of decision falling outside the scope of the Community Directives, indicates to the contrary.”

Sir, the Tribunal was there making a slightly different point. T-Mobile was saying that Article 4 requires a full appeal on the merits, that was what was being argued there, and hence s.192 must require a full appeal on the merits. But the Tribunal in para. 38 was agreeing with Ofcom’s submission that the Explanatory Notes do not reveal that Parliament took the view that Article 4 must always require a full appeal on the merits. It might be that

judicial review is sufficient and, indeed in para. 42 they found that judicial review was sufficient.

So the Tribunal was not disagreeing with the proposition that s.192 was intending to transpose Article 4 and no more, we say that is absolutely plain from the Explanatory Notes. Sir, we say that the ambit of what you have to decide on this appeal is therefore limited to price determination appeals from dispute determination appeals, and not beyond that. There is no automatic read across as Mr. Read suggested.

I was going to leave to my learned friends who dealt with the point the first time around, the Competition Act parallels, and it may be they can deal with that in their notes. Suffice it to say that we of course accept the similarities of the drafting of the Competition Act and the drafting of the 2003 Act, but we say the point goes nowhere. In the first instance, there is plainly, as Mr. Read had to accept, a very important difference on wording in relation to the Tribunal making the decision itself in the Competition Act format and the primary remitting remedy back to Ofcom in this case. There is a much more fundamental difference which is as to the nature of the decisions being appealed from the Competition Act forum and the classification of those decisions as criminal, but I will leave that to my learned friends to deal with in more detail given the time.

My learned friend sought to suggest that the stance of Ofcom on this application was at variance with the position in previous cases when it was suggested there has been a general attitude of "let it all in" which is now being abruptly changed in this case.

We do not accept that that is right or a fair characterisation of the position in any way.

What I am not going to do is to be sucked into analysis of previous cases as to the basis on which evidence was allowed in or not in because that really would be a satellite litigation of the worst sort.

THE CHAIRMAN: I quite agree that would not be helpful.

MR. HERBERG: Ultimately, even if the point has not been taken before, it is not a jot alter the fact that the Tribunal are having to decide the issue of principle on this occasion. It is certainly the case that Ofcom have become increasingly concerned about the potential for bypass of the regulator's judgment by reference to new arguments, new issues appearing on appeal. So it is certainly a matter of increasing concern, but specifically in relation to the TRD case we certainly do not accept that the basis on which the evidence was not objected to on that occasion is anywhere near what we were faced with here.

My learned friend referred to the *Vodafone* case at tab 25 and the standard of profound and rigorous scrutiny which was there referred to, picking up on the earlier *Hutchison* case. We

say there is absolutely nothing inconsistent in there being, at least in some circumstances, a profound and rigorous scrutiny of Ofcom's decision making on an appeal to the Tribunal with that scrutiny being limited to an examination of Ofcom's reasoning on the basis of the materials which were before it. Indeed, the opposite would be very odd. It is very difficult to see how an emphasis on profound and rigorous scrutiny of Ofcom's reasoning, Ofcom's analysis, is consistent with a wide power of allowing new evidence and new arguments to be made which by definition Ofcom was not considering and scrutinising profoundly or rigorously or otherwise on its decision below.

Similarly, we say that the reliance on the asserted obligation of Ofcom to investigate, as it were, of its own motion takes BT nowhere. We do say it is utterly unrealistic to suggest that Ofcom's undenied right, as it were, to go beyond the parties' own submissions and to consider matters of its own motion can transplant to a proposition that it can now be a ground of appeal that, unprompted by the parties, Ofcom was under an obligation to carry out a detailed quantitative consumer benefit calculation within the very narrow four month timetable in which it had to deal with the parties' submissions and reaching a conclusion on the dispute referred. To say that it should have done all that, not on the basis of anything put to it by the parties but simply of its own motion in a sense is by the by. BT saw the draft determination. If it took the view that there was a substantial gap in Ofcom's analysis its response to that was the time to say so. By preference it ought to have supplied the missing analysis and told Ofcom what it ought to have done, but failing that, if that was practically impossible because of the timing when it got the draft determination, at the very least it ought to have said: "There is a gap in this analysis, here it is as best as we can sketch it out, you must extend time and do it yourself or give us an opportunity to put it in". What we say is desperately unfair as a proposition and simply not in accordance with the statutory scheme is to suggest that they can effectively hang back, not put it in themselves and then unveil the case for the first time on the appeal and say: "It does not matter we did not put it in, you should have done it yourself below and that is why we were allowed to put it in on the appeal."

