IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1111/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 November 2009

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

– v –

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

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HEARING – APPLICATION TO AMEND

APPEARANCES

Mr. Meredith Pickford (instructed by Osborne Clarke LLP) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

THE CHAIRMAN: Good morning ladies and gentlemen. Our main if not only matter to consider at this CMC is the application to amend the notice of appeal. You are going to kick off, are you, then, Mr. Pickford?

MR. PICKFORD: I am, thank you, madam. As you can see audience figures are somewhat down compared to our usual ratings for this particular hearing – such is the level of excitement of Sky and BT that they have stayed away altogether and, indeed, we thought at the end of last week that Ofcom might be as well, but luckily I have the pleasure of being opposite Mr. Holmes today, who acts for Ofcom.

This is Carphone Warehouse's application to amend its notice of appeal under rule 11 of the Tribunal Rules. There are also some housekeeping matters concerning timing of the next steps in the proceedings that it might be convenient for the Tribunal to touch upon at the end of the hearing. How much we can decide in relation to those today but we will have to wait and see.

Turning then to the amendment, the argument which Carphone Warehouse seeks to introduce is that Ofcom's consultation procedure was flawed, not only for the specific reasons already identified in the notice of appeal, but also because it should have disclosed the financial models underlying the price control. The amendment seeks to introduce para. 74A into the notice of appeal. If we might just go to the correspondence bundle, and look at tab 1, and turn to p.22 of the draft amended grounds. We have here section 5 of the notice of appeal, which sets out the existing grounds of appeal and they are divided into two. First we have the non-price control matters, and those start at para. 69 and then we go on to the price control matters, and they start at para.76. In relation to the non-price control matters Carphone Warehouse currently pleads two separate points, and they both concern different types of procedural flaw. The first point is that we say Ofcom's decision to divorce the setting of the WLR price control from the setting of the MPF price control was flawed, and the second point is that we say the consultation was also inadequate. In relation to that latter point we advance two arguments in support of it. First, we say that Ofcom's failure to consult on the draft measure rather than a range of possible measures was in error, and that is at para. 73.

Then at para. 74 we identify failures to consult on some issues, we say at all, and by the proposed amendment we seek to add a further third argument in support of the point that there was inadequate consultation as set out at para.74A Paragraph 74A.1 sets out the history of Carphone Warehouse's requests for provision of information and the model. 74A.2 says that:

"Throughout the consultation process Ofcom refused to provide the models and information described above, even on the basis of a confidentiality ring with equivalent safeguards to those which Ofcom has readily agreed to in the context of these appeal proceedings."

74A.3:

"This prevented CPW from being able properly to test the robustness of the modelling relied upon by Ofcom in determining the price control, including the key assumptions underlining the models, the formula used in their construction and the cost forecasts. It also prevented CPW from being able to carry out sensitivity testing around the assumptions used by Ofcom, and from developing alternative pricing proposals for WLR SMPF and MPF.

74A4:

"By reason of these failures Carphone Warehouse's ability to make cogent and well informed representations on a central element in Ofcom's decision-making process was materially compromised and the consultation was accordingly inadequate."

THE CHAIRMAN: In 74A.2 it says: "… refused to provide the models and information described above".

MR. PICKFORD: Yes.

THE CHAIRMAN: That information described above, what is that then?

MR. PICKFORD: The information is certain underlying financial information that was either, we believe contained in the models or was an input into those models. Given that we had not actually seen the models themselves, we did not know precisely where all the information was that was driving the outputs. What we could see was the outputs of Ofcom's modelling process and what we were trying to get at were all the assumptions that we believed most likely lay in the model that led you to those conclusions. So there is not a very clear and discrete distinction necessarily between information and models, the point is it was everything that was relied upon by Ofcom in its modelling process in getting to its final answer, that is what we were trying to gain access to. We say that that amendment raises a legitimate and important point concerning Ofcom's procedures and Ofcom's opposition to it is not well founded and the scheme of the remainder of my submissions is a relatively simple one. First, I intend to set out what we say is the general structure of Rule 11 and it does merit careful consideration and then I apply that to the facts of this particular case.

THE CHAIRMAN: Perhaps it would help if I could raise two points on which we would particularly welcome your help, they may be points that you are already planning to deal with. One is the point about what effect does it have that there is no particular relief attached to the inadequate consultation grounds, whether the ones that are already included or this one, how does that affect things?

MR. PICKFORD: Yes.

THE CHAIRMAN: The second point, and this is something that I will also want Mr. Holmes to address is particularly having regard to 74A.4 what is it that you say that you have to show in order at the end of the day to make good this claim of inadequate consultation. You seem in 74A.4 to be putting your case quite high by saying that the failures prevented you from making cogent and well-informed representations and then that your ability to do those was materially compromised. We will want to explore what actually you say you have to establish in order to make good this plea, whether you are making a bit of a rod for your own back there.

MR. PICKFORD: Thank you, madam, in relation to that point that you have just raised, I will come on to deal with that more fully, but what I would say for the time being is that we say all of those elements are actually satisfied relatively easily in the present case simply by the fact that we were not provided by the model. We say that of itself meant that we were not able to make cogent and well informed representations, that we were not able to make any representations on something that we did not know about, so by definition they would not have been cogent and well informed. We were able, obviously, to make a number of representations about other elements of the process and we have no quarrel with that. We say that there was one specific part of it that was missing, and it was a central element because it was the financial element for the ultimate price controls and, for that reason, the consultation process was flawed and effectively the adjectives that are used in para. 74A.4 are arguably, to some extent, superfluous, because the essence of it is that we were not able to make representations on something that we could not see.

If we could turn to Rule 11, which is in the authorities bundle, it says:

> "(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give further or consequential directions as may be necessary.

(3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless –

(a) such ground is based on matters of law or fact which have come to light since the appeal was made; or

(b) if it was not practical to include such ground in the notice of appeal; or

(c) the circumstances are exceptional."

Ofcom contends at para.1(b) of its first submissions of 7th October, citing *Rapture*, that under Rule 11(1) the Tribunal has a wide discretion as to whether the permit the amendment which it will exercise in accordance with fairness and justice having regard to all the circumstances.

Save to note that some circumstances may not, in fact, be relevant ones in the exercise of the Tribunal's discretion, we do not dissent from that. It is also common ground between us that Rule 11(3) does limit the Tribunal's discretion in a manner which does not have an exact analogy under the Civil Procedure Rules. However, the Tribunal's Rules do nonetheless share the same overriding objective with the Civil Procedure Rules of enabling the Tribunal to deal with cases justly. We see that reflected in the Guide to Proceedings 2005 at para.3.1. I do not need to take you to it, it is a very obvious point.

Where we part company from Ofcom is we say that Ofcom's approach to Rule 11 substantially over-inflates the role of Rule 11(3) in a way which was never the draftperson's intention and would only serve to frustrate the Tribunal's ability to deal with cases justly. When read in its proper context with due regard to the purpose of the Rules it is quite clear that limitation placed on the exercise of the Tribunal's discretion by Rule 11(3) is itself, in fact, a very limited one.

Can we then turn to the case of *Floe*. This is the cornerstone in many ways of Ofcom's submissions. It is relied on by them, simply for your note, at paras.2 and 16 of their first submissions, and paras.24, 30, 31, 33, 34, 35, of their submissions of 13th October. We say they are quite right to focus on it because it is, in fact, the key authority on Rule 11 and its interpretation. However, we say that Ofcom has unfortunately misunderstood it. *Floe*, together with *VIP*, has a very long running history, which you, madam, have recently had the pleasure of becoming acquainted with. It concerns, amongst other matters, the legality of telecommunications apparatus called GSM gateways. *Floe's* original notice of appeal contained the grounds that the Director General of Telecommunications had failed to base his investigation on the legislation prevailing at the time. One sees that at para.51. That was the terms in which the notice of appeal was originally articulated.

If one goes then to para.18, one sees the amendment that *Floe* sought to introduce.

THE CHAIRMAN: There was no particularisation of that plea in the original ----

MR. PICKFORD: As I understand it, there was not, madam, no. If one goes to para.18 one sees the amendment that *Floe* sought to introduce. It was as follows:

> "'The Appellant ... contends that as a matter of law and application of the facts the Respondent erred in coming to the conclusion that the GSM Gateway devices owned or supplied by the appellant were being operated in contravention of section 1 of the Wireless Telegraphy Act 1949'."

That is the amendment.

Then the Tribunal's analysis of the application and Rule 11 begins at para.28, and it is worthy of careful consideration. They say:

> "It seems to us that, in the High Court and most tribunals, permission would be given to Floe to amend its notice of appeal in order to advance the Primary Argument, subject as appropriate to terms as to costs, depending on the rules as to costs in the particular jurisdiction in question.
>
> We would see that approach to be in accordance with the overriding objective set out in the Civil Procedure Rules ('CPR') Part 1 ..."

Just pausing there, that is the same overriding objective that the Tribunal shares –

> "... and also in accordance with the rules governing amendments in CPR Part 17.
>
> Thus for example:
>
> 'The overriding objective (of the CPR) is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed' per Peter Gibson LJ in *Cobbold v. London Borough of Greenwich*, August 9, 1999, CA.'
>
> However, rule 11 of the Tribunal's Rules is on its face more restrictive than the practice in the High Court, having regard to the terms of rule 11(3). As appears from paragraph 2.1 of the *Guide to Appeals under the Competition Act 1998,* issued in 2000 by the Tribunal's predecessor, the Competition Commission Appeal Tribunal, the Tribunal's Rules are intended to reflect the general philosophy of the Civil Procedure Rules, including the overriding objective. At the same time, the

Tribunal's largely written procedure reflects the Rules of Procedure of the Court of First Instance of the European Communities, as subsequently amended. The CFI rules have been found from experience to be, in broad overview, a suitable model for the kind of cases the Tribunal is asked to determine.

The CFI rules are, however, based on the continental system of pleading, which do not have any system of 'amendment' of the kind familiar to the common law. Article 48(2) of the CFI's Rules of Procedure provides that 'No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'."

We see there the genesis of Rule 11(3). It then goes on to explain at para.32:

"It should be noted that the term 'plea in law' which appears in Article 48(2) of the CFI's Rules of Procedure does not mean 'any legal argument' but is a term of Scottish origin thought to be the nearest, albeit inexact, translation into English of the phrase '*moyen nouveau*' which occurs in the original French version of Article 48(2). That term reflects the distinction in continental between '*le moyen'* (the basic ground relied on) and '*les arguments'* (the arguments in support of the ground). Thus '*le moyen'* is the basic plea, such as error of law, illegality, discrimination, procedural failure, and so on, and '*les arguments'* are the arguments in support of each such plea. In order to mitigate the apparent rigidity of the continental system, they are some '*moyens'* which the Court can raise of its motion if the parties fail to do so. Moreover, although a '*moyen nouveau'* cannot be raised by the parties, there is no objection to the parties advancing additional '*arguments'* in support of an existing '*moyen'*.

Rule 11 of the Tribunal's Rules is not intended to introduce the technicalities of continental-type pleadings before the Tribunal. However, the basis thrust of rule 11 is to limit the possibilities of amendment after an appeal has been introduced."

Plainly, it is not intended to introduce all of the technicalities because we see from Rule 11(1) that there is a broad common law style discretion that is conferred upon the Tribunal, but what this passage does enable us to see is precisely what was intended by the introduction of Rule 11(3) and its extremely limited scope. All it is intended to do is prevent an appeal which is based on, say, alleged procedural failings from veering off in a totally different direction into an appeal based on, say, an error of law. That does not rob Rule 11(3) of its substance as Ofcom alleges. All it does is to make clear that the ambit of Rule 11(3) is a very limited one. Quite rightly so, we say, because it was not intended to

frustrate the ability of the Tribunal to exercise its discretion in a way that enables it to deal with cases justly and to enable the real dispute between the parties to be adjudicated upon. Nor was it intended, we say, to introduce the type of angels dancing on a pin approach which Ofcom's approach is often prone to lead to because once one leaves behind the clear lights of a ground of appeal in this context being equivalent to *le moyen*, one begins very often to find oneself embroiled in deeply unproductive debates about whether a ground is an argument or an argument is a ground. That is not a particular concern if one sticks to the Tribunal's clear analysis in *Floe*.

Ofcom, for their part, say their approach is that a ground of appeal must specify in at least broad terms the basis on which the procedural substance of a decision is alleged to be flawed. Now, in one sense we so not quibble with that. If a notice of appeal is to satisfy Rule 8(4), of course the grounds of appeal need to be supplemented by an explanation of the basis on which the argument is brought forward. So, a notice of appeal needs both *le moyen* and *les arguments*. Without *les arguments* the notice of appeal is clearly deficient and insufficiently precise to enable the Tribunal to adjudicate on it. That is exactly why, in the present case we need to amend our pleading to introduce the further arguments that we rely upon. We are not saying that we could make these points free-standing without something more concrete to anchor them in, but they are the arguments.

Ofcom's mistake is to read across that requirement for specificity that arises out of Rule 8, which serves one purpose, into Rule 11(3) which, as the Tribunal's analysis in *Floe* makes clear, serves an entirely different purpose, Ofcom's approach simply does not accord with the explanation that is advanced by the Tribunal, including the President of the Tribunal who was instrumental in developing the rules, in *Floe*.

Now, Ofcom's real difficulty, we say, is this - and it is a question that it persistently fails to grapple with: the Tribunal is quite capable of exercising its discretion under Rule 11(1) to enable it to act in the interests of the fair and just disposal of appeals. It does not require a straight jacket in the form of an over-inflated approach to Rule 11(3) to assist it. Indeed, quite the contrary - such a straitjacket would positive frustrate it in its ability to deal with cases justly. Any arguments that Ofcom might want to advance it is quite capable of advancing and the Tribunal is quite capable of adjudicating on them under Rule 11(1). The Tribunal can take those points into account as appropriate in any give case.

THE CHAIRMAN: The point that you said a moment ago - "Well, the aim of this distinction and the aim of Rule 11(3) is to stop the case veering off in a totally different direction" -- That leads me to wonder that when you are examining this question, "Is it a *moyen*? Is it an

argument?", is that something that you get looking just at the words or the structure of the pleading, or is it something that you arrive at by saying, "Well, what would have to be done by the parties in order to investigate this new ground? If those sorts of investigations, or the kind of evidence that would be needed is something which is entirely different from the kinds of investigations and evidence that would be needed for the existing pleading, does that tell us anything about whether it is a new *moyen* rather a new *argument*, or is that just a discretionary point?

MR. PICKFORD: No, madam, we say it does not. What enables you to distinguish between an *argument* and a *moyen* is looking back to the origins of this rule as explained by the Tribunal, and its basis in continental pleadings. One sees quite clearly from that that *moyens* are exceptionally high level. They are error of law; procedure failure, and the other grounds listed there - discrimination. They are those types of exceptionally high level point, and for whatever reason continental systems of pleading developed on the basis that one had to constrain one's appeal as one went through the legal process to the original *moyens* that were pleaded. Within that there is, in common with the common law, a considerable discretion to permit amendments.

THE CHAIRMAN: But does it not later say that if you had a predatory pricing case -- In para. 42,

> "-- cannot raise an appeal or a complaint of excessive pricing when the original complaint was one of predatory pricing".

Those might both be said to be an error of law if they arose from an interpretation of Article 82 ----

MR. PICKFORD: They might be. In any given case there may be fine distinctions that ultimately the Tribunal is called upon to make. That was not, in fact, a distinction that the Tribunal was being called upon to make in this particular case. It is illustrative that in the *Floe* case the original pleading was in exceptionally broad terms and the Tribunal was quite happy in that case to grant the amendment and it did not think that Rule 11(3) applied.

Now, I accept that there may be other difficult cases where one has to carefully dissect what truly is a *moyen* from an *argument*. But, when I come on to deal with this particular application, we say that it is very clear which side of the line this application sits - whether or not there are other applications that would be less clear.

Now, Ofcom also refers to the cases of *Rapture* and *H3G*. I can deal with those, if necessary, in reply, but our basic submission in relation to both of them is that they do not add anything over *Floe*. They substantially relate to their own facts. They do not contain an

analysis of the origins of a Rule 11(3) which *Flo*e does. Indeed, to that extent they are essentially *per incuriam* because it appears that in both cases the Tribunal was not taken to the analysis to which I have taken the Tribunal in Floe, which explains the distinction between *moyen* and *argument*.

So, coming on to the question which was just troubling the Tribunal, if we apply this analysis now to the facts of this case we have two points. Our first point is that *le moyen* in the present case is procedural failure, as identified as a *moyen* in *Floe*. *Les arguments* in support of that are currently those set out in the notice of appeal - that is, the de-coupling point; the need to consult on the measure not a range; the failure to consult on certain discreet, albeit we say important, issues. The latter two we have grouped together as challenges to the adequacy of Ofcom's consultation. On that basis we say that the proposed new argument that Ofcom failed to disclose its model is simply another argument in support of an existing *moyen* - namely, procedural failure. That is our first point.