Can I turn then very briefly, I hope, to the facts. I have perhaps made rather better progress than I feared I might do. The considerable part of Mr. Read's attack was on a submission which I hoped I had made clear I was not making for the purposes of this hearing, namely, that BT ought to have known of the need for the disputed evidence before the draft determination. Whatever the rights and wrongs of that, and there is a huge temptation to say things about it in response, I indicated quite clearly that I was content to proceed for the

purpose of this hearing on the basis of the proposition that it was when they got the draft determination that it was revealed to BT the lines that Ofcom were taking and, indeed, not taking in its proposed determination of the dispute.

I was concerned at some point in his submissions it appeared to be suggested that BT were still not aware of the true position even after 23rd December. With the exception of one limited point, which is the step function to which I will come, that is simply not the position on BT's own evidence. I will not take you back to it, but for your note can I refer you to Mr. Fitzakerly's statement at para. 15 where he says in terms that that was the position, that when they got the draft determination they were then aware of the scope of the dispute and what Ofcom was promoting.

MR. READ: Sir, just so we are clear about the point I was making. I was making the point that BT knew obviously from the draft determination what Ofcom was saying in the draft determination, but they were putting back arguments saying: "No, you have gone beyond the scope". It was in that context that I was saying that BT was still seeking to argue that the draft determination should not stand because of the scope. That was the point I was making, rather than necessarily saying that BT could not see what was in the draft determination, which is the point that Mr. Fitzakerly goes to. I hope that helps Mr. Herberg.

MR. HERBERG: It is absolutely right that BT did continue to make arguments about the scope as they were perfectly entitled to do; but it is also the case, absolutely clearly, that BT went on to address what was in the draft determination on the basis that it might be what Ofcom found. They did not say, "We are going to argue with you about scope and not address your substantial arguments on any point because we do not think they are relevant". They did what any prudent litigant or person in a dispute situation would do, which is to address the arguments in any event. I think I took you to the point – it may be in the covering letter – where that was made clear, but I will see if I can find it before I sit down.

As I understand it, it is certainly not being suggested that at any time after the date of the draft determination BT did not know what there was to answer, apart from in relation to the step function where it is suggested that something new came out of the final decision.

There was some suggestion yesterday that we do not know whether the expert evidence was going to be disputed or not, whether the disputed evidence will actually be contested by BT or anyone else, it may be partly undisputed. The simple response to that is that you simply cannot allow admission on the basis that it may not be disputed. If it is allowed in there will need to be detailed expert evidence and we will in due course see the extent to which it is disputed. That cannot possibly be a reason for allowing it in. Indeed, our objection was not

based on the obvious falsity of the evidence, that is not the basis on which the objection is taken.

Sir, can I then deal, I hope shortly, with the step function point. We say that it is actually a very limited point indeed and there was perhaps a danger in the way that BT's case was put of the tail wagging the dog. This is a very limited self-contained point which should not affect the overall issue as to the objection to BT's evidence as raising new matters. This all arose out of one footnote in BT's skeleton argument, footnote 42, which made the point, purportedly by way of illustration, that there were new matters raised in the final determination and that effectively this is the one that had been identified, Ofcom placing heavy reliance on the step function within 956 in its final determination, and that involving a misunderstanding of Dobbs 1 as commented on in Dobbs 3. That is the point that is being made.

I took you in my opening to passages where the step function issue was addressed in the draft determination so it is absolutely obvious that that the step function point was well in issue and was fairly and squarely there for BT to respond to. That leaves the much more limited point about whether Professor Dobbs' evidence is nevertheless admissible to show that there is something wrong in the final determination that they could not have dealt with beforehand to make the point that it is said that BT nevertheless got it wrong in the way they dealt with the point.

Sir, I do not think you have actually been taken directly to the third report of Professor Dobbs, just so that you can see the nature and scope of what we are arguing about here. This is the new evidence that deals with this point, and it is in tab 18 of bundle 2. The point really starts at para.20 and ends at para.27, and does not include, indeed, para.26, which is a separate point. The sum total of what one is arguing about is effectively paras.20 to 25 and 27 of Dobbs 3. If the worst came to the worst I would submit that those paragraphs ought to be admitted, if nothing else. It is an extremely limited point. It certainly should not in any way compromise the main objection which Ofcom makes and maintains to the thrust of the new evidence which is going far wider and is actually a new analysis, as I have already submitted, as to the specific effects of the specific pricing structure. This is a quite separate and very limited issue.

The second point I would make is that everything that is in these paragraphs effectively is argument. It could come with really as much force or lack of force from Mr. Read as from Professor Dobbs. When one looks at it, it is effectively argument. Professor Dobbs does at

para.20 and following is look at the conclusion in 185 as to step function and underlines various points in BT's findings. At para.21 he says:

> "Concerning Ofcom's comments at paragraph 5.185, and repeated at paragraph 5.187 given Ofcom chose to give such particular emphasis to the incentives within a step to the exclusion of incentives to move down steps, the comments underlined are broadly correct in respect of my first report."

So the parts he is underlining as to the conclusions are roughly right.

> "My first report only identified that the wholesale price must be an increasing function of retail prices – but did not identify what rate of increase would suffice to guarantee incentives for MNOs to reduce retail prices. It merely showed that using an increasing function (smooth or step function) was 'on the right track'."

So this all of a piece with my submission that the first reports were very general in terms and talks about the possibility "on the right track" and did not deal with specific effects. Then he says that Ofcom rightly noted:

> "… the effect 'on a step' is to encourage the MNO to increase retail price and move 'along the step'."

That, in itself, is significant. He is saying that Ofcom is right, when you are on a particular step there is an incentive to move to the top end of that step. Maldoom also accepts that. He then says:

> "However, it completely ignores the important incentive to move to a lower step. For example, as I had specifically commented '*if the step to the left is sufficiently far down, this incentivises the MNO to reduce price to move down to this step'*."

He says they completely ignore it. We would say, with respect, that that is rather unfair. While para.188, with which he is dealing, does not talk about moving down a step, para.187 the immediately preceding paragraph, and one can see he quotes that at the top of the page, makes exactly that point, in relation to BT, including Dobbs' arguments, the NCCN may actually lead MNOs to leave prices unchanged or even decrease them. There may be some scope for this, but only under certain circumstances. This is because there is a complex set of factors which will affect whether the wholesale price schedule creates this incentive and those factors included as identified by BT and identified by Dobbs, such as without detailed information it is difficult definitively to conclude whether the charge would result in increased, decreased or unchanged 080 retail rates. So it is not quite fair to say that Ofcom

did not accept that there were competing incentives in both directions and that the overall incentive might be down as well as up. In any event, the point here is not to, as it were, attack Dobbs 3 or to say it is false but just to look at the limited ambit.

One then sees 23, 24, 25, 27, the same observation applies. He is effectively simply considering those paragraphs. He is advancing an argument, not expert evidence, but simply an argument as the correctness or otherwise of those paragraphs of the final determination. He says that it is unfair to say that BT has not provided any evidence that would persuade them to change their minds. There is a point made therefore about evidence. He makes the point in 25 that:

> "… Ofcom nor other interested parties have managed to show that NCCN 956 *clearly* provides any incentive for MNOs to *increase* prices."

That is a point based on the burden of proof. He is saying, in other words, it has not been proved the way.