We say that in any event, even if we apply Ofcom's approach, which is another step down, we still meet that test. To remind the Tribunal, they say that a ground of appeal must specify, at least in broad terms, the basis upon which the procedural substance of a decision is alleged to be flawed. On that approach we have two procedural grounds of appeal. The first basis on which we say there is a procedural failure is the de-coupling point. The second basis on which we say there is a procedural failure is that the consultation was inadequate. In relation to that point we currently raise two arguments in support and the amendments will be the third argument in support. We say that whichever approach one takes, we are the right side of the line - whether it is our approach or Ofcom's approach.

Turning then to Rule 11(1) - the exercise of the Tribunal's discretion - we say that at the heart of the new argument lies the following point: is the respondent in the position of Talk Talk Group, whose business model depends critically on the inputs it buys from a monopoly provider such as BT, required to appeal to this Tribunal in order to scrutinise the models underpinning that price control when it now appears that those models could have been disclosed, we say, with appropriate confidentiality arrangements during the consultation procedure itself. We say that raises an important point of principle, and it is one that should be adjudicated on.

To deal with one of the points that the Tribunal raised with me at the outset, we say that there are very real practical ramifications for that point. One of those is that Ofcom is about to embark on the same process of consultation in relation to the same price controls as they would apply from April 2011. Now we have not asked for a declaration from the Tribunal

but in advancing this point we are anticipating that the Tribunal will give a judgment in relation to it and we would hope that that judgment could be relied upon to inform the future approach of Ofcom to these matters. So they are very real because they are about to come and hit us again.

There is a second respect in which we say that there are practical ramifications from this point which is that it should inform the approach that the Competition Commission takes in scrutinising Ofcom's modelling, because we say the failure to disclose it during the consultation process means that now is the very first opportunity for parties such as Carphone Warehouse to subject that model to proper scrutiny, and we say that means the Competition Commission as it goes through analysing the price control needs to be particularly alert to the fact that there was not a final round of consultation when parties were able to bring forward arguments in relation to the model previously and now really is the time for that detailed scrutiny. So we say there were those two respects in which this point as important practical ramifications notwithstanding that we have not sought any sort of declaration in relation to it.

What are Ofcom's objections under Rule 11.1? They are essentially threefold. Firstly, they say that they are prejudiced by having to do additional work, secondly they say that the point will be sterile if there is no accompanying price control matter arising out of it and, thirdly, they say that we should not be permitted to chop and change our case at least without explaining, more properly than we have done, why.

In relation to the first issue, it is notable that Ofcom do not argue that they could not be compensated in costs should the amendment be allowed. That is not their position, they say that misses the point. They say t hat they will nonetheless be prejudiced by the fact that they would have to do additional work in order to respond to the point. Ofcom are somewhat unclear about the extent of that additional burden on them. They say at para. 16 of their second submissions of 13th October, that it is hard to quantify.

But if one then turns to para. 17, at tab 10 that encapsulates the essence of Ofcom's concerns. It may be worthwhile turning to that just to read it. They say this ----

THE CHAIRMAN: I am sorry, which bundle?

MR. PICKFORD: It is tab 10 of the correspondence bundle, para. 17:

> "To say that such additional burdens 'can be compensated in costs' is to miss the point. Price control appeals pose a significant strain on Ofcom's resources: they are typically highly complex pieces of litigation, raising a myriad of points over an extended period. Ofcom is currently involved in two such appeals and a third

appeal (in respect of WLR) has been described by CPW's counsel as 'very likely'. Ofcom must combine its role as Respondent in these appeals with its ongoing regulatory responsibilities, which, in the case of price controls, constitute an almost continuous cycle of consultations and market reviews. Any increase to the burdens of litigation may therefore carry a cost in terms of Ofcom's general effectiveness in discharging its functions which goes well beyond the direct expense of litigation itself."

So that is Ofcom's point and we have four points to make in response to that. The first is in fact that there is no additional burden in this particular case caused by the amendment at all, and the reason for that is that we intend to appeal the WLR decision. We have the right to bring the same point about the failure to disclose the model in relation to that decision and so if it is not permitted now it will be inevitably something that Ofcom has to deal with later, and all that Ofcom's current resistance to the introduction of the point is achieving is delay, which we say is the precise opposite of the principles that should guide the Tribunal in the exercise of its discretion. That is the first point we make in response.

The second point is that, even within the context of these proceedings, we say that the point we are raising is an issue of principle about whether Carphone Warehouse needs to wait until and incur the costs of an appeal to this Tribunal in order to scrutinise a model which we say it should have had, and could have had access to during the consultation procedure. We say that is not a difficult point on which Ofcom will need to serve reams of evidence. Now Ofcom say that in fact the point may be somewhat complex and difficult, though as I have pointed out they are not entirely sure about how much it will require of them in terms of additional evidence. But they rely on the case of *Easai v National Institute for Health and clinical Excellence* which is at tab 2 D of the authorities bundle, and that illustrates how the point that we rely upon is in fact a heavily factual and context specific one. The first point worth noting here – this is a decision of the Court of Appeal, on appeal from the Administrative Court, and they overturned the decision of the Administrative Court. It is worth just briefly noting that of course the Administrative Court does not engage in lengthy factual investigations, still less does the Court of Appeal do so, and yet it was quite comfortable overturning the decision of the Administrative Court, so that of itself immediately suggests that this is unlikely to be a case that depended on a very heavy and extensive lengthy factual analysis.

THE CHAIRMAN: I think the point they were making, in the Judgment there is a reference t o quite a number of different witness statements that they considered.

MR. PICKFORD: We do not deny that Ofcom may wish to advance some evidence in relation to the point. We say they have over stated how big the point is, but it is no part of my case to persuade the Tribunal that this will not involve Ofcom in material effort. We quite accept it will involve them in some effort, what we say is that they themselves are not even sure about how much effort and we suggest that, in fact, it is not likely to be as great as they are leading the Tribunal currently to fear.

What we do say in relation to *Eisai*, notwithstanding Ofcom say that they are going to need to advance lots of evidence about all the information that we were given and how that fits into the context of the price control generally. We say very similar arguments were in fact advanced in the *Eisai* case by the National Institute, and they were rejected by the Court of Appeal. If one turns simply to look at para. 49 we see in the Judgment of Lord Justice Richards the following:

> "I accept that Eisai was given a great deal of information and was able to make representations of substance. It knew the assumptions that were being applied and could comment on them. It knew what sensitivity analysis had been run and could make comments on those. It could and did make an intelligent response, as far as it went. In my judgment, however, none of that meets the point that it was limited in what it could do to check and comment on the reliability of the model itself."

- that, we say, is the essence of our point too. Indeed, it is *a fortiori* in our case because in the *Eisai* case Eisai was provided with a copy of a model, it simply was not an executable version of the model that you could change the assumptions. In our case we were not provided with a copy of the model at all.

So in response to the question the Tribunal asked me at the outset, in terms of the hurdle that we need to cross in order to prove this point. We say it is not a high hurdle at all, because it follows necessarily from the fact that we were not provided with the model and that the model is clearly a central part of the price control, that there was a material flaw in Ofcom's consultation procedure because at the time it was suggested, "This is all too difficult and confidentiality reasons prevent us from disclosing it". We have now seen that, in fact, those confidentiality reasons do not provide a good reason for not disclosing the model because it has been disclosed to a confidentiality ring, just as we asked for during the consultation procedure. That is our second point in response to Ofcom's point about the burden.

The third point we make ----

THE CHAIRMAN: You do not accept then that, in order to make good this point, you have to show that there was, in fact, something wrong with the model that you would have pointed out to them?

MR. PICKFORD: No, we do not, and if I may I will come on to that point, because that is Ofcom's next answer, their next attempted answer, to our application. They say this is all sterile, and I would like, if I may, to deal with that in due course.

Sticking for the time being with this present ground which is that they say, "This will cause us material additional effort".

Our third response is this: we say Ofcom's focus on its resources and other demands as guiding the exercise of the Tribunal's discretion under Rule 11(1) is, in fact, misconceived and it is unprincipled. We say that the Tribunal's primary function in considering amendments is not one of protecting Ofcom from being exposed to additional work. The Tribunal's role is to hold Ofcom to account where an appeal is brought pursuant to statute, and approaching the issue of amendment it must have regard to the need to deal with cases justly; and in particular to allow the real dispute between the parties to be adjudicated upon. That was quoted in *Floe*.

If Ofcom had insufficient resources to carry out all its functions under the Communications Act properly we say that that constitutes potentially a failure on its part properly to exercise its powers under s.38 in setting its industry levy. We say it is certainly not an important factor for this Tribunal to take account of in exercising its discretion under Rule 11(1).

It is worth just pausing for thought for a moment to test it, because Ofcom's approach, if they were right, would have the following implications: supposing an appellant happens to bring an appeal when things are a little slow for Ofcom. On Ofcom's world view, that would be a factor in favour of the Tribunal exercising its discretion in their favour under Rule 11(1), because if they have not got too much to do they might as well do this as do anything.

Conversely, if you are unlucky enough to bring an appeal when Ofcom are feeling rather put upon and feel they have got rather a lot to do, then according to Ofcom that is unfortunately your bad luck because that is something they say, when it comes to the Tribunal exercising its discretion, should be taken into account under Rule 11(1), and we say that that approach is unprincipled and it is wrong.

Our final point in response to Ofcom's argument about the resource implications is that their position is, in fact, rather short sighted, because we say disclosure of underlying

modelling during the consultation process should assist in better informed decision making by Ofcom, thereby reducing the likelihood of time consuming and expensive appeals. That is the first point that Ofcom advance and our answers to it.

The second point is that they say that, without any price control matters arising out of Ofcom's failure to disclose the model accompanying, the point is sterile. This is the point, madam, you anticipated. We say in response to that three things: first, we say that in so far as Ofcom are saying that an amendment cannot constitute a legitimate basis for contesting the decision in its own right without those accompanying price control matters they are wrong. Ofcom themselves rely on the classic exposition of the requirements of a proper consultation in the *Coughlan* case and that is at tab 2E of the authorities bundle. I simply wish to quote the principal paragraph that Ofcom rely on there, which is para.108, and here the court said this:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken ."

There is no additional requirement that there is a need to demonstrate how the decision maker would have taken a different decision had the consultation been adequate. Indeed, we cannot possibly say, we cannot know what would have happened in the counterfactual world, where we had had the models disclosed to us and we had made representations on them, what Ofcom's response might have been.

If I might develop that point, Ofcom in their defence in response to our notice of appeal say that there are lots of points that we raise which are ones that simply concern the exercise of their discretion. They say they are not points that give rise to an error of law. We do not accept in relation to any of the points that we have raised that they are in that category. Let us suppose for the sake of argument that there are points that do fall within that category, there are points where Ofcom has a discretion which it exercises and it would be impossible to say that whichever way they exercised it they were right or wrong. Nonetheless, in denying us the ability to comment on the model we were denied the ability to influence Ofcom in that decision that it ultimately took. Therefore, it follows necessarily, we say, that matters could have been different and the suggestion that you have to have some accompanying substantive ground has no basis in general public law principles at all.

THE CHAIRMAN: The big difference between this case and a general public law case is that the end result, if you manage to establish inadequate consultation, is that the case gets sent back to the original decision maker. Of course, it is always open to the original decision maker, once they have made good the procedural unfairness, to come to the same substantive decision. The difference here is that that is not what you are asking for because part of this appeal is a merits investigation by a different body into the result at the end of which we will know whether there was anything wrong with the model or not.

MR. PICKFORD: We will know whether there was anything wrong with it, but we will not necessarily know in fact whether Ofcom might have exercised its discretion differently had representations been made to it during the consultation process. We have been throughout this procedure pragmatic in that we have not asked, as appellants before us have asked in relation to the same jurisdiction, "If we identify a procedural error the whole thing has to go back". That had been advanced on previous occasions. That is not our case because we want to see a practical solution to the problems that we identified.

We could have asked for that, we could have said that there is something so fundamentally wrong that the whole thing needs to go back and Ofcom should start again. The problem with Ofcom's approach is that it would effectively make it immune to all sorts of procedural challenge. It could raise the same point in relation to any procedural challenge. It could say, "Unless you can identify a point of substance then it is sterile and we do not have to deal with it". Indeed, if you look at the logic, the logic falls down because even if you do identify something substantive that is related to it they can still say the same thing. They can still say, "Well, that does not add anything to your substantive point. Therefore, we do not need to deal with it". So, on Ofcom's logic it is actually sterile either way. That is why we say it is actually bad logic because ultimately these are points which the Tribunal is entitled to adjudicate upon and we are entitled to raise before it. As we explained before, we have reasons for wanting it to do so because it will inform the approach that the Competition Commission takes to these matters. If we convince you that in fact Ofcom should have provided the model and it did not, then we say that should inform the approach that the Competition Commission takes during its investigations for the reasons I explained.

THE CHAIRMAN: Explain again if there is a link between that point and the point you are making about Ofcom's claim that certain of the complaints that you make are points within their discretion. Is there a link between those two?

MR. PICKFORD: Well, certainly it might be argued that where Ofcom were unable to take account of points in exercising their discretion when they should have done, then that

enables the Competition Commission a greater latitude effectively in exercising its discretion to correct the fact that Ofcom never exercised its discretion properly at the last stage because it did not have the benefit or the material that it should have had. In essence, the failure of consultation leads to a situation in which Ofcom had inadequate material before it on which to take its final decision because it did not have all the representations.

THE CHAIRMAN: So, is another way of saying what I think you are arguing that insofar as Ofcom would want to argue that even in a merits appeal there is some margin of appreciation to be given to them by us, or by the Competition Commission, because they, as the regulator have chosen one of a number of perfectly acceptable ways of doing something, that that margin of appreciation may be eroded in a situation where there was inadequate consultation?

MR. PICKFORD: Indeed, madam, if I may say so, that very succinctly puts the point that I am trying to advance. It is certainly, we say, eroded, and it may be eroded effectively to nothing so that the Competition Commission has to take that element of it again. But, we do not need to debate here, now, exactly how far it has eroded. The point is that it is eroded. That is our first answer to the complaint that this is sterile.

The second answer also is the one that I have just explained - that not only is it wrong as a matter of principle, but there are real practical ramifications from this point, both in relation to the Competition Commission's approach and - because we hope to secure a judgment which informs the approach which Ofcom will take in the future, including in relation to exactly the same price controls that it is about to embark upon consulting on again.

The third point is that we say in any event the factual premise for this argument is not a good one because we can confirm - and we can come on to deal with the ramifications of this later in terms of procedure - to the Tribunal today that we do intend to rely upon failures that have become apparent to us as a result of our investigation of Ofcom's model. Indeed, a number of the other points that we have already raised in our notice of appeal we say are reinforced by the disclosure of the model. So, ultimately we say that this argument is in fact sterile because there will be substantive points in any event, albeit we do not accept that there needs to be in order for the Tribunal to adjudicate on it.

THE CHAIRMAN: We may come to the question of when we are going to see these ----

MR. PICKFORD: Indeed, madam. I can say now - although, again, there are other points we need to discuss later - we propose to do that within fourteen days of today's date. I can explain all the efforts that we have been engaged in to try to bring forward those points as soon as we can.

Now, Ofcom's final point in resistance is this: they say, for its own reasons and with the benefit of expert legal advice, CPW chose not to pursue the challenge in its notice of appeal as originally lodged. They say that at para. 11 of their original submissions which are at Tab 3. Then they build upon that in their subsequent submissions, and they say that as a consequence CPW should not be - in its words - 'permitted to chop and change its case, taking up points which had previously been discarded without offering a good explanation why'. That is their third point.

We have four points in response to that. The first is that an argument which proceeds on the basis that by failing to put something in your notice of appeal, that raises a *prima facie* justification for the Tribunal exercising its discretion against you is a nonsensical one. So, to that extent there cannot be any prima facie objection to the amendment. So, what we then have to turn to, is the next element of Ofcom's argument, which is that they say, "Well, there needs to be at the very least a very good explanation as to why you are doing what you are doing now" -- In relation to that point we say that that requirement for an explanation would be to import into Rule 11(1) the requirements of Rule 11(3). Rule 11(3) is all about explanations as to why something was not originally pleaded and is now pleaded. We say there is no such requirement in Rule 11(1) and it is certainly wrong to import Rule 11(3) into Rule 11(1) - at the very least. So, that is our second point.

The third point we make is that, as it happens, we say the background to the introduction of this point is perfectly understandable. In contrast to the, we would say, somewhat leisurely 13.5 weeks that Ofcom has taken to develop its defence, CPW brought forward its application within the tight timeframe of two months permitted under the Tribunal's rules. We brought the application to amend when we did, just four working days after having been told by Ofcom that it would disclose its model - and, indeed, only one working day after receiving that model. The reason why we brought it then is because it then came to us that what we had previously been told during the consultation process when we had said, "Well, can't you disclose this to a confidentiality ring?", and we had been told, "No, that's not appropriate" -- But, then, suddenly, the model was disclosed to a confidentiality ring. We say that that change of position -- Obviously the two situations are not necessarily identical, but we say that nonetheless there was a change of position, and we say that that demands an explanation and that we could not have known, prior to Ofcom's decision that it was going to disclose to a confidentiality ring -- that it would do so. That is what prompted the amendment which we say we made extremely promptly, having received that new information.