Then at para.27 he says:

> "My initial reports, thus, explicitly suggested that *are* significant incentives to 'step down' … The fact that the wholesale price function is an increasing function is, in my view, in itself, evidence that there are some incentives to decrease price. The next section …"

and this is then the divide –

> "… [goes on to show] that it is indeed likely that NCCN 956 gives an incentive to MNOs to reduce prices."

We then move into what we say is new argument and new evidence as to why actually he was right in speculating in the earlier reports that it might be likely that there would be an incentive to reduce prices.

Sir, what I say in relation to that is, first of all, the Trojan horse of step changes should not determine your decision on the much more fundamental question of the admissibility or inadmissibility of new evidence. We say that even on that question alone we would invite the Tribunal to exclude that part of Dobbs 3 along with everything else on the basis that there is nothing new. There is no new expert evidence that is being excluded. Where there is a quarrel with the way Ofcom have treated the matter in a final determination, we are not shutting them out from making all proper submissions on it. If the Tribunal had any lingering concern about whether Professor Dobbs ought to be allowed to say that, this is the sort of thing that he might well say if he were being cross-examined on his first report. That is a genuine point that could come up by way of defending his first report or by commenting

on Ofcom's decisions. That would be the sort of matter which could be ventilated. We would have no particular objection to those paragraphs alone being allowed in although we say that is not the most appropriate course.

Sir, that does raise the question of witnesses and, as it were, the segregation of evidence, a wider point made by Mr. Read. There is absolutely no guarantee that either Professor Dobbs or Dr. Maldoom would be required to give oral evidence in this matter. That would be a matter for further consideration, but given the nature of their first reports, matters that were before Ofcom, it is certainly not in any way assured that they would be required to give evidence at all. Even if they were, we say that would not give rise to any difficulties at all. There is a very clear divide, we say, in this case between the nature of the evidence that they gave on their first reports on which they could be cross-examined and the much more extensive evidence they give in their subsequent reports which are different in nature which would be inadmissible matter. The Tribunal would, if our objection were upheld, not be interested in their specific arguments as to whether NCCN 956 has a specific effect or reducing price because of their further worth. That is quite separate from the matters on which they gave evidence in their first report and there would be no difficulty in the usual way in confining an expert to the subject of their relevant reports as a matter which was before the Tribunal. It simply would not be relevant to looking at whether Ofcom had got it wrong as a matter of fact or law to hear their opinions on the wider matter. We certainly do not shrink from the proposition that this applies to arguments of law as well. We say it is absolutely right – this was another point that Mr. Read made and suggested it would be surprising. We say that it is not in the least surprising, it is not typically the case that a party which does not take a point at first instance can freely raise it on appeal. They may be permitted to do so potentially with costs penalties or whatever it is in their favour, but it is certainly not the case that there is an automatic right to make new arguments which have not been advanced below with impunity. That is of course the notice of appeal no doubt requires them to identify errors of law made by Ofcom on the appeal.

Of course, especially in a regulatory framework, it is frequently the case that it is going to be very difficult to divide up pure arguments of law from arguments of fact. There may well be mixed questions of fact and law, but the basic approach is that the Tribunal is looking at Ofcom's decision on what was before it, and therefore naturally they will be looking at the arguments that are made to it. If there is identified as being an entirely new point of law that was never put that would be a matter on which the Tribunal would have to,

as it were, take control of its own jurisdiction as to whether it was going to permit a party to be heard or not.

THE CHAIRMAN: Just to take an entirely hypothetical example, suppose in the course of dispute resolution process Ofcom in its final determination decided the matter on a point that it had never aired at all before, clearly that is something which would raise a very serious question on appeal, but are you saying in order to raise that question one would have to rely, as an appellant, on the exceptional circumstances exception that you are postulating?

MR. HERBERG: Sir, yes, one would rely on that, and, of course, there would be no objection taken. If it was a genuinely new point it would be an obvious case in which a party in fairness and in justice would have to be allowed to make submissions on it. One hopes that would not arise, but Ofcom, if it is in a position where it decides as a result of responses to a draft determination that it is going to seriously change course on fact or law, or the result, it will typically extend the period, find exceptional circumstances and is to refer the draft determination, so it would not even get to that stage, but of course if it did not do so, or if it did not realise it was putting a new point then that would be a classic situation where it would be absolutely right for the parties to be entitled to address that point. We would not even require a hearing before the Tribunal in that situation one would hope, that would be the juristic basis by which the parties would be addressing the point.

THE CHAIRMAN: Yes, thank you.

PROFESSOR STONEMAN: While we are asking you questions, do I read it correctly that one of your arguments is that if new evidence is allowed at the appeal stage, that this will encourage parties to the dispute not to put in evidence at the administrative stage?

MR. HERBERG: Sir, yes, particularly ----

PROFESSOR STONEMAN: What is the incentive structure for the parties to not put in evidence that is to their own advantage at as early a stage as possible.

MR. HERBERG: Its infrastructure is apparent when one bears in mind that we are dealing with a four month limited process with very limited time on the parties as well as on Ofcom to arrive at a decision. The parties will therefore have a short amount of time, as it were, to get their houses in order, to deploy their evidence and to make their arguments to Ofcom, and there may well be cases where they effectively take the view "Look, we cannot do all this, Ofcom have given us the decision on 23rd December we are not going to have time to do everything. Let us not worry about this now, we can leave it until later, let us concentrate on putting on the best case we can on X. We will win it on that and, if necessary, we can

deal with point Y before the Tribunal. They may take the view the calculation is that it is better therefore to deal with one aspect well, for example, than to try and cover the whole range. That could be a decision which a perfectly responsible party could decide to take if it has the assurance that it has a wide right of admission on appeal.

PROFESSOR STONEMAN: If you take this particular case, let us say that is what BT did just for the sake of argument, BT got their calculations wrong and they lost, if you like, and as a result they are suffering from not having the revenue under NCCN 956 for a considerable period of time and they have also had to repay to the MNOs considerable sums of money that may have come across.

MR. HERBERG: Sir, yes.

PROFESSOR STONEMAN: I find it difficult to believe how that incentive structure would encourage them to hold back evidence because they might put it in on appeal?

MR. HERBERG: I am sure that typically parties would want to put the best case they could to Ofcom as well as the best case on appeal. I am not suggesting that it would be frequently the case that a party would deliberately decide to hold back its case for the appeal, why not put it before Ofcom as well. Typically, although there might be rare cases where, for tactical reasons, they thought the point would play better in a tribunal format, I know not. My argument does not rest on that extreme case. My argument is based on the nature of the process below being a short time limited process meaning that parties working under great pressure may well decide that they can afford not to run matters to the full, they know they have got a full effectively *de novo* re-hearing later. Although it is not put in terms of a *de novo* hearing that is what it amounts to in relation to those matters.

I am not making any submissions about what BT thought in this case, but just to take one example, they chose to engage Professor Dobbs to get him to provide the evidence, although they had been repeatedly told he was not back from holiday until 18th January, even though their submissions were actually due in on 12th January. If they knew that they had no second bite of the cherry and anything they were to get from him had to be within this time limited period they might not have decided to go with an expert who was only back from holiday well after they were meant to have their submissions in. It might be they would have said, "We will use our internal expert and get something from him", or, "We will use someone different". It is pure speculation, I am not making any suggestions about this case, but one can see that as soon as the pressure is off in terms of what is meant to be a limited four month swift basic dispute resolution procedure, as soon as the pressure is off of knowing that there is a full right of appeal where all new matters can be put in parties may

have completely different strategies as to what they feel that they can get together or they have to get together before the hearing. It does not involve bad faith or the suggestion that people are trying to gain in the system by deliberately holding it back.

Sir, subject to two comments on the applications of the interveners those are my submissions.