Now, Ofcom's argument in response to this, they say - and this is at para. 28 of their second set of submissions at Tab 10 is that CPW has no reasonable basis for supposing that by disclosing the model during the appeal, Ofcom has thereby accepted that disclosure should have been made at any earlier stage. That is their answer. But, we say that Ofcom's argument proceeds on a false premise. We are not arguing that Ofcom has conceded the point. What we are saying is that its change of position really brings to light the very essence of the point which I have made previously, which is: Why should we have to appeal to get disclosure of a model to a confidentiality ring when it appears to us that we could have had that all along?

If it were necessary - which we say it is not - we say those recent events would in fact justify the Tribunal in applying Rule 11(3)(a), which entitles it to introduce a point even where 11(3) is engaged when there are new facts arising. We say we do not need to, because, as I have explained previously, we said we are firmly within Rule 11(1) territory. But, if the Tribunal were not persuade by that, it could nonetheless go down that route.

Our fourth and final response to Ofcom's point about us having discarded, abandoned this point is again that it simply proceeds on a false factual premise. Carphone Warehouse never discarded the point that Ofcom's LLU decision is procedurally flawed because it failed to disclose the models it relied upon. The simple reason why it never discarded it is because it was never in its notice of appeal in the first place. We say that Ofcom does not have any right to expect the privileged advice that has been provided by CPW's lawyers to it to be disclosed as part of the justification for an application. But, what I can say, and confirm unequivocally to the Tribunal, is this: CPW was never advised to discard this point and never chose to discard it. We say, therefore, that the premise for Ofcom's point that it did is a false one, and the point therefore falls away.

So, we say that in all the circumstances the proposed amendment is a proper one. It raises an important point of principle and the Tribunal should reject Ofcom's attempts to prevent it from adjudicating upon it, and from holding Ofcom to account.

I hope, madam, I have dealt in the course of those submissions with the two points that you asked me at the outset. Unless there are any other ----

THE CHAIRMAN: Well let us see how Mr. Holmes puts his case and then you may need to deal with things in reply.

MR. PICKFORD: Thank you madam.

THE CHAIRMAN: Thank you very much, that is very clear, Mr. Pickford. Mr. Holmes?

MR. HOLMES: Madam, today Carphone Warehouse seeks the Tribunal's permission not amend its notice of appeal in order to advance an additional challenge. The complaint that Carphone Warehouse now wishes to advance is that Ofcom did not provide enough information to Carphone Warehouse during the extensive consultation which preceded the price control decisions at issue in this appeal and that in consequence its ability to respond to the consultation was materially compromised. You asked, madam, if this set the bar too high and if Carphone Warehouse had perhaps made a rod to beat its own back. We say that that is the correct test, there was no error in the pleading and that that is what Carphone Warehouse would need to show if this amendment were to be admitted.

I will refer to this proposed complaint as the "disclosure challenge" as I have done in my written submissions for today. We are told now that there will be other applications to amend, but that Carphone Warehouse is still not able to bring those forward and has given no indication as to what those amendments may involve.

Our primary submission today is that Carphone Warehouse should not be permitted to expand its case in the manner sought. Carphone Warehouse's submission would raise an additional ground of appeal within the meaning of Rule 11(3) and none of the conditions for the application of that rule are met in this case. But whether the case is considered under Rule 11(1) or 11(3) we take issue with Mr. Pickford as to whether there are good reasons for allowing the amendment. We say that the interests of justice are against allowing the amendment at this stage.

In the alternative, if permission is to be given today we say it should be made conditional on two things. First, upon Carphone Warehouse applying for and being permitted to advance further price control arguments arising out of Ofcom's models, that is to say the further amendments to which Mr. Pickford has referred, but has not specified the contents of and upon Carphone Warehouse further particularising the proposed disclosure challenge which, as currently developed, we say is insufficient to enable Ofcom to respond to it properly.

Our opposition, madam, is not borne out of any desire to avoid hard work, as has been suggested today. There is no shortage of that for Ofcom and having just assisted in settling the defence I can assure you that Ofcom does not shirk from its responsibilities before this Tribunal, and the Competition Commission as well as its ongoing regulatory duties under the common regulatory framework. Nor, madam, do we seek to evade judicial scrutiny.

However, we do have a number of concerns about the nature and content of Carphone Warehouse's amendment which we feel it appropriate to raise with the Tribunal today. In particular, it appears to us to risk a complex detour of limited if any relevance to future

cases or to the outcome of these proceedings. It is raised late and, we say, in the specific circumstances in which it is raised that the explanation give for it is not adequate. Finally, it seems to us to be insufficiently supported or particularised.

I propose to divide my submissions into three parts. First, I will identify various aspects of the proposed amendment which we say are relevant to the question of whether or not it should be admitted. I will then turn to Rule 11 and the rather theological debate about how one classifies points between grounds and arguments and, in conclusion, I will develop my submissions as to why we say the application should be refused or alternatively granted only subject to conditions.

I will start with the proposed amendment itself. The Tribunal has already been taken to it but I think it would be helpful to look at it a little further. It is behind tab 1 of the correspondence bundle. As Mr. Pickford has noted, it falls within the non-price control matters of Carphone Warehouse's appeal which begin at p.22, the amendment itself is at p.24 and consists of the underlying text in new para. 74A.

The first point to note about the amendment is that Carphone Warehouse's challenge has a history to it. This emerges from para.74A.1, where Carphone Warehouse makes various references to the correspondence which passed between Ofcom and CPW during the consultation stage. The disclosure challenge is not the result of a sudden inspiration during the course of the appeal. It was pursued with vigour throughout the consultation process, and Carphone Warehouse could easily have included it in the notice of appeal, despite the strict two month's time limit within which the appeal had to be brought.

The second salient feature of Carphone Warehouse's proposed amendment goes to the relief sought in respect of it, a point which you, madam, raised with my friend, Mr. Pickford. You will see in the opening sentence of para.75 that:

> "CPW does not seek to have the LLU Decision set aside for failures of consultation alone. It recognises that it can ask the CC to review the underlying subject matter on the merits and pursues that avenue as its primary remedy."

This is, to say the least, unusual. We are not aware of any other cases before the Tribunal in which grounds of appeal had been pursued without any specific remedy being sought in respect of them. Grounds of appeal are normally brought in order to obtain a practical outcome, whether in the form of a remittal or variation of the contested decision. By way of example, the non-price control matters pursued by Hutchison 3G in the recent mobile call termination litigation would, if successful, have resulted in the removal of any price control from the appellant. This is not the case with Carphone Warehouse's disclosure challenge.

They could have said that these errors merit the decisions being sent back to Ofcom as the primary decision maker to rectify the consultation process of any errors which occurred, and to arrive at a decision informed by the results of consultation. That is not what they said. Instead they do not seek any specific relief of this nature, and we say that Carphone Warehouse's application requires careful scrutiny by the Tribunal. Before permission is granted the Tribunal should be satisfied that there are solid reasons to justify devoting time and resources to it despite the lack of any specific remedy being sought in respect of it.

THE CHAIRMAN: It does raise a problem that they allude to at the end of their submissions, which is what role, if any, do complaints about the procedure followed by the original decision maker have in a situation where there is an appeal on the merits, particularly an appeal which is quite clearly because of this rather unusual structure that we have involving the Competition Commission, meant to be quite a detailed examination of what the end result was. Are you saying that they need to choose effectively in their appeal? They can either raise procedural points and ask for their case to be remitted if those points are successful, or they can raise substantive grounds in which case it goes off to the Competition Commission, but that they cannot combine procedural and substantive complaints?

MR. HOLMES: We do not go that far, madam. What we say is that if a procedural complaint is adjectival or ancillary to a substantive question so that determination of that procedural point is genuinely relevant to the way in which the substantive matter is to be dealt with, then it would be legitimate for that procedural question to be considered without any requirement for an appellant to seek remittal. We accept that procedural challenges can be brought in the context of a merits' appeal. One alternative would be for an appellant to seek remittal. Another alternative would be for an appellant to show that the procedural ground in some way related to the substantive matters and was justified for that reason. What we say is not permissible is to have a sort of retrospective inquiry in relation to the procedures adopted if that does not lead to any substantive outcome, either in terms of remittal or in terms of an impact on the consideration of the price control matters.

THE CHAIRMAN: So on your case he has to establish his point about, well, it would affect how the Competition Commission looks at the substantive issues in order to be able to bring this amendment?

MR. HOLMES: Yes, madam, although I should clarify that Ofcom is the primary decision maker here and we may yet take the position that if procedural error were shown the appropriate

course would be to remit. That is a risk that I think an appellant who raises procedural matters in the interests of affecting the Competition Commission's deliberation must face.

THE CHAIRMAN: Say that again?

MR. HOLMES: I do not wish to foreclose the possibility that Ofcom, when these matters are heard, when the non-price control matters are heard, may itself wish to argue that if a procedural error is shown the appropriate course is not for some intensive standard of review to be applied in the Competition Commission, but that the appropriate course would be for the thing to come back before Ofcom for a short consultation to rectify any procedural errors and to proceed on that basis. I am not saying that is what we will do, I am simply alerting the Tribunal to the possibility that that might be a course that Ofcom would consider pursuing.

CPW's justification for pursuing both the proposed disclosure challenge and the two existing procedural challenges is then developed at paras.75.1 to 75.4. One of those justifications we had thought before today, and I think also today, can be put aside immediately, and that is the justification at para.75.3. These were the justifications that CPW initially advanced in order to explain why it should nonetheless be permitted to advance its original procedural challenges despite the lack of any request for relief in the form of remittal. One of the arguments that was originally advanced is at para.75.3. If the Tribunal agrees with CPW that the *LLU* decision should be set aside and the matters remitted to Ofcom for an integrated decision on LLU and WLR prices it may be noted that, to some extent, this would merely give effect to what should have been a further state of consultation by Ofcom on its proposed price control.

MR. PICKFORD: Madam, I hesitate to interrupt, but I can confirm, to assist Mr. Holmes, that we are not relying on that point in support of this application.

MR. HOLMES: That is very helpful, and, madam, the reason why that is not available to CPW is because this is a reference to the relief originally sought in relation to CPW's other non-price control matter, the so-called "decoupling" matter or WLR challenge. The Tribunal will recall that CPW has signalled within a few weeks of lodging its notice of appeal that it was not now proposing to pursue the relief originally sought in relation to the WLR challenge. It is unclear whether it still maintains the WLR challenge at all, Mr. Turner having reserved CPW's position on that, and we pleaded to it in case it is pursued. Given that remittal is now not sought, this justification, as Mr. Pickford says, is not available in support of this or the existing procedural challenges being heard.

The primary reason given for pursuing the procedural challenges is the one which CPW develops first at para.75.1 and which it returns to at para.75.4. CPW's procedural challenges are said to be connected with the conduct of the price control matters which are the main focus of CPW's appeal. Thus, at para.75.1, CPW says that the publication of the *LLU* decision was the first time that those in the position of CPW were able to scrutinise certain of the parameters that Ofcom had chosen to derive its price control. Accordingly, the approach of the Competition Commission needs to be particularly intense to compensate for Ofcom having failed to consult properly on its intended price control.

A similar point is then made in relation to costs at 75.4. There CPW says that it is entitled to the costs of its appeal because, had Ofcom consulted properly, there may have been no need for what is, in effect, the final stage of consultation being played out at great cost in the Tribunal and the Competition Commission.

So again the argument is that the procedural grounds are connected with the substantive matters raised before the Competition Commission in relation to which CPW says that it should be given both intensive review and costs.

In relation to CPW's main existing procedural challenge and its price control case, the link is very clear from para.74 where the failure to consult point is developed. You will see that CPW alleges that Ofcom manifestly failed to consult on certain issues at all. Merely by way of example, we now know that these are the only matters relied on. The following points arose for the first time in the *LLU* decision with no prior consultation in either the first Openreach consultation or the second Openreach consultation. Skipping over the first, which relates also to the WLR challenge which may or may not be pursued, one sees at 74.2 to 74.5 that in relation to each of these failures to consult there is a reference forward to specific paragraphs in which the price control matters are developed, and this is the link – this is where it is said that the failures to consult are connected with the price control matters before the Competition Commission. This is the justification for why these matters are being argued now by CPW. They say that in relation to these matters the Competition Commission should apply intensive review because these matters were not properly considered by Ofcom, there was not a proper consultation process, so they should be decided entirely *de novo* by the Competition Commission as though it were a primary decision maker. That is the case. Equally, the costs of conducting that examination before the Competition Commission should be met by Ofcom because of its alleged failures of consultation.

We do not accept that if procedural errors were shown this should have any necessary consequences for standard of review or costs, but even if the premise for CPW's justification were accepted we say that the justification is currently not available in relation to the proposed disclosure challenge. This is because there are at present no substantive challenges being pursued which arise out of Ofcom's modelling. There is therefore nothing in relation to which CPW can presently argue that more intensive scrutiny should apply or costs should be given on the basis of the disclosure challenge. There is nothing in the nature of those failures to consult which is before the Competition Commission, which the Competition Commission should look at carefully or which costs should be granted in respect of.

We know today for the first time that amendments apparently will be forthcoming in two weeks today, 16th November. We say in relation to those that the Tribunal simply cannot rely on those today in deciding whether to admit this challenge. If you are with me on the difficulties which arise in relation to remedy from the lack of a substantive challenge, we say you cannot take CPW's word that there will be valid and substantial matters that will ultimately be admitted to go forward before the Competition Commission. These matters may turn out to come to nothing, they may be based on simple errors or misunderstandings, and the letter which CPW sent on Friday already gives us some cause for concern in that regard. You may have seen that CPW raised one specific point which we have not yet had an opportunity to address, but we think that there is nothing to that point and we will write as soon as we are able during the course of this week to explain why we think there is nothing to it.

Until we see the amendments really they cannot be weighed in the balance. If the Tribunal thought that there was a good basis for admitting the current amendment, the proposed disclosure challenge on the basis of those other things it would have to wait and see what they looked like.

So we say then that the primary justification for the non-price control matters cannot presently be prayed in aid in support of this application.

To be clear, we are not suggesting that procedural challenges can only be brought if some error is ultimately shown. That is not our position. When Mr. Pickford attacks that, he is attacking a straw man. Clearly, whether there is a procedural error or not stands to be determined whether or not any errors would have come to light had the procedural error not occurred. Our point is rather that grounds of appeal and arguments should be connected with relief. They should have some connection with the outcome of the case. So, therefore,

if the justification for advancing a ground is because of implications for the substantive matters arising in the appeal, there must be substantive matters for that justification to bite on.

THE CHAIRMAN: But why do you say that there has to be some specific relief resulting from the procedural unfairness?

MR. HOLMES: The Tribunal is not in the business of giving advisory opinions. Its task is to dispose of appeals and to decide whether relief should be granted in respect of them.

THE CHAIRMAN: Yes. But, if we look at s.195 ----

MR. HOLMES: S.195 - the disposal of the appeals.

THE CHAIRMAN: Yes. So, under s.195(2) we have to decide the appeal on the merits and by reference to the grounds of the appeal set out in the notice of appeal. Then we have to decide what, if any, is the appropriate action for the decision-maker to take.

MR. HOLMES: Then you have to, of course, remit the decision after you have decided.

THE CHAIRMAN: Then we have to remit the decision. But, why do you say that if we accept one of the grounds of appeal as being well-made, that we then have to provide some remedy for it?

MR. HOLMES: Madam, the scheme of s.195, we say, places the emphasis very clearly on the provision of remedies. The Tribunal has to consider what directions to give in each case and must then remit the decision. It has clearly anticipated that there will be actions -- expects that there will be some remedial consequence deriving from the appeal. I see, madam, that you smile - because this argument is not altogether new to the Tribunal. It is one that we have all grappled with before. You no doubt have in mind the hearing on the disposal of the appeals in the recent 'calls to mobile' case where the Tribunal of course emphasise exactly these passages in support of the proposition that the purpose of an appeal is to produce relief. At least in a price control appeal there will always be some relief sought at the outset. It may be that over time the significance of that relief will be eroded and there is a risk that the significance of that relief will be entirely eroded by the end. But, a litigant does not begin without a claim for relief. To test the proposition one has to ask how the Tribunal would have reacted if CPW had brought only the procedural challenge which it now seeks to pursue without any of the other material in which the proposed ground is currently nestled, and came to the Tribunal and said, "We do not seek remittal. What we are looking for is guidance for future cases". The Tribunal would not in that case be prepared, I think - it would obviously be a matter for argument -- The Tribunal would

surely have significant reservations in entertaining a challenge without any relief of that nature.

THE CHAIRMAN: There was a slightly analogous situation in the preliminary issue that we heard in the Orange appeal where the question was whether the decision of Ofcom to accept jurisdiction over a dispute under s.185 was a decision which had to be appealed within the time limit from that decision or whether it was a point that could be erased in a challenge to the ultimate disposal of the dispute. The position there was that well-advised clients were always going to bring a protective appeal so as not to be out of time. So, it was always going to be a hypothetical question whether, if they had not brought a protected appeal, they would have been precluded from arguing lack of jurisdiction as one of the grounds of challenging the ultimate disposal of the dispute. We did, I think, with Ofcom's encouragement, decide that point for the benefit of future parties because it was a point that needed to be decided. Now, could one not say here that it is a bit tough to put a claimant to an election, in effect, between a procedural complaint and a substantive complaint, but that it is important for future cases to know whether Ofcom should disclose this model as part of its consultation process?

MR. HOLMES: The circumstances of that particular issue in relation to ... which I must admit I had forgotten - it was buried in the back of my memory, but it now comes back to me when you mention it - were quite specific in that there was a particular adjectival question which arose in the context of a clearly well-founded - an appeal in relation to which relief was clearly sought. We do not say that there will never be any scope, particularly with the agreement of all parties for the Tribunal to venture opinions on matters of that kind. But, that is really a league apart from the situation we are faced with here where there is a substantial ground of challenge which it is now proposed to advance with significant factual debate associated with it, and in relation to which we say no relief is sought at all. However, madam, even if you were not with us on the notion that there would never be scope for the Tribunal to give an advisory judgment of that kind - and, of course, the Tribunal will be reluctant ever to say, "Never" because one never knows what may be around the corner - we say that where this is the only available justification the Tribunal should embark on a exercise of this nature with great caution and should at least be satisfied that the matter is of sufficient importance to merit this investigation without remedial consequence. I will come on now to make submissions as to why we say that is not the case here.

The third feature of the amendment is CPW's central complaint and whether this can be said to amount to an important point of principle as contended. Returning to para. 74A of the proposed amended notice of appeal on p.24 of Tab 1 we say that the real meat of the case is at paras. 74A.3 and 74A.4. There CPW says that,

> "Non-disclosure of Ofcom's modelling prevented CPW from being able properly to test the robustness of the modelling, including the key assumptions underlying the models, the formulae used in their construction and the costs forecasts. It also prevented CPW from being able to carry out sensitivity testing around the assumptions used by Ofcom and from developing alternative price proposals per WLR, SMPF and MPF. By reason of these failures CPW's ability to make cogent and well-informed representations on a central element in Ofcom's decision-making process was materially comprised and the consultation accordingly inadequate".

In our submission, this core issue does not turn on any significant point of principle, but is likely instead to involve a careful consideration of the facts and circumstances of each individual case. This is clear form the case of *Eisai* in the Court of Appeal. I cavil slightly at Mr. Pickford's description of this as being a case on which Ofcom relies. This case was, of course, raised by CPW first of all in support of its application. The point at issue in that case – this is at tab 2 D of the authorities' bundle. The point at issue in that case is developed at para. 2 of Lord Justice Richard's judgment:

> "The point is a relatively narrow one, though arising in a context of some technical complexity. In its consultation process NICE made available to consultees, including Eisai, a read-only version of an economic model, in the form of an Excel spreadsheet, which was used to asses the cost-effectiveness of the drugs. Eisai requested but was refused a fully executable version of model. Eisai's case is that the non-provision of a fully executable version rendered the consultation process unfair and the decision to issue the guidance was in consequence unlawful."

The judgement of the court was given by Lord Justice Richards with whom Lords Justice Tuckey and Jacob agreed. Lord Justice Richards set out the legal principles from para. 24 onwards of the Judgment. He begins at para. 24 noting that it was not disputed that NICE was subject to the general principles of procedural fairness. Paragraph 25, he then sets out the key passage of Lord Woolf's Judgment in *Ex parte Coughlan* as helpful statement of general principle, and Mr. Pickford took you to:

"108 … To be proper, consultation must be undertaken at a time when proposals are still at a formative stage: it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response …"

We emphasise, madam, "sufficient reasons for … intelligent consideration and an intelligent response."

"… adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

112 … It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, al though it may be quite onerous, goes no further than this."

Now, we say that that frames the legal principle at issue in this case, and in applying that legal test, it will clearly be necessary for the Tribunal to grapple with the question of what was sufficient in this case, was more material required for intelligent response and, if so, why. We say the way in which it is pleaded at 74A.4 puts the matter absolutely right – if we could go back to that, tab 1, p.25, where it is said:

"By reason of those failures, CPW's ability to make cogent and well-informed representations on a central element in Ofcom's decision-making process was materially compromised, and the consultation was accordingly inadequate."

That seems to us to be simply a gloss on the language of Lord Woolf in *Coughlan*. There is this question of sufficiency, of whether enough has been given and whether in consequence intelligent response was possible. That is the key issue of principle which arises in all of these cases, the key legal point on which these cases are to be decided.

THE CHAIRMAN: I am just trying to think through what the process that you are saying one needs to go through in order to make good this?

MR. HOLMES: I will come to that if I may, madam. It is something we have been very alive to because obviously we have been reflecting on how we could plead to this if the amendment were admitted so it is a point that I propose to develop in a moment, if I may. Just to finish off on *Eisai* first, however. Lord Justice Richards then goes on to explain at para. 27:

"What fairness requires depends on the context and the particular circumstances …" and at the end of the paragraph:

"… the various cases cited to us provide illustrations of that, without adding materially to the statements of principle in *ex parte Coughlan*."

Then he concludes the legal debate at para. 33 over the page.

> "Such debate as took place between counsel in relation to the authorities amounted in my view to minor skirmishing. Overall, as it seems to me, this case depends not on the resolution of any real dispute about the legal principles, but on the application of well established principles to the particular context and particular circumstances of NICE's appraisal process."

We say that exactly the same is true here, the disclosure challenge if admitted would turn on the application of well established principles to the particular context and circumstances of this case. It might be helpful at this stage to just correct an incorrect impression that may have been given inadvertently by Mr. Pickford. Ofcom did not say that during the consultation process, and has never said, that this was all very difficult and disclosure was not being made primarily for reasons of confidentiality. Our position has always and consistently been that set out in the statement itself, that sufficient material was provided to enable intelligent response. So we base ourselves firmly on this legal test developed in *Coughlan*. We understand Mr. Pickford's client based itself similarly on that test when it sets out the hurdle that it needs to surmount in para. 74A.4, that we say is the legal test that would need to be applied. Lord Justice Richards then proceeded to consider the application of the general legal principles to the facts of the case in *Eisai*, which may give us some clue as to what type of factual inquiry would be necessitated if this amendment were admitted. You see at para. 37 that he records:

> "There is significant disagreement between the experts about the extent of disadvantage to a consultee if NICE provides it with only a read-only version of its model."

At para. 38 in the final sentence they also note that Eisai's expert, Professor Martin Knapp, of the London School of Economics, is recorded in the final sentence of that paragraph:

"…. Identifies some important areas where alternative data assumptions or modifications to the model structure should in his view be tested."

So what Eisai were saying in this case was not that there was an open-ended fishing expedition that could be done in relation to the model, it was said that the model was needed

for certain specific tasks, certain important calculations that required to be performed, and that was how the debate was framed in *Eisai.*

At paras. 43 and 44 the court then turned to decide how the evidence was to be left, and you see there that there was disagreement between the experts and the significance of the inability to track formulae automatically in the read-only version. Unsurprisingly, perhaps, the court had no great appetite to wade into that factual dispute and concluded that it was not in a position to resolve it.

> In the following paragraph, however, and this we say is the crucial paragraph, it is said that "In relation to sensitivity analyses, however, there is no relevant disagreement: it was found by the Appeal ----"

THE CHAIRMAN: Wait a minute though, just looking at para. 43, the court does not seem to have felt that it needed to decide how important a disadvantage it really was to have only the "read only" version in order to decide that there had been a breach of procedural fairness in not ----

MR. HOLMES: But only madam, we would say, because in the following paragraph there was the disadvantage on which it relied, the sensitivity analysis.

> "In relation to sensitivity analyses, however, there is no relevant disagreement: It was found by the Appeal Panel, and is common ground, that such analyses cannot be carried out with the read-only version. Further, I do not see anything in NICE's evidence to contradict what Eisai's witnesses say about the importance of sensitivity analyses in checking for problems in a model. It is not surprising, therefore, that Mr Pannick put the main focus of his submissions on the inability to carryout sensitivity analyses rather than on t he problem of checking the formulae."

Then one finds the conclusion at para. 49 which Mr. Pickford already took you to:

> "I accept that Eisai was given a great deal of information and was able to make representations of substance. It knew the assumptions that were being applied and could comment on them. It knew what sensitivity analysis had been run and could make comments on those. It could and did make an intelligent response, as far as it went. In my judgment, however, none of that meets the point that it was limited in what it could do to check and comment on the reliability of the model itself."

That, madam, is a reference back to the important sensitivity analyses in para. 44 on which Mr. Pannick, counsel for Eisai, rested his case and which the court accepted.

With great respect, the fact that this is a Court of Appeal Judgment and the fact that it was an appeal from an Administrative Court Judgment makes no difference to the fact that this was a conclusion grounded in the evidence. There was a difference of view as to the significance of the evidence between the Administrative Court and the Court of Appeal. There was a huge body of evidence which both courts waded through and it had to decide matters on the balance.

THE CHAIRMAN: So they did not go into the question of whether, had they had the executable model, they would have been able to persuade the decision maker to do something different, nor did they have to go into the question of whether the sensitivity in the analysis in the model was actually wrong, but they did have to decide, you say, that sensitivity analysis was an important plank in the whole process and that there was not other material either in the read-only model or elsewhere in what they had been provided with that enabled them to carry out a sensitivity analysis. Is that a summary of where we are with it?

MR. HOLMES: Madam, that is an invaluable lesson in learning not to interrupt the Tribunal, because you put the point much better than I could put it myself. We entirely agree with that and that is Ofcom's position.

THE CHAIRMAN: And the amount of evidence that was needed in order to establish that sensitivity analysis is important, it was common ground that it could not be carried out with the read-only version and one assumes common ground that there was nothing else that enabled them to do it?

MR. HOLMES: Yes, madam. I will leave that point there.

As you say, Lord Justice Richard's conclusion was based on considerable conflicting evidence and was firmly embedded in the facts of the case before him. Particularly there was evidence about specific sensitivity analyses that Eisai's experts were unable to carry out as to the importance of those exercises. That was a fact specific conclusion and the factual context required to arrive at it was substantial. The *Eisai* case does not lay down any general principle in favour of the disclosure of modelling material, it simply applies the well established principles of *Coughlan* to the facts of the case.

In its submissions in support of the application CPW advances an alternative point of principle which is said to arise under the disclosure challenge, and this point is put most clearly in CPW's reply submissions of 14th October at tab 12. The point is at p.3, para.4.2:

> "Ofcom simply fails to address the point to address the narrow point which lies at the heart of the proposed amendment: why should a respondent in CPW's position be put to the vast expense and trouble of bringing an appeal before the Tribunal in

order to scrutinise key modelling at the heart of the decision making process which could have been provided to it during the consultation procedure?"

That is their simple point of principle which they say lies at the heart of the amendment. As to this we say that CPW appears to us to be trying to pull itself up by its bootstraps. The fact that the modelling has now been disclosed does not dispense with the need for CPW to show that the modelling should have been disclosed at a prior stage, or at all. Our willingness to disclose the modelling does not show in any way that we concede the relevance or need for CPW to have access, or to have had access, to the modelling. We disclosed it because BT, whose confidential material is contained in the modelling, did not raise the same objections that they had during the consultation phase.

So this point of principle pre-supposes what CPW will have to prove, namely that it needed to have the modelling at all. The fact that it has been disclosed now does not demonstrate that appellants have to go to the vast trouble and expense of appealing in order to get to the modelling. We say that they have no need of the modelling in order to make an intelligent response.

That is the core point, as is apparent from *Eisai*, with which they will still have to grapple if they are going to make good their proposed disclosure challenge.

The fourth and final aspect of CPW's proposed amendment concerns the character of the disputed fact and degree which we say would really lie at the heart of the disclosure challenge.

How would this factual inquiry be conducted in relation to the disclosure challenge, if admitted? Unlike *Eisai*, there is no witness evidence offered in support of the challenge to make good CPW's claim that its ability to respond to the consultation was materially comprised. CPW does not explain what would be involved in the sensitivity testing, to which it refers at para.74.83 and on which the court in *Eisai* had clear and specific evidence; nor does CPW explain which are the key assumptions which it says are not adequately set out and explained in the second consultation. The Tribunal will recall that the second consultation and the *LLU* statement both contained detailed accounts of the assumption on the basis of which Ofcom proceeded in revising Openreach's costs projections. This is not a case in which Ofcom has provided no detail at all and its modelling is a "black box" to the appellant.

The debate with CPW is really about the level of granularity of detail CPW needed to have and whether it needed to see very specific individual data which BT claimed as confidential and declined to disclose. All that we have currently in support of the disclosure challenge is

a reference to some correspondence which passed between CPW and Ofcom during the course of the consultation process and a letter from RGL Forensics which was appended to the second consultation.

I will not try and take you through the CPW correspondence now, although, having read it, I can assure you that there is nothing more concrete or specific in it regarding the modelling than appears in CPW's current proposed amendment.

I have with me a copy of the RGL Forensic letter, which I would like to hand up to the Tribunal, if I may. It is in the appeal bundles, but I think it is easier to give you a copy of it. (Same handed) You will see that the letter mentions two specific models, BT's 'OAK' model and BT's 'RAV' model in the lower part of the first side. In relation to the latter, it notes that a meeting has been arranged for RGL to view the RAV model at Ofcom's office. That meeting did, in fact, take place and RGL were shown the RAV model at that meeting. Then over the page you will find a single paragraph at the top of the page where RGL states:

> "... without access to the outstanding information and queries, it is not possible to come to a conclusion as to the reasonableness or otherwise of the unit costs set out in the consultation document."

In relation to the factual basis of the proposed disclosure challenge we say that the challenge would involve complex and contested factual questions about whether CPW needed more information than was provided, why it needed that information and whether it could have used the information to material effect. CPW's case, as currently pleaded ----

THE CHAIRMAN: Just a minute, what was that last bit, whether it could have used ----

MR. HOLMES: Whether it could have used the information to material effect. That, I agree, is ambiguously couched. We are not there implying that any errors would, in fact, have come to light. We are asking whether there is anything in the nature of the models which might have enabled a material response to be made if error were disclosed.

CPW's case, as currently pleaded, gives so little away that it would be very difficult for Ofcom to plead to it as presently developed. At the very least, we would expect it to explain what sensitivity analyses CPW has in mind, which key assumptions CPW says were not set out in the second consultation, what alternative pricing proposals for WLR, SMPF and MPF CPW says it would have been able to develop with the benefit of the model, and why CPW says that the lack of access to the model had a material impact on its ability to respond intelligently to the consultation.

As a practical matter, and as nothing more than that, we note that discussion of these issues will, in fact, turn on the amendment once it comes forward. There is no doubt that once these issues have been crystallised, when we are assessing what might have been material for CPW to raise, we will have to look and see what they have, in fact, raised. We are not saying that is a necessary stage of the analysis, but the practical forensic reality is that when we are debating - if the amendment is admitted - that will constitute an important part of the discussion. We say that if admitted, Ofcom should not be expected to meet the disclosure challenge until those other matters are brought forward.

THE CHAIRMAN: You mean until they have brought forward proposed amendments arising from the model?

MR. HOLMES: Yes, madam.

THE CHAIRMAN: So. You say that if there are no amendments -- If there were no amendments brought forward -- if they have said, "Well, actually, now we have had a chance to look through the model we see in fact there is nothing there to which we take exception", would you argue that that automatically makes their challenge devoid of any purpose it might otherwise have?

MR. HOLMES: We say firstly that that goes to remedy. One should not embark on a remedial debate about a point of principle unless there really is a clear point of principle upon which guidance will be valuable for future cases. I understood Mr. Pickford to have confirmed today that amendments will be forthcoming. So, we can now proceed on the basis that there will be substantive amendments although there may be a debate as to their admissibility.

That concludes my examination of the proposed amendment itself.

I would like now to turn to Rule 11 and the legal framework in accordance with which the application is to be determined.

I would like to take you back to the rules, if I may, at Tab 1B of the authorities bundle.

Madam, I am aware of the time. I suspect I will overrun by about ten or fifteen. I hope the Tribunal will accept my apologies.

Rule 8 concerns the time and manner of commencing appeals. Rule 8(1) provides that an appeal to the Tribunal must be made by sending a notice of appeal to the registrar so that it is received within two months of the disputed decision. Rule 8(4) then lays down various things that the notice of appeal must contain. Rule 8(4)(b) specifies that it should contain a summary of the grounds for contesting the decision. Rule 8(4)(c) requires a succinct presentation of the arguments supporting each ground.

So, there we have the distinction introduced between arguments and grounds.

Rule 11 is then concerned with amendments to the notice of appeal once lodged. It provides in effect the teeth to ensure that the requirements of Rule 8(4) are observed and that grounds and arguments are brought forward at the outset and the notice of appeal served within two months of the disputed decision.

Rule 11(1) makes clear that an applicant may amend the notice of appeal only with the permission of the Tribunal. As Mr. Pickford has correctly said, it is common ground that the Tribunal has a broad discretion to decide what to do under that head in the interests of justice.

Rule 11(2) expressly confers on the Tribunal the power to grant permission on such terms as it thinks fit and to make consequential directions. This is the power which we would seek to invoke on our conditional alternative submission for today.

Rule 11(3) then lays down a special and more restrictive rule in relation to applications to introduce new grounds of appeal as opposed to merely new arguments in support of existing grounds. They will only be permitted in the restrictive circumstances listed which Mr. Pickford has already shown you.

Now, I described the distinction between grounds and arguments as somewhat theological. All that we say in relation to this is that the distinction cannot and should not be pinned down too precisely. It is one of degree, to be decided in an individual case where grounds simply delineate the more fundamental and important aspects of an applicant's case. But, we do say that a ground must contain some substance. It is not simply a generic label for the type of complaint being made. You must incorporate, at least in broad terms, the basis on which the contested decision is being criticised. To accuse the decision-maker of error of law or of procedural failure is not to advance a ground. The ground must identify what error or failure is being alleged. That is not to over-inflate Rule 11(3). It is simply to supply it with a proper purpose which is to consistently and clearly police amendments, and to make clear that where there is a major amendment a very important point being introduced - which is sufficient because of the factual inquiries to which it gives rise, or the tangle of legal issues involved in it, is sufficient significant to constitute a ground of appeal in its own right. Of course, the appellant's own delineation of its notice of appeal cannot be decisive. The Tribunal has to take a broad view and decide for itself the relative weight and importance of points that are being introduced.

CPW disagrees with this analysis and says, as its primary case, that the relevant ground of appeal is procedural failure and that therefore any new aspects of process that it wishes to raise would all fall to be considered under Rule 11(1). It relies on para. 32 of *Floe* where

the Tribunal discusses the related distinction between *moyen* and *arguments* in the rules of procedure of the European Community court of first instance in Luxembourg. Reliance is specifically based on the sentence where the Tribunal says,

> "Thus *le moyen* is the basic plea such as error of law, illegality, discrimination, procedural failure and so on, and *les arguments* are the arguments in support of each such plea".

It is said that therefore procedural failure is a relevant category along with error of law. Now, we say that that interpretation is wrong. The following para. 33, without taking you to it, makes clear that the read-across from Luxembourg to Victoria House cannot be stretched too far. Rule 11 is not intended to introduce the technicalities of continental type pleadings. Further, the Tribunal itself did not consider that error of law was the relevant ground of *Floe*'s notice of appeal when deciding to admit a new legal argument. I can develop that point, if you like, madam, but it is set out in my skeleton argument. I might rather, given the time, give you the reference. The skeleton is at Tab 10. The reference is at para. 34(b). We have also relied upon the way in which the Tribunal reads *Floe*'s second ground. I think I will take you back to that because Mr. Pickford cut off the reading before reaching the passage on which we rely. That is to be found at Tab 2B, para. 51. You will see,

> "In the present case, the second ground of appeal, prepared by Floe's administrator without, apparently, access to legal advice, was the Director's failure 'to base [his] investigation on the legislation prevailing at the time'".

That, then, was Floe's characterisation of the ground. The Tribunal then makes clear that this was not the ground of appeal with which it was grappling when deciding whether this was a Rule 11(10 or Rule 11(3) matter.

> "Although couched in terms directed against the Director's finding in the Decision that Floe was not duly authorised under its contract with Vodafone for the purpose of the WTA, this ground is essentially contending that the Director made an error of law in deciding that Floe was acting illegally for the purposes of section 1 of the WTA".

That was found to be sufficiently broad, as I explain in my written submissions to encompass both the original argument in support of that ground and the new primary argument, as it was called. Both of those could be comfortably fitted within the ground 'error of law' in deciding that *Floe* was acting illegally for the purposes of s.1 of the WTA.

THE CHAIRMAN: One must be careful here, though, not to give a party a benefit arising from their complete failure to particularise a particular ground that they are making. It could be

argued - and I think Mr. Pickford would say - that in the actual pleaded sentence that comprised the pleading was rather difficult to see what it was getting at entirely. One of the things it might have been getting at could then be seen to have been elaborated upon by the argument that they now sought to raise.

MR. HOLMES: Yes. I see that point.

THE CHAIRMAN: So, one does not want to get to a situation where an appellant which does go into some detail rather than just making some very broad and airy pleading is disadvantaged because then you can say, "Oh, well, this is something different from the particulars that you have given and therefore is a different ground".

MR. HOLMES: I entirely agree. Obviously the degree of charity that the Tribunal is prepared to accord to a pleading will depend somewhat on whether the circumstances in which the pleading was prepared and in this case was prepared I think by Floe's administrators and without necessarily the input of specialist legal advice, and so the Tribunal may therefore have been more generous towards the pleading than would otherwise have been the case. Indeed, it is not clear whether a pleading which simply specified the decision was contrary to the legislation prevailing at the time would be sufficiently particularised to be admissible. The Tribunal, of course, has the power to send back a notice of appeal which is not adequately developed, but we say this is a matter of fact and degree for individual cases and the Tribunal is well placed to exercise judgment and discretion in approaching individual matters so that parties are neither unduly penalised for the poor quality of their pleading, if not professionally advised nor unduly penalised for the high quality of their pleading if so advised.

It is difficult to see though how the Tribunal's analysis at para. 51 would make any sense if the error were simply error of law. That is clearly not the basis on which the Tribunal was proceeding and nor, in subsequent cases, has the Tribunal interpreted "ground" as meaning simply error of law or procedural failure, so that once one challenge is advanced going to law or procedure, any number of other challenges could be advanced. We have referred the Tribunal to *Rapture* and *H3G* , these were said to be *per curiam*. Madam, the counsel here present and you, madam, were all present at the contested admissibility hearings, of which there were several. We would simply refer you to the previous round in which the Tribunal was, as you will see from the transcript, taken to the relevant passages of *Floe* and, indeed, in *Rapture*, the Tribunal relied on *Floe* having been taken to it by both advocates, and it seems a little hard to believe that it would not have considered this passage.

In its first letter introducing the amendment, Carphone Warehouse advanced the alternative argument that the disclosure challenges an additional argument fitting within the ground described as inadequate consultation and that was Mr. Pickford's alternative approach today. Again, we say that this is not correct. Inadequate consultation is no more illuminating at the basis of Carphone Warehouse's challenge than is procedural failure. It gives no guidance as to why the consultation is said to be inadequate, was the consulting authority not approaching the matter with an open mind? Was its consideration tainted by actual or apparent bias. Was enough time allowed for consultation? If that were the characterisation it would allow a whole multitude of different arguments to be advanced without engaging Rule 11(3), and we say that cannot be right. We are still not getting to the meat here of what the real basis of the challenge is, and so you need to dig down to a further level of detail and when one does so it is plain that the disclosure challenge does in fact constitute a separate and discrete line of attack from any that is currently pleaded in the notice of appeal.

There are currently two procedural challenges in the notice of appeal, the first claims that Ofcom breached the Community legal requirement to consult on a draft measure because it used ranges instead of a precise final number in the second consultation, and this is really, so far as we can see, an allegation of legal error as much as procedural error, and they are saying that the requirements of the Framework Directive were not met.

The second alleges a failure to consult on matters contained in the final decision. It relates to specific and identified differences between the second consultation and the LLU statement. The key issue is whether Ofcom went beyond the changes permissible under the final limb of the *Coughlan* formula, based on conscientious consideration of consultation responses.

I see, madam, that you are considering the pleading?

THE CHAIRMAN: Well if they had done their pleading differently and instead of having 74A they had had 74.6 – failure to consult on the appropriateness of the model that they used, would you still say it was a different ground?

MR. HOLMES: Of course, madam, it would not turn on the particular way in which they chose to couch it, one has to look at the substance of it. We say that the substance of the point at 74 is not a failure to disclose material, which is the point that was debated in *Eisai*, which is now said to arise which really goes to the second limb of the *Coughlan* test, whether sufficient material was provided to enable intelligent consideration and response. The point at 74 goes to a different concern, which is where you have a consultation stage, you

have the decision. The decision incorporates certain modifications on the basis of responses received to the consultation and the question is whether that merits a round of re-consultation. We say that that is a different point, there are different cases which deal with it, and different factual points.

THE CHAIRMAN: Looking at, for example, 74.5, Ofcom's decision to introduce one-off price reductions for certain ancillary services. I am just wondering whether the failure to disclose the model is part of the failure to consult on these individual outcomes which are incorporated in the final price control.

MR. HOLMES: But these failures are all on the face of the decision. One can go to the decision and find these matters which appear in the decision which were not included in the second consultation, there is no dispute that they were not included. In some cases there is dispute as to whether ----

THE CHAIRMAN: Yes.

MR. HOLMES: But it is a different point, we say, from the point which is now being raised, which is about whether further disclosure should have been made than was contained in either the consultation or in the final decision. There is quite separate case law which deals with those two points. The way in which these arguments would progress would turn our consideration of different cases and quite different factual inquiries, so we say that one cannot really encompass the new ground of challenge within that existing ground.

My final point on Rule 11(3) is simply to note that we do not agree that this should be narrowly construed so as to ally the Tribunal's Rules with the Civil Procedure Rules insofar as is possible. The Tribunal system of case management is separate and distinct. It is an appellate institution dealing with issues that have typically been well traversed in a prior administrative procedure, as in the case of this proposed amendment. It has to deal with complex cases, expeditiously and efficiently and there is an obvious value in keeping cases within manageable bounds by not allowing them to veer off in other directions as Mr. Pickford himself said. So I do not think there is a disagreement really about that.

Specific disciplines are enshrined in the Rules in order to ensure issues are promptly identified and dealt with and there is no good reason for construing the disciplines narrowly.

That brings me to my conclusion, madam, I am sure you will all be pleased to hear, which is how should Carphone Warehouse's application be dealt with under Rule 11?

Our first submission is that for reasons already given the disclosure challenges an additional ground of appeal, it falls to be dealt with Rule 11(3) and none of the specific conditions in that Rule are met.

Carphone Warehouse seeks to argue that the conditions of Rule 11(3) are met on only one basis, namely, that disclosure of the model during this appeal is a new matter of fact which justifies allowing Carphone Warehouse's amendment because it materially improves Carphone Warehouse's prospects. We say to this that the disclosure of the model has no effect on Carphone Warehouse's prospects; it will still need to show that it needed to be given the model at the consultation stage in order to make an intelligent response, and that the other stuff it was given was not sufficient for that purpose, so that hurdle will still have to be surpassed, and it cannot rely on the subsequent disclosure to get around that problem. Alternatively, we say that even if the disclosure challenge is an additional argument in support of some existing ground of Carphone Warehouse's appeal the Tribunal should exercise its discretion under Rule 11(1) against admitting it now. No relief is sought in relation to the challenge. CPW's attempts to invoke an advisory jurisdiction on the Tribunal's part are inappropriate here where there is no important issue of principle, only an involved factual inquiry of limited assistance in future cases. That factual inquiry will divert resources away from the price control matters which we say are the real focus of the appeal.

Finally, we do say that CPW has not given a good account of why it did not bring the challenge within two months. This is said to be an attempt to introduce Rule 11(3) by the back door. We say that is not the case, it is simply that you are exercising a broad discretion about whether it is just to allow CPW to bring forward new material now. The new material in question was material that CPW pushed forcefully in the consultation process. There is no dispute about that, and yet they decided not to run with this.

Mr. Pickford says there was no advice given to discard it. That is not something that I would challenge of course, but CPW clearly had this argument available to it, and that is all that is necessary for the purposes of this argument.

THE CHAIRMAN: I think what Mr. Pickford says was that because you had so stoutly maintained your position during the consultation they thought, "There must be some very good reason why we cannot see this model". Then suddenly, as soon as the appeal is brought, you seem to be perfectly happy to disclose the model to the confidentiality ring. Then they think, "Why could we not have seen it before?" I take the point that you made, by disclosing it now you are conceding that you ought to have disclosed it before, but I think what they are saying is, "There must then be some other reason why you did not disclose it during the consultation period which now seems no longer to pertain and we do not understand what that reason is or whether it is a good reason".

MR. HOLMES: Madam, the reason is perfectly clear and we have made it plain now on several occasions, what happened during the consultation process was that there was a prolonged process of engagement, CPW asked many hundreds of questions which are set out in spreadsheets which we may have to wade through in due course, and we answered them. They were closed off. We answered as many as we could. CPW declined to prioritise its requests. CPW pushed for disclosure of financial information from BT and then subsequently for Ofcom's own modelling. We explained that we did not accept that this material was necessary for them to make an intelligent response. We also explained that BT objected to the disclosure of the material. We pushed back with BT over a number of weeks because there was a prolonged engagement also with BT where we said, "Why not offer this data".

Let us face it, in a very full consultation process on which Ofcom prides itself, there is inevitably a great deal of material provided which is not in fact necessary to make a sufficient response, and if there were no obstacle to disclosing the modelling, regardless of its relevance, we would not have had any objection to CPW having it. There was a difficulty that prevented us from doing so and that was BT's unwillingness to accept that its confidential material should be shared with CPW.

Once we came to the appeal stage that objection was not maintained by BT. BT made it clear that it was happy for the material to be disclosed within the context of a confidentiality ring, thereby drawing back from its prior opposition. Without conceding the relevance of it, we were prepared therefore to disclose. There is no difficulty in understanding why the disclosure was made.

THE CHAIRMAN: It is just that Mr. Pickford in his submissions said that he understood that it had not been a confidentiality point that had prevented you from disclosing it, but maybe I misunderstood.

MR. PICKFORD: Madam, I think our understanding was that there was a confidentiality concern about it and that was one of the reasons why it was not going to be disclosed, and we understand that has now been confirmed.

MR. HOLMES: Madam, I am reminded that there was also a further practical difficulty at the administrative stage, which was how you drew the line on this material, which we did not accept was necessary for sufficient disclosure to meet our obligations of general public law of consultation. There was also the question about who this material should be given to. There was also the question of who this material should be given to. There are lots of

people who buy these inputs and you have to draw the line somewhere then about who should see it and who should not.

THE CHAIRMAN: These are obviously all matters that we would have to go into if we allow this amendment.

MR. HOLMES: Indeed, madam. Could I just briefly advance my alternative submission. If the Tribunal is not inclined to refuse CPW's application, we say that terms should be attached to the granting of permission in the exercise of the Tribunal's power under Rule 11(2). We say, firstly, that provisions should be made conditional upon CPW applying for and being permitted to advance further price control arguments arising out of Ofcom's model. We now know that those arguments are coming forward. I have also explained why we should not be required to plead to them until those matters are brought forward.

We say that such arguments are a necessary complement to the disclosure challenge in order to ensure that the challenge is not remedially sterile and therefore it is appropriate for that condition to be attached.

Further or alternatively, we say that permission should be conditional upon CPW further particularising the disclosure challenge by specifying the sensitivity analyses and alternative pricing proposals, the key assumptions that it contends were not sufficiently explained and all facts and matters relied on in support of the contention that lack of access to the model had a material impact. We say this is highly necessary.

I do not want to trespass too much on a housekeeping point which I think Mr. Pickford will come to, but we learnt on Friday afternoon from CPW's counsel that CPW may apply to put in reply evidence on the non-price control matters and that this may necessitate the date for the non-price control matters to be put back. Specifically CPW wishes to bolster its case by coming forward with reasons why the alleged failures to consult are substantial or material matters.

Evidence about materiality should, we say, properly have been advanced from the outset, and if CPW comes forward with evidence now we must be allowed to meet it. This illustrates the difficulties that arise when an appellant's primary case is not as fully developed as it might be. I think it may yet provide a significant obstacle in dealing fairly with the non-price control matters which are raised.

The Tribunal may be concerned that to grant such conditions would jeopardise the hearing date of 2nd December for the non-price control matters. As to this, I understand my friend Mr. Pickford will later today be asking the Tribunal to set back the hearing date for those

matters in any event so that CPW can come forward with this further evidence. The Tribunal will have to decide upon that in due course.

In any event, justice does necessitate that Ofcom be given a proper opportunity to deal with the points and we say that, whether or not the price control matters are or are not a necessary component to advance CPW's case, and we do not contend that they are, we should at least see those matters in order to understand in concrete terms what has been pleaded, and so, therefore, this will not affect it. The timing for 2nd December is already, I think, going to be a difficult thing to maintain.

THE CHAIRMAN: Just looking at your point about it should be made conditional, looking at para.74A.3 ----

MR. HOLMES: Yes, madam, of the Rules of Procedure?

THE CHAIRMAN: No, of the proposed amended notice of appeal, that is where there is a description of the points that they say they might have wanted to deal with. Is your point that they should specify which key assumptions, which formulae, which costs forecasts they are concerned about?

MR. HOLMES: Insofar as they are able to, yes, they should. They clearly have in mind particular alternative pricing proposals. That language is not carelessly chosen. There are matters they have in mind to use these models for. We are going to have to try to grapple with responding. We are going to have to say, "Well, no, the key assumptions were properly set out", but we do not know what key assumptions they are specifically relying upon here. We do not know what alternative pricing proposals they would have been able to make, they say, without the model. We think that that at least should be sketched out so that we have a clear target to aim at -- clear points to meet when it comes to the process of pleading our defence, if the amendment were admitted.

THE CHAIRMAN: That seems to me a slightly different point. The question of whether they should be required to particularise 74A.3 so as to narrow down the points to which you have to plead seems to me a different point from a requirement that then in respect of each key assumption, say, that they identify that then there is a substantive challenge to the key assumption as it was in fact dealt with?

MR. HOLMES: Madam, I fear that I have succeeded in eliding my two conditions. These are separate conditions. They are in the alternative. They are either further or in the alternative. The Tribunal could make a grant of the application conditional on one or other of these or on both of them, but I am not saying that they are linked so that one follows from the other. Our one point is that really they should first bring forward the substantive matters. Our

other point is that they should properly particularise their pleading. We say that both of those conditions should be set, but that they are self-standing conditions on our case.

THE CHAIRMAN: Thank you. There was one other point about the practicality or the importance of the point of principle that Mr. Pickford puts forward, which is this point that the Tribunal has previously grappled with, as you mentioned, which is the fact that if the substantive point is raised and dealt with by the Competition Commission, that does not entirely put right any procedural failing that there was in the investigatory stage because of this question mark over what, if anything, can be done to remedy things during the period when the price control is in effect, pending the resolution of the appeal. But, one cannot say, "Well, it does not matter that you could not point out this problem to us during the investigation stage because you are able to point it out to the Competition Commission once you have got the model during the appeal stage" because there is then this period where, assuming that it is found at the end of the day that there was something wrong, if that had been put right at the Ofcom stage, then the price control for the whole period would have been based on that correct assumption, or correct key input, or whatever, whereas if the correction can only be made at the later stage at the end of the appeal, then there may be nothing that can be done over the elapsed period.

MR. HOLMES: But I do not see, madam, how that differs from any ground of appeal advanced before the Tribunal. There will always be a period of potential prejudice arising from errors in Ofcom's decision-making, and that the appeal is brought to try and correct those errors ----

THE CHAIRMAN: Yes, but does it not point to the fact that there may be some value in deciding procedural unfairness points that relate to the investigation even when one is dealing with a merits appeal?

MR. HOLMES: That might make sense if the relief that was sought was immediate remittal, which would then enable the procedural errors to be rapidly resolved. But, that is not the relief sought. Supposing that procedural errors were found as a result of the hearing - the price control matters. CPW is not saying that the price controls should then be set aside and that there should be a further process of consultation. They are rather saying that we should await the end of the process. Their election in that situation is to rely on the relief that they could obtain from the Commission. But, that is very much their choice.

THE CHAIRMAN: Thank you. Would it be convenient to break a little bit earlier, Mr. Pickford and then come back? How long do you think you are going to be in reply?

MR. PICKFORD: I should think in reply I should only be about ten or fifteen minutes, but there are quite a large number of housekeeping matters that may detain us for some while. I would be very grateful if the Tribunal would adopt that approach. That may be very sensible.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Holmes?

MR. HOLMES: Madam, I am afraid to say that when I came to look at my notebook after the short adjournment there was one point with which I had not dealt, and Mr. Pickford has kindly agreed that I should very quickly address it now, with your permission

THE CHAIRMAN: Yes.

MR. HOLMES: The point was simply the suggestion that this argument is entirely sterile because the same point could be raised by way of an appeal against the WLR decision.

THE CHAIRMAN: That was the point I was just going to raise with you as well.

MR. HOLMES: Very good. On that we have two points to make. First, we say that insofar as the same procedural sterility that we say arises in this appeal should arise also in that appeal, that is to say if there were no substantive points raised, which could justify a higher standard of review, and if there was no remittal sought then we say that would be a good basis for not allowing that aspect of an appeal to proceed, and we would be seeking to strike it out on that basis as well.

We also say that it would not be appropriate in deciding today's application in relation to this extant appeal to consider an appeal which may or may not be brought in respect of another separate decision. It is too vague and speculative a proposition to treat when considering the concrete appeal before us and an application to amend.

THE CHAIRMAN: Yes, I think the point we were mulling over was that point, that is: is your objection to this really an objection to amending the pleading to include this or is it an objection that you could have made had 74A been included in the notice of appeal as originally lodged, to which I think you are saying as currently pleaded it would have been subject to the same objections as you are now making.

MR. HOLMES: Yes, madam, in contra-distinction to the other non-price control matters.

THE CHAIRMAN: That was what I was just coming to because you have not sought to strike out the other allegations of inadequate consultation ----

MR. HOLMES: Yes, madam.

THE CHAIRMAN: -- and, as I understood it, that was because there are some words in parenthesis in those paragraphs which refer forward to substantive objections to the later on.

MR. HOLMES: Not only those words in parenthesis, madam, but also the fact that there is a specific link made in the justification for the claim in para. 75 based on the need for a heightened standard of review and for a decision about costs based on those substantive matters being raised.

THE CHAIRMAN: So you accept that the heightened standard of review point, if it is a good point, is a sufficient link between the substance and the procedure to provide a basis for the procedural challenge?

MR. HOLMES: Yes, and we say that that cannot be relied upon at the present stage in relation to this application which, of course, we suggested might be deferred for this reason because there are currently no substantive challenges to the matters arising out of disclosure of the modelling.

THE CHAIRMAN: But you do not go so far as to say that the substantive challenges have to be good ones, or we have to think that they are good ones, it is enough that they are there being made?

MR. HOLMES: If the substantive challenges were plainly bad, if it was absolutely clear on their face that there was an objection to them, we say that would not provide enough cloak or cover for a claim, but we are not saying that you have to adjudicate on, or be satisfied as to the merits of those challenges – if they would not survive a strike-out application before the Tribunal then it would be a peculiar thing to say that they could justify having a hearing on non-price control matters in relation to which no relief was sought. We do not say that in relation to any of the price control matters to which, for example, the failures to consult are connected. We have pleaded to them, we have responded to them, they are price control matters which it is perfectly appropriate for Carphone Warehouse to raise before the CC. Just briefly, there are of course two consultation points. T he other is the alleged failure to consult on a draft measure and in relation to that we would say that if there were a problem with the consultation, if we really had failed to consult on a draft measure, it is difficult to see really how the appeal could at that stage continue before the CC because we would have failed to respect our Community obligations as regards consulting the EC Commission. That is a rather different point – there would have been no consultation at all

THE CHAIRMAN: Well that really looks forward some considerable time to a situation where we have heard the non-price control matters, we deliver a ruling on them, say, part way through the CC's deliberations on the price control matters, given that no one has urged us to do those two investigations sequentially rather than concurrently, so what then happens to the remaining months of the Competition Commission's investigation in the event that we

decide that one or other of these procedural points is well made is something we will have to decide nearer the time, is it not?

MR. HOLMES: Well I agree, madam. I must admit to being slightly dismayed and disheartened by the suggestion that it would necessarily take a good portion of the period for the Competition Commission's deliberations. It may be that the Tribunal would find that these points, some of them in any event, were more easily dispatched than that.

THE CHAIRMAN: A worst case scenario, say, that we are a way into the Competition Commission's investigation, then we will have to consider what the consequences of whatever findings we make on the non-price control matters are for the continued appeal.

MR. HOLMES: Evidently that supports the need to have those matters dealt with insofar as possible as early as possible during the course of the Competition Commission's deliberations.

THE CHAIRMAN: Yes.

MR. HOLMES: Madam, unless there are any further questions.

THE CHAIRMAN: No, thank you very much, Mr. Holmes. Yes, Mr. Pickford?

MR. PICKFORD: Thank you, madam. I intend to take a number of points in reply and I will essentially follow the scheme in my reply that Mr. Holmes set out in his submissions – I will take them in order.

The first point that he focused on very heavily was the question of relief. He says that we are not seeking any relief in relation to the point that we wish to introduce, and therefore that illustrates that it is not a point that the Tribunal should adjudicate on.

The first point which we make in response to that is, as we have explained, we do seek relief. We seek the relief that the CAT set aside the decision of Ofcom on the basis that it was flawed in relation to price control matters, and in order to do that it needs to rely on the determination of the Competition Commission and we say the determination of the Competition Commission is informed by these failures. So they do ultimately go to the relief that we are seeking, albeit that they do not give rise to it in their own right; they are still relevant to it.

The second point is that Ofcom posited a test, it said, for establishing whether a ground is legitimately advanced or illegitimately advanced, and it said that you can look at it this way: suppose that we were only advancing these matters and they were shorn of all the price control matters that we advanced, would we be allowed to plead them in the way that we have without any substantive relief, and they say the answer to that is "no", and therefore that demonstrates that these cannot be good grounds of appeal. We say that Ofcom's

positive test is misconceived, and the reason for that is as follows: the relief that we seek in this appeal is borne of a combination a combination of pragmatism on our part and the fact that we do, in this appeal, have price control matters that are raised, and therefore we are seeking for a determination from the Competition Commission. Were we in a different appeal, and had we had no price control matters to raise at all, is an entirely hypothetical question -- what sort of relief we might have sought. We might have sought in those circumstances -- and a hypothetical appellant might seek - to have the matter remitted to them, but as, madam chairman, you observed, Ofcom's approach effectively require the appellant to elect one way or the other which type of appeal they are going to have and as soon as they have elected that they want matters to go off to the Competition Commission for determination, they effectively relegate all of the other points that they might raise to ones that they say simply cannot be legitimate grounds in their own right. We say that that is wrong.

Indeed, one can meet Ofcom's point, if one really wanted to, by simply amending our prayer for relief to include, for instance, a declaration that Ofcom erred in relation to its consultative approach. We do not think that adds anything.

THE CHAIRMAN: That is a bit difficult, is it not, because the kind of relief we can grant is rather circumscribed by s.195.

MR. PICKFORD: Madam, anticipating that very point, that is why we did not include a declaration because we did not feel it was necessary to get into a debate about whether the Tribunal had the specific power to do that, or it did not. That point has not been decided and I entirely appreciate there is a question mark about it. We do not need to go there because we are quite content to rely on the minimum that we need. The minimum is a judgment on these matters which will inform the determination of the Competition Commission and are good points in their own right.

Turning to the *NICE* case again, and the particular points that Mr. Holmes took you to, he again emphasised that it all depends on the particular facts and context of that case. He emphasised the following paragraph in particular: he took you to para. 38. The case is at Tab 2D of the authorities bundle. He apparently emphasised that, but I am not sure that he read in full that,

> "Professor Martin Knapp, of the London School of Economics, makes similar points about the limitations of the read-only version, stating that the inability to track formulae automatically makes it impossible in practice to confirm that the model contains no errors and has been correctly constructed with the appropriate

formulae. The read-only version also allows inadequate consideration of sensitivity analyses carried out by technical staff at SHTAC and NICE and makes it impossible to carry out further sensitivity analyses. He identifies some important areas where alternative data assumptions or modifications to the model structure should in his view be tested".

Over the page, at para. 44, it goes on,

"In relation to sensitivity analyses, however, there is no relevant disagreement: it was found by the Appeal Panel, and is common ground, that such analyses cannot be carried out with the read-only version. Further, I do not see anything in NICE's evidence to contradict what Eisai's witnesses say about the importance of sensitivity analyses in checking for problems in a model".

Now there is really no magic here, we say, about the types of consideration that the Court of Appeal was dealing with in *Eisa*i and the points we are raising here. The point is a really very simple one: you cannot analyse and test the robustness of the construction of a model, the formulae that are used in it without visibility of it. In *Eisai* the point was far finer. There, it was when you have a model, what kind of model do you need to be able to do those kind of tests? Here we say it is absolutely self-evident. You obviously cannot run a sensitivity test to establish whether there are errors in the model when you have not got the model. It is really that simple. Nor can you test the assumptions.

THE CHAIRMAN: What there does not seem to have been in the *NICE* case that there is here is some argument that there was other material made available to you which did enable you to see what assumptions were being made without having to see that they were inputs in the model, as such.

MR. PICKFORD: Madam, on the contrary, we would say that is precisely one of the issues in the *NICE* case. If you go on to paras. 47 and 48 one sees there Mr. Giffin's arguments. Indeed, if one goes back to para. 46,

"Mr. Giffin submitted that Eisai's ability to engage in critical appraisal was not hampered materially by the lack of the fully executable version of the model. Quantifying cost-effectiveness requires the application of assumptions; an economic model is the way of synthesising and working with those assumptions. The proper subject-matter of consultation was a debate about the appropriate assumptions. The consultees received a very detailed technical assessment report as well as the read-only version of the model (if they requested it); they knew the

assumptions and were in a position to debate them, as well as being in a position to make comments on the model itself".

So, that was precisely the same point that was being advanced there. The answer in this case is precisely the same, which is that, as Lord Justice Richards accepted, Eisai were given a great deal of information and were able to make representations of substance. It knew the assumptions. It knew how they were being applied. It could comment on them. It could run sensitivity analyses -- Sorry. It knew what sensitivity analyses had been run and could comment on those. It could, and did, make an intelligent response as far as it went. That is the key point. There are all sorts of things that you can do. We do not say that there was not quite a lot that we could do. All we say - and it is a very simple point - is that there was plainly something we could not do, which was, for example, test whether the model, the spreadsheets contained any, for example, arithmetical errors. We did not know because we did not have them and we could not test them. It really comes down to that very simple point. There really is not the same sort of magic in it that Ofcom is suggesting. We say it is far simpler than they would have you believe.

THE CHAIRMAN: I do not think it can be as simple as saying, "Well, this case decides that in every instance where a model is used in a particular investigation by a regulator, that model has to be made available to interested people". It does seem to have been dependent on identifying something that could only be derived from the executable model and showing (a) that that was an important thing; and (b) that it was not otherwise available.

MR. PICKFORD: Yes. In relation to the importance question we say that it really cannot be sustained - the suggestion that this is not an important part of Ofcom's reasoning in this case. It is the very model -- it is the very synthesis of their analysis. So, it is plainly utterly central to ----

THE CHAIRMAN: I do not want to get into a debate about whether they should have disclosed the model or not. That may be for a later time, if we allow the amendment in. What I am struggling with at the moment is what do you need to plead in order to get this ground of appeal, or argument, launched. Perhaps you are coming to that.

MR. PICKFORD: I am going to come on to that in relation to Mr. Holmes' submissions.

So, just summarising in relation to Eisai, we say we are not only on all fours, but in a far stronger category of situation than was considered in Eisai. There is very little magic in the discussion there of sensitivity and testing the robustness through sensitivity analysis. All that means is just putting in extreme examples to see whether the thing works and whether it still holds. If you discover that you get a funny answer out, you begin to think, well, maybe

there is an error somewhere in this model. That is all we are talking about there. There is really no magic in it.

That brings me then to the third point which is that it is said that we have not particularised our case sufficiently. We say that you can test it in fact in this way: Ofcom say as part of their case, as part of the reason why we should not be allowed to amend, that we could have brought this challenge back in July. They say that this is a very late challenge. We dispute whether it is late at all. We say we brought it within four days of it becoming apparent to us that this was a sensible thing to do. Indeed, it was three weeks before Ofcom even served its defence. It chose not to reply to it. That was its choice. But, in any event, putting that point aside, it says that we could have brought this challenge in July of this year. Now, we do not dispute that technically that was possible. Let us also suppose, just for the sake of argument, that BT at that point - because it had not changed its mind about the confidentiality issue, so we did not have the model -- Would that mean that we could not bring this point forward? We say, no, it would not. The very fact that Ofcom says we could have brought it forward must illustrate the fact that we could have brought forward this point earlier and that there is not a necessary dependency on then going that further step and saying this is how things would have been different had we been able to bring this point in the first place. As it is, we say we are going to do that, but we are quite clear that that is not a necessary element.

Indeed, until one has had a considerable opportunity to scrutinise the model – we might still be here not having been provided with it, it does not mean that we could run this point – but without scrutiny you cannot say what you could have done differently, how you might have reorganised the model because you do not know what you do not know. It is not a more sophisticated point really than that.

Turning then to the *Floe* case, Mr. Holmes submitted what we see to be a slightly odd point in relation to the ambit of Rule 11(3). He indicated that the Tribunal was applying – and we presume that he considers it was legitimate – a charity in relation to its interpretation of the distinction between a ground and an argument, or a "*moyen*" and "*les arguments*", in that particular case. We say you cannot apply charity to that kind of distinction. It might enable you to say, "Under Rule 11(3)(c) it is an exceptional case because these particular appellants were not originally legally represented", that is a different. The question of construction is a hard edged question of black letter law. It is not one where the Tribunal can exercise its discretion. So we say that point is simply misconceived.

More generally, we say that Ofcom's articulation of what it says was the test to be derived from *Floe*, it persists in the confusion between the necessity for specificity under Rule 8, which obviously does require arguments to supplement grounds, and the requirements of Rule 11. Mr. Holmes has still been entirely unable – he still totally ducks the question of why the expansive approach that he says one should apply to Rule 11(3) is required in order to allow the Tribunal to deal with cases justly. He does not have answer for that and the reason why he does not is because there is no good answer. As I made clear in my initial submissions, his approach would, in fact, frustrate the ability of the Tribunal to do its job properly.

The sixth point that arises is that is now clear from Ofcom's submissions that they did, in fact, depend on the confidentiality issue in their decision not disclose. They say that we did not need it, but they also say that in the interests of always trying to be as transparent as they possibly could, if there had not been a confidentiality problem we would have seen it, and the problem was that BT was saying, "No, you cannot see it". That was one of the reasons that led to the view that they took.

There was then subsequently a change in that position. We are quite content if it was BT's change of mind that led Ofcom to change its mind. We are not trying to pin it on Ofcom, but what we are saying is there was a change. There was a change in that at one point it was said that confidentiality meant that we could not see this, certainly that was BT's view, and then another, during this appeal process we could. That was the key decisive factor as far as we were concerned as to whether this was a point that was worth while pursuing or not.

I will come back to the conditions that were suggested in a moment. On the point that Mr. Holmes raised after lunch on the WLR appeal point. We have never advanced the WLR point in answer to his point on sterility. We have a number of answers to the sterility point but the WLR point was not one of them. We advanced the WLR point in answer to his suggestion that this was going to require lots of additional work and that was a reason why Ofcom should not be required to do it. Our answer to that is, "Well actually, if that is your only answer, that is not good enough because we are going to introduce this later and so you are simply putting off the evil day", and that is in no one's interests. So that is the context in which that arises.

Then, finally, dealing with the issue of the conditions that Mr. Holmes suggests, it seems to us that his case really has collapsed into a case about the necessity for conditions because in the interchange that, madam, you had with him I understood that he was conceding that where a link could be made between a procedural matter and some additional substantive

matter arising then they were content as long as it was not a point that was strike-outable, that that made the point entirely legitimate. So he seems now to hang on the point that he had not yet seen what our substantive points are.

In relation to that, our answer, as you will have gathered from what I said in my opening submissions, is that we do not need to do that. It is a self-standing point in its own right. If the Tribunal wishes us to plead it out further we are happy to do that. Because the point is really a discrete one, which we say is self-evident and really simply requires an analysis of the authorities and application of them to this particular case, we say it would not be particularly productive to engage in the kind of process that Mr. Holmes seems to be suggesting, but if that is what he wishes and if that is what the Tribunal wishes, we are quite content to do that. If that was really the only objection then we would have been quite happy to respond to a request for further information, as indeed we have done previously in these proceedings, without having to a whole hearing in relation to the matter.

THE CHAIRMAN: Just looking at your para.74A.3, I think the point that Mr. Holmes was making was that they consider that in answering this plea it is open to them, under the *NICE* case, to say in relation to each point where you say, "We were not really able to deal with this because we could not see the model", they can say, "You were able to deal with this because actually we provided you with the necessary information in our letter of whatever date and so there was no inadequate consultation". If it is right that that is how they can and should respond to this point that you are making, they want to know, "When you say including the key assumptions underlying the models, are Ofcom then supposed to, off their own bat, identify each key assumption underlying the model and say in respect of that key assumption, well, actually if you look at what we provided to you on 15th January then you have got enough information to be able to respond constructively, and in relation to every formula used in the construction you had enough information to deal with that in this, that and the other letter", because that is requiring them to do a great deal of work in digging out the key assumptions and the formulae used in the costs forecasts in order then to be able to rebut them. Now, we saw in the NICE case that it did seem to narrow down by the time it got to the Court of Appeal to a couple of points, the inability to track formulae and the sensitivity analyses.

MR. PICKFORD: Yes.

THE CHAIRMAN: And so NICE were able to say in relation to those well, yes, we accept that you could not find it out, or no, we do not accept that you could not find it out, but if Ofcom have to dig out every key assumption and formula and cost forecast in order to be able to

counter your allegation that you could not deal with it then that leaves them a bit of a broad target to try and hit, whereas what they are saying is: "Can you say which of the key assumptions, and which formula you want to rely on?" If you say: "Well, it is all of them because we could not see the whole model", then we do look as if we get into a bit of a morass quite quickly.

MR. PICKFORD: Well we say it does not need to be a morass because ultimately we say it is, assuming we were all given the opportunity to advance this point, self-evident, that if you have not been given a model you cannot check the calculations in it, no matter what you have been told. I hear, madam, what you say, and it certainly is not our intention to cause undue difficulties to Ofcom in dealing with a matter that it could deal with if only if it were more precisely pleaded. So we are very happy and, indeed, if Ofcom had said: "This is our concern ----"

THE CHAIRMAN: Well it is not their only concern, they have a lot of concerns, but just focusing on this particular one at the moment.

MR. PICKFORD: If this were the only concern we would be very happy to take it away and to attempt to be as precise as we possibly could in order to minimise the points on which Ofcom needed t o come back, and obviously we would not demur from that.

THE CHAIRMAN: Well it is my concern, if we decided to let this go ahead, that if it is pleaded like this and we just get a defence back saying "No, you were able to see all the key assumptions and formulae and costs' forecast from other material then we are not really much further forward in being able to decide the issue.

MR. PICKFORD: Madam, notwithstanding what I have said I can certainly see that the Tribunal would be concerned that there would, at the very least, be that risk and, for that reason alone, we would be happy to deal with it, albeit that we say that actually, when one really gets down into these things it is not as difficult and complex as Ofcom suggest.

THE CHAIRMAN: The other point that was the first alternative that Mr. Holmes put, the first alternative condition, which is the need to link into the substantive challenges in the way that he says you have done in para.74.1 to 5, you say that is going too far?

MR. PICKFORD: Yes, we do, but we are going to be, as I said also seeking to bring forward substantive amendments to the price control matters and, insofar as we are able to so, we are very happy to draw the linkages there as well, so that will itself become a non-point, albeit we certainly do not accept that there is that need in order to advance a point such as this in its own right.

If I may on that point, Mr. Holmes drew your attention quite fairly to the letter from RGL Forensics, but it is worth considering that letter in slightly more detail and we say it does make clear the difficulties which RGL Forensics had in assisting my client. It says in terms:

> "You will see that our report concludes that we have been unable to determine whether or not Ofcom's calculations provide a sufficiently robust basis on which to set future prices. The purpose of this letter is to set out why we have been unable to come to a conclusion on this important point.
>
> The key difficulty we have faced in our review has been the lack of visibility of Ofcom's model and supporting calculations.
>
> As you know, in our review we relied not only on published information, but also worked alongside your team in discussions with Ofcom to better understand their calculations. I would like to stress that at all times during our review, Ofcom attempted to answer our requests for further information and maintained a very open and constructive dialogue with us. However, we were not given access to a number of key documents during our review which, in effect, meant that we were unable to conclude on the reasonableness of Ofcom's calculations. In all cases the issue appears to have been that BT refused to release the information requested on the ground of confidentiality."

Then it goes on to deal with the "OAK" and the "RAV" models, it explains that it had not received full responses to queries regarding:

> "(a) The reconciliation of revenues and costs in BT's model to t hose in its regulatory Accounts; and
>
> (b) Explanations for variations in forecast unit trends.
>
> In our view, without access to the outstanding information and queries, it is not possible to come to a conclusion or otherwise of the unit costs set out in the consultation document."

This is a professional firm of forensic accountants, the person who wrote this letter is Hugh Kelly, who sits behind me, who used to work for Ofcom, so he should know a little bit about how Ofcom's models tend to be built, and not require exacting standards that could not reasonably and practically be met by a Regulator. This was his considered view at the time in relation to these models.

Madam, unless there are any further points that you wanted to raise with me, that probably concludes the point on the amendment. There are then a number of points that we should, I think, at least touch on if the Tribunal is willing to do so in relation to next steps.

THE CHAIRMAN: Well next steps presumably rather depends on what we are going to decide about the amendment?

MR. PICKFORD: It does, madam, and if the Tribunal were able to decide that point now, following a short adjournment, I am sure that would be extremely helpful indeed.

THE CHAIRMAN: Well let us adjourn and see whether we can come back, not with a reasoned decision, but at least with an indication as to how we want to go forward.

MR. HOLMES: Madam, we entirely endorse that course but we should say that would agree with Mr. Pickford, that the other matters of case management do need urgently to be addressed today, whatever the outcome; they do not depend on the outcome of this hearing. The hearing might affect them but they do need to be dealt with.

THE CHAIRMAN: Yes, that is what we meant, yes.

MR. HOLMES: Thank you, madam.

THE CHAIRMAN: Let us adjourn until five to three, and see whether that is enough time for us to come to a view. Thank you.

(Short break)

THE CHAIRMAN: Both parties in this appeal agree that it would be helpful if the Tribunal could indicate whether we have been able to come to a conclusion, although we will need to give our reasons in due course. We have been able to come to a conclusion which is that we consider that this application falls within Rule 11(1) and not Rule 11(3) and that we are prepared to allow the amendment to be made.

The conditions that Ofcom have asked to be attached to that permission, if we grant it, we deal with in the following way. We agree with Ofcom that it is important for the appellant to identify more precisely than is done currently in the proposed para. 73A.3 which key assumptions and formulae and costs forecasts etc. they allege they were not able to test the robustness of because of their not having access to the model. So, we would want to see more particularity in the pleading in that respect.

Ofcom also raise the question of the linkage of this inadequate consultation point with substantive complaint or complaints. Mr. Pickford has told us that Carphone Warehouse will shortly be bringing forward substantive amendments following on their analysis of the model. They will then wish to argue along the lines of the existing para. 75 of the notice of appeal that the alleged inadequate consultation in relation to the aspects of the decision which are challenged in those proposed amendments should affect the intensity of the Competition Commission's scrutiny of those new price control matters.

What we now need to explore is where this takes us in terms of the process. Would it be convenient for Carphone Warehouse to produce a draft further amended pleading which covers both the extension of para. 74A.3 and the new proposed amendments arising from the disclosure of the model at the same time? If that is convenient, is it better for us to adjourn this application to amend, subject to them bringing forward a revised proposed amendment covering those two aspects? There are many imponderables in the further conduct of this appeal, such as we do not know of course the extent to which the amendments on substantive matters that Carphone Warehouse is going to propose are going to be contested by Ofcom; we do not know what the effect of the recent publication of the decision on WLR is going to be in terms of the existing non-price control matter which has been referred to as the de-coupling point; or whether there are going to be aspects of any future appeal against the WLR decision which need to be combined with aspects of this appeal. But, we cannot let all those imponderable points deflect us from trying to make progress as fast as we can with getting the questions on the existing price control matters off to the Competition Commission so that they can make a start on their investigation of the number of substantial price control matters which are already raised in this appeal and to which Ofcom has already pleaded.

That is where we are at the moment. Mr. Pickford, perhaps it is up to you to say what you propose.

MR. PICKFORD: We certainly strongly endorse the point that the key in terms of the case management of this case at the moment is to ensure that the price control matters are advanced and referred to the Competition Commission as swiftly as possible. It was for that reason that we were proposing to attempt to bring forward any amendments that were required within fourteen days of today's date. We are very happy to attempt to deal with the non-price control points as well. My only concern is that by bringing those into the same timetable, that may potentially make it more difficult to deal with the price control matters, which are the priority, so that we can hold the date of 27th November for the discussion of the referral. Certainly we will be keen not to let that slip because those matters are time critical in the sense that the sooner this goes to the Competition Commission, the sooner the Competition Commission can report.

The non-price control matters are less time critical in that although they do inform the approach that the Competition Commission is to take, it does not need to know at the outset precisely what your judgment is in relation to them - as long as it knows substantially before it has to report it can tailor its approach accordingly. For that reason we consider

that if there is to be any flexibility in reorganisation, it should be to ensure that price control matters go forward as soon as possible and to potentially re-align the way in which we deal with the non-price control matters.

So, if the Tribunal were content, we would suggest that it might be sensible to separate out the non-price control particularisation that has been asked for from the further price control matters that are ones that we are seeking to advance. We are happy to try to combine the two, but we just do not know whether that is necessarily sensible.

THE CHAIRMAN: What we were not sure of is how long it would take you to expand upon para. 74A.3 - whether that was something that, well, you already know what the answer is, and that it is just a matter of drafting it, or whether there is more work to be done by you in deciding what points you want to focus on in that regard.

MR. PICKFORD: To be completely frank, madam, I have not given that matter detailed consideration. So, at the current state I am not exactly sure precisely how long it should take. I do not think it should be particularly onerous. All I am keen to do is to ensure that in the event that something unexpected arose in relation to that, we were not faced with a situation where we were trying to get something done in order to fit in with the price control matters timetable, but did not actually need to be done on the same track. But, as I said, essentially we are in your hands. We are happy to do our best. It may be sensible, if the Tribunal is content with this, that we attempt - because we are trying to move this forward and it is in my clients' interests to move this forward as fast as we can, to bring forward all of those amendments that have just been discussed within fourteen days, but with liberty to apply in the event that the non-price control matters appear to be causing us problems and it would be more sensible simply to focus on the price control matters.

THE CHAIRMAN: I think Mr. Holmes also said that they would prefer, if the amendment was allowed, to plead to everything at once. Clearly that makes sense. But, I think we are all agreed that the priority is to get the questions off to the Competition Commission. Of course, there may be a slight spanner in the works if the substantive amendments that you bring forward within fourteen days are clearly going to raise price control matters. It may be that some of them are not agreed to by Ofcom. But, our current feeling is that, well, the questions are not absolutely carved in stone. It might still be a good idea to get the questions off to the Competition Commission even if they may need to be slightly tweaked at some later stage once we finally know what amendments are going to be included and what are not. It does not mean that this process becomes rather fragmented, but our judgment is that it is better to take that risk than just to put everything off with no foreseeable deadline.

MR. PICKFORD: Madam, we certainly agree with that. One of the difficulties with which we are all faced is that the procedure, for all of its potential benefits, is a slightly cumbersome one, given this dual track. It does cause these sorts of problems. It is incumbent upon all the parties to do their best to work around them. We would certainly hope that when it comes to the reference of the price control matters that Ofcom were willing to take a relatively pragmatic approach, not necessarily to seek to contest every matter then which could, as you say, be dealt with in terms of fine-tuning the reference questions. We will obviously have to wait and see.

THE CHAIRMAN: We have no reason to suppose that they will not take an entirely pragmatic and responsible view.

MR. PICKFORD: Indeed. We hope they do.

THE CHAIRMAN: But, nonetheless, they may well have good points to make in opposition. We just do not know.

The next step then is for you to bring forward your amendments. Do you agree then that the best course at the moment is to adjourn the application for permission -- I do not know whether we can adjourn it if we have actually decided it ----

MR. PICKFORD: Madam, we consider that a perfectly acceptable course would be for you to decide it, which you have done, on conditions. Your order is that the application should be allowed, subject to certain conditions which you are entitled to impose under Rule 11(2). That is entirely consistent with the legal framework. That would be the conclusion of today's hearing, the application has been allowed subject to conditions.

THE CHAIRMAN: Yes, and the condition is that you then bring forward a revised draft which will not be a re-re-amendment, it will just be this same amendment at the same time, all being well, as including the further amendments in relation to the substantive matters.

MR. PICKFORD: Yes, we are certainly content with that course.

Madam, if I might explain what our position is, because I think this will be hopefully helpful to the Tribunal and to Ofcom, in relation to the price control amendments that we are planning to bring forward. There are, from the inspection of the model that we have carried out so far, effectively two categories, it would appear, of points. There are what appear to us to be new points based on new errors that we have only now come upon having seen the model. Mr. Holmes referred to what we suspect is one of those, which is the volumes forecasts in relation to ancillary services. Mr. Holmes says they have not reviewed it yet, they think we might be mistaken. We shall see, but certainly on the face of it we

believe there is a mistake there. That is one category, an example of the control falling into one category.

The other category is that there are other points that we have already pleaded that we consider have been reinforced and confirmed by our review of the model. For example, we say at para.91.1 of our notice – we do not need to go there – that Ofcom has caused itself various problems by starting from BT's models, internal models, when it should have started from the regulatory accounts. We say that is the normal way of doing it and it has caused all these difficulties for itself by not following that approach. That point is already pleaded, but we say, now we have seen the models, that gives support and confirms our concerns in relation to that.

In relation to what we think that we can do within the next 14 days to enable this appeal to be progressed, that is to amend our notice of appeal so that all of the points that we are hoping to rely upon are set out in the form that one would hope to see in a notice of appeal to enable the Tribunal then to take a view on what maters should be referred. What we do not believe that we can do, what we can undertake to do, is necessarily to provide all the supporting evidence that might relate to those points within the next 14 days.

Madam, could I hand up a short note which we have prepared, and which I have given to my learned friend, on what we have been doing in relation to the model. (Same handed)

What it explains is, in summary terms, how the model is constructed and some of the difficulties that we have encountered in dealing with it. The difficulties are not intended to be a criticism necessarily, they are simply explaining that we have not been sitting on our hands and that we have been doing our very utmost to progress this appeal as fast as we can because, as I have said, it is in our interests to do that. We have, unfortunately, been limited in our ability to do that, not simply because of the complexity and the difficulties that we have experienced in relation to the model but because there are certain important respects in which the information that we have been supplied with is not complete. We wrote in relation to this issue to Ofcom on 19th October seeking disclosure of various further categories of information and also further spreadsheets which we did not believe had been provided. That letter has been inserted, I believe, at 17A of the correspondence bundle.

Ofcom have replied to us. They replied last week. We were hoping that they might be able to reply more speedily, but in any event they have replied. They are content to disclose the further matters in so far as it is within their power to do so, because they say certain things only BT have and so we have to seek those from BT. The difficulty that we have is that, despite prompting from those instructing me, BT has simply refused to respond to us in

relation to these issues. So it is now a fortnight that has gone by and we have had complete radio silence from BT. So the current situation is that we are somewhat hindered in our ability to progress certainly the fine tuned witness evidence in support of our points without access to that information. We said in our most recent letter to BT, "If you do not respond to us we will inevitably have to seek an order from the Tribunal compelling you to", and we still have not had any response to that. I do not intend to make that application here, because BT are not here and we have not given them notice that we are going to make it. That is a material consideration in relation to our ability to bring forward our full case on these matters, and it is of some concern to us that BT has not responded and it is perhaps somewhat unfortunate that they are not here today to have a little bit of pressure applied to them more directly.

That is the situation in relation to price control matters and what we hope to do about them. There is then a further question in relation to the issue of a reply. Madam, you may recall that at the last CMC we had on this matter you indicated that the appropriate approach to take in relation to the question of reply was to get in the defence, get in the statements of intervention, and then take stock at that point as to whether a reply was appropriate. We are very happy to do that, subject of course to the fact that we are also keen to try to get the price control matters referred off as soon as we can. We have not yet had the statements of intervention and the hearing of 27th November is fast upon us. Trying to think ahead, we anticipate that in relation to certainly in certain respects both price control matters and non-price control matters there will be points on which we wish to reply.

In relation to price control matters and non-price control matters the situation is as follows: we anticipate that it would be sensible for us to reply to the legal points that are advanced by Ofcom in its defence because they set the legal framework for what is then referred off to the Competition Commission. It is not absolutely essential that we do that prior to the reference of those questions, but we believe it would be probably be sensible if we could, and we are happy to give that a go. That is what we say in relation to price control matters. What we do not expect to do in a reply is to respond to all of the detailed financial and economic points that have been raised by Ofcom in its defence and the many annexes to it. We do not think that is a sensible or practicable way to proceed. There is at least a four months reference in the Competition Commission pending and it simply would not be sensible for us to try to deal with all of those matters ahead of that. We are happy to deal with those, as indeed happened on the last occasion there was such a reference, during the process. So on price control matters our reply would be specific to the legal framework, the

key legal points that are raised, and we would leave the rest to be dealt with during the Competition Commission reference.

In relation to the non-price control points, plainly there is only one forum for those. It is this Tribunal. We anticipate, on the basis of what we have seen so far in Ofcom's defence although we are still reviewing it carefully, that we will need to have reply evidence on certain points that are raised by Ofcom, in particular in relation to the consultation challenges that we have raised, in particular the points where we say, "You did not consult us at all on these five different issues", one of Ofcom's responses, they have a number of, is "These points really are not material and so it was not incumbent on us to consult you in relation to them". We will wish to respond to that. Mr. Holmes said that we should have advanced that before. We do not think that is fair or sensible, we did not know what Ofcom's response might have been to these points. For all we knew, Ofcom might have accepted that there was a failure here and it should have done something. Its answer is that none of that was significant.

We have in general terms in our evidence explained the significance of this appeal. We have not gone through it item by item in relation to those points explaining their significance and that is one of the things that we will need to do in our reply evidence on the non-price control matters. So we do anticipate that there will be a reply.

THE CHAIRMAN: That is real evidence rather than just submission, is it?

MR. PICKFORD: It is likely, I think, probably to require evidence as well as submission.

Certainly there will be submission. We only received that defence last week and we have been doing a number of things – we have been preparing for this application – so we have not yet considered it in any detail, but we say, as currently advised, it seems quite likely that there will be a requirement for some evidence to support those points because we will be wanting to say, "Look, this point is material, because Mr. Heaney says it matters £X million to his business", so that is the sort of evidence that I anticipate we may wish to advance.

THE CHAIRMAN: And where is this all getting us to?

MR. PICKFORD: Well where this is all getting us to is that given the matters that have been canvassed today and also that it does appear to us that it is overly ambitious for us to attempt to hold the 2nd and 3rd December dates that we had for the non-price control matters. As I said, it is in our interest to try and progress this quickly, we do not particularly want to give them up but we cannot see realistically how we are going to be able to hold those and fit in all the various steps that we have got to prior to a hearing to enable everyone a proper

opportunity to respond, digest and deal with them. So that is where it is leading to on the non-price control points.

On the price control points, as I said, save for the fact that we are not going to be advancing all of the evidential issues now, we do hope within the next 14 days to bring forward everything that is necessary for the Tribunal to adjudicate on what the reference question should be.

THE CHAIRMAN: So you are saying that, as far as the next steps are concerned, we should allow your application subject to the conditions that you expand up on in s.74A.3, and order you to – well we cannot really order you to bring forward your other amendments, but we could set a deadline for the proposed revised notice of appeal to be served. Then presumably, Mr. Holmes, you will need time to serve an amended defence?

MR. HOLMES: Madam, I imagine I will. I would like to address you generally on these case management points as Mr. Pickford has, I do not know whether you would like to finish his submissions first?

THE CHAIRMAN: I am just trying to get clear in my own mind, Mr. Pickford, what actual directions you are asking us to make today?

MR. PICKFORD: Well the directions that I am asking you to make are that the amendment be permitted subject to conditions. I do not say that as a direction you have to direct us to bring forward our amendments within 14 days. It would be permissible for that to be a basis on which you have granted the application. It can be a recital that "Upon CPW undertaking to bring forward its amendments within 14 days you hereby grant permission to amend subject to conditions.

THE CHAIRMAN: Are you also asking us to vacate the dates of 2nd and 3rd December and give you permission to serve a reply?

MR. PICKFORD: Yes, we are certainly asking that those dates be vacated because it does not seem to us that whatever happens, it is going to be possible properly to hold those.

THE CHAIRMAN: Well we could keep them pencilled in for this case even if they are not going to be used for the non-price control matters in case there is anything else that crops up.

MR. PICKFORD: That is true. Madam, one sensible option might be to at least hold 2nd December date as a moment at which to take stock of where we have got to then, and set down the detailed directions for then finally disposing of the non-price control matters, that might be sensible.

THE CHAIRMAN: Also, if there were to be any contest to your substantive amendments, other than the expansion of para. 74A.3, that might be a convenient time for those to be dealt with.

MR. PICKFORD: Indeed madam, Yes, we are very happy to be here in the Tribunal and to facilitate the progression of the case as best we are able. It is simply a final hearing on those points I think is ----

THE CHAIRMAN: Yes, well that is why I am trying to nail down what it is that you are asking us to do in terms of directions, so there are those four things effectively – or three and a half things.

MR. PICKFORD: And we do seek permission for a reply, we do anticipate that one will be necessary, it is very common place for there to be a reply. We hope there is not going to be excessive argument about it, but we will see.

THE CHAIRMAN: Thank you. Yes, Mr. Holmes?

MR. HOLMES: Madam, if I might first address you on the question of whether the appropriate course today is an adjournment or an order?

Having sought an order subject to conditions we are nonetheless quite attracted by your idea of an adjournment for this reason: because it seems to us that if you were to make the order conditional upon certain courses, certain things being done by CPW there would have to be some opportunity for us to consider and to comment on the new pleading that they bring forward to see whether the concerns have been fully addressed. It might therefore be preferable if they were to adjourn this and they were to bring forward their new amendment and, subject to any observations we might make in correspondence, you could then grant permission on the papers once you see it. That seems to us an attractive course.

On the other matters canvassed, we note first of all that there are arguably limits to the extent to which you can make too many directions of a general nature in the absence of two of the four parties and without having heard them on the appropriate course of conduct of these proceedings. We understand that Mr. Pickford has raised a concern about the hearing dates on 2nd and 3rd December, and they were indeed canvassed with counsel for the other parties – you may have seen BT's letter, which it wrote today, raising concerns this morning about the prospect of reply evidence and reserving its position without having heard more about the scope of that evidence. We, for our part, are concerned at the suggestion of reply evidence, and we do say points about materiality are quite clear – this is in relation to the non-price control matters. It is said that reply evidence is needed because of an argument

that we have raised about the extent to which these matters, these supposed failure of consultation are sufficiently serious to merit further consultation.

Now, it is absolutely plain from the applicable case law, which must have been known to Carphone Warehouse at the time that the significance or importance of modifications to a proposal at the final stage, following consultation in the decision is a key question about the adequacy of the consultation and we say it should properly have been raised initially. We are not saying that ----

THE CHAIRMAN: Well I am not prepared to go into this today, and I am not sure how it disadvantages your client if they put in a reply.

MR. HOLMES: I am so sorry, madam, I thought you were asking today about whether they should be given permission to serve a reply in the terms that Mr. Pickford has outlined. It is not that we oppose necessarily such evidence, but we do say that we should have an opportunity to meet it, it is described as reply evidence, but given that it is being brought forward for the first time at this stage we should properly have an opportunity to be able to meet it.

THE CHAIRMAN: Yes, I understand your point.

MR. HOLMES: Another suggestion that has been made today is that the reply as regards the price control matters that Carphone Warehouse would prefer to leave its response to those until matters are before the Competition Commission. Now, we have no difficulty with the idea that the Competition Commission will be conducting a roving investigation and will no doubt raise questions, there will be plenaries, there will be bilateral meetings, there will be plenty of opportunities for discussion. We would be concerned, however, if Carphone Warehouse were to take way from today any suggestion that it would be appropriate for them to put in substantial bodies of evidence which may materially expand the scope of their appeal before the Competition Commission and to assume that in any way that course has been sanctioned by the Tribunal. We would emphasise they have progressively sought to expand the scope of their appeal, they have had the model now for over five weeks and they are now proposing to come forward with new matters which were only described, I must say to my surprise, this afternoon.

THE CHAIRMAN: Well they have not attempted to change their case without applying to amend.

MR. HOLMES: I am not suggesting they have but nonetheless there is a clear tendency to expand the scope of the case and it is clear that that is having an impact on case management and it does need to be watched. With that in mind we would just lay down a

marker at this stage that it would not be appropriate, we say, for CPW to come forward with substantial reply evidence without being invited to do so by the Competition Commission during the course of the Competition Commission's procedures.

THE CHAIRMAN: As far as the defence is concerned, I think what we have in mind is that once you have seen the revised notice of appeal which contains the amendment we are allowing plus the revised para. 74A.3, plus, we hope, the substantive amendments arising from the disclosure of the model, you will then need presumably to amend your defence. Now, one of the known unknowns is that we do not know whether you are going to have objection to the proposed substantive amendments.

MR. HOLMES: No, madam.

THE CHAIRMAN: But, we would be reluctant to put off the formulation of the questions to go to the Competition Commission pending any resolution of any such contest. So, at the moment we envisage that you would serve a revised defence to this amendment, plus any uncontested substantive amendments in time for us to know where we are by 27th November, if that is feasible.

MR. HOLMES: Madam, I understand entirely your reluctance to delay the reference of the price control matters to the Competition Commission. But you will appreciate that it is very difficult for us to give any kind of an undertaking as to what or cannot be done when we have not seen the amendments in question. We have heard them described for the first time today in only the most sketchy of ways. Obviously we will do our best. It goes without saying that we will try our hardest to respond to points once they are brought forward. We hope that the way in which you will decide to do that is by adjourning today's application and then once new matters are brought forward, if there are any problems will be rapidly raised in correspondence. Otherwise an order can be made on the papers permitting an amendment. We would then propose to plead to it as rapidly as we can. We would also, as soon as we have had an opportunity to consider it, write to you, advising you of the scale of the task as we see it, and of the length of time that we envisage that we will need. Other parties would then have an opportunity to respond accordingly. If it were necessary in order to try to avoid any delay to the price control matters going off, we could plead to those first. We would do our best. I have to say that I think it will be a heroic proposition to plead -- This is all based at the moment on supposition, but assuming that there are quite substantial further matters raised on 16th November, then it might be a difficult task for us to plead to those in time for 27th. We would do our very best. I do not know if we can take matters all that much further forward today.

I appreciate the difficulty that the Tribunal is in. I can only say that we will do our best.

THE CHAIRMAN: We have at least got the price control matters which are pleaded and your defence to those. We ought at least to be able to put together the questions to the Competition Commission that arise from those, and perhaps we ought to be content with being able to do that by 27th November. If some of the amendments that you bring forward on 16th November are not contested and can be quite easily slotted in, then we will deal with those if we can. But, perhaps we ought to be modest in our expectations.

MR. HOLMES: I certainly would not suggest that we vacate the date of 27th November. It does seem that we could usefully use that date. Insofar as there are discreet price control matters which are untouched by the amendment, there should be no reason why, once we have all of the pleadings in, they should not be referred off. There is nothing, I think, in the rules as I read them that would prevent an iterative process - and even, if necessary, an amendment to a reference should that prove necessary in due course.

THE CHAIRMAN: I think that is right. I think that we do have the ability to refer questions at any time in the course of the proceedings under the rules. That must mean to amend any reference that has already been made.

MR. HOLMES: Yes, madam.

THE CHAIRMAN: I think we will rise again for a few minutes and see where we are.

(Adjourned for a short time)

THE CHAIRMAN: We have decided that we will grant permission to Carphone Warehouse to make the amendment which they have applied to make today subject to them revising para. 74A.3 to provide further particulars along the lines we have described, and to do that within fourteen days of today.

We also direct that within fourteen days Carphone Warehouse lodge any further application to amend the notice of appeal with proposed amendments arising out of the disclosure of the model.

As to the service of the defence, we note that Ofcom have told us that they will lodge an application to amend their defence as soon as possible after they have seen the new proposed amendments and we encourage them to deal in that revised defence with as much of the proposed amendments to the notice of appeal as possible, subject of course to any challenge they may wish to make to the new amendments proposed. We do not therefore propose to set a particular date today for the service of the defence.

There has been some debate between the parties about the service of a reply, but we do not propose to make an order in relation to that today.

Having regard to a number of factors, in particular the new non-price control matter that we have now given permission to be introduced, because of the importance of everybody focusing on the preparation for the hearing on 27th November for the settlement of the questions to go to the Competition Commission, and because there is clearly some debate over whether there should be a reply and reply evidence served, we have decided that we will not be hearing the non-price control issues in this appeal on 2 and 3rd December. We would like to keep the date of 2nd December in everyone's diaries for a CMC in case that should be necessary, but we will release the date of 3rd December.

We give liberty to apply to the parties to come back to us in case what we have just outlined becomes unfeasible for some reason.

Finally, everyone has assured us that they regard it as being in their clients' interests that this matter is progressed as quickly as possible, and in particular that the reference to the Competition Commission is made as soon as possible to enable them to make a start on what are undoubtedly more important and complex price control issues contained in the appeal and already pleaded to in Ofcom's defence. We hope and expect that the parties will proceed with the further conduct of this appeal in that spirit.

MR. PICKFORD: Thank you, madam. I have one short application to make in relation to that which is for our costs of today, or a proportion of them, to be assessed if not agreed. We have been successful in it, subject to the imposition of the condition to particularise the claim. That condition was not one which was raised by Ofcom in its skeleton argument. Its previous argument was either that it should be rejected in its entirety or that the application was premature. It was never advanced that it should be granted subject to conditions. We say had that been the only issue then we need not have been here today, because we certainly would not have bothered to make a very big song and dance about that. We would have been quite happy to deal with that off-line, as it were. For that reason, we ask for our costs.

MR. HOLMES: Madam, firstly, we would note that we did raise the difficulty that we thought that we would face in responding to the proposed amended notice of appeal as drafted in our skeleton arguments for today. I can certainly give you the reference for that if you will give me one moment to find it. (After a pause): We say at para. 15 that it would currently be very difficult to offer any meaningful response to CPW's additional ground given that it is only supported by a short letter from CPW's external consultants, JGL Forensics, which adds nothing of substance and (2) that it does not particularise the specific types of

sensitivity and other analysis that CPW would have wished to perform in relation to the modelling. That point, I think, was not responded to in the subsequent skeletons.

More generally as regards costs, madam, the previous practice of the Tribunal has not been to award costs in relation to contested application hearings of this kind. You will recall in relation to our contested application hearings in the Hutchison 3G appeal that there were no interlocutory orders for costs although Hutchison was unsuccessful in part in relation to both of its applications to amend. We say that it is more appropriate to leave this matter for today and to consider it as part of the costs in the cause.

Of course, you will also be aware that Ofcom has consistently taken the position that costs should not be awarded against it as a responsible public authority. The points that we have raised today, we say, are responsible and legitimate ones for us to have taken as a regulator. We therefore submit that no order for costs should be made.

THE CHAIRMAN: Are you saying that we should make no order for costs or we should not make an order for costs - if there is a difference between those? Are you saying that we should not consider the costs of today or that we should decide that the costs should like where they fall?

MR. HOLMES: If you feel