In relation to the status of the experts' reports, Mr. O'Donoghue's submissions, we have not sought to argue, as you know, that the reports should be excluded because of their status. We do see – the point that Mr. Read made at the end – value if they are to be admitted. We say, in the first place, that the BT experts could only be admitted as experts' reports, we do not think they are factual material. We do see a value, if they are to be admitted, in having them properly introduced as proper expert reports which would involve expert declarations and potentially adjustments. It is not simply a formal matter of putting a little acknowledgement at the bottom, it is a matter of seriously considering whether or not there is anything they want to change or amplify. Of course it would still go to weight as to what weight ought to be placed on those reports.

In relation to the T-Mobile application, I would not like it to be thought that we, as it were – and it is not our position – think that there are no problems with the notice of appeal. I have adverted repeatedly to difficulties in appreciating how it is that the new material is to be used in supporting the notice of appeal and I stood up to intervene to make the point when it was said that there was no attack on principle, the use of it in Principle 1, that there had been inclarity as to the way it was used to attack Principle 1 and that would be a matter of concern if the fresh material was being used on that basis as well. I would not like it to be thought that because we have not made a separate application to the same effect that we do not see that there is a difficulty and a problem on that aspect of the matter.

Sir, can I just have a moment? (After a pause) Sir, there was one reference which I was going to give you, which I am afraid I have not been able to find at the moment, for the proposition that BT stated in providing their response to the draft determination that they objected to scope but that nevertheless they were going to address the matters which they contended were out of scope. I cannot at the moment find that. If I can find it I might just simply put a reference in.

THE CHAIRMAN: That will be absolutely fine.

MR. HERBERG: Sir, I am grateful. Unless there is anything further I can assist the Tribunal with, those are my submissions.

THE CHAIRMAN: No, Mr. Herberg, that was very helpful, and thank you all for your submissions. Two points before we rise. As I said, we are very happy to receive written submissions in reply by, let us say, tomorrow morning from the interveners and Mr. Herberg's reference, but only if you have something to say in reply.

Secondly, delightful though it has been to have you all here, I am very conscious that we do not have a timetable running up to the 10th January hearing. Rather than have a further hearing before the Tribunal, which would have to take place after we hand down judgment, what I would suggest is that when we hand down judgment the parties co-ordinate and seek to agree a timetable for events going forward and seek to send that agreement within a week of the judgment being handed down to the Tribunal for the Tribunal either to approve or to raise any difficulties on it. We are happy to leave that in the parties' hands as to precisely what steps are agreed. Clearly it will depend on what we say in the judgment whether BT will need to amend its notice to narrow it or whatever. That is a matter which we will have to deal with later.

MR. READ: The only observation I was going to raise is that it is slightly dependent upon when the judgment comes out. All I was going to ask is that the Tribunal might perhaps give a bit of indulgence if it is getting close to the holiday period. Obviously all the parties will try and do their best to sort out a timetable but it will need a bit of reflection and it does depend upon when the judgment comes out. If the Tribunal can bear with the goodwill of the parties to actually sort this problem out then we will undertake to do so.

THE CHAIRMAN: I am sure the parties will behave sensibly. For our part, we will try and get a judgment out as quickly as possible, but I am conscious that it is not going to a straightforward judgment to write.

The only point we would make on timetable is that we would look to have an end date in terms of when everything is done to be ready for a 10th January trial at some point in early December, around 10th December, let us say, if I can put that down as a marker to work to. Apart from that, I suspect we are relatively indifferent as to the stages the parties agree for pleadings and skeletons, and so on.

Unless there is anything more?

MR. HERBERG: Sir, if I could supply the reference now to avoid me having to bother everyone overnight. It comes in BT's response to the draft determination which was the 12th January document which is at tab 8 in the first document bundle, para.2.4. This was their response. The scope of the dispute, para.2.3 explains that BT thinks that Ofcom has gone beyond scope; and then identifies where they have gone beyond scope. Then at 2.4 they say that

BT responds to these points even though the points go beyond the published scope, in order to ensure Ofcom's full understanding of BT's position. Sir, that is the paragraph that makes it clear that they are actually addressing the points that were beyond scope, they said.

THE CHAIRMAN: Thank you very much.

MR. HERBERG: I am obliged.

THE CHAIRMAN: Thank you all very much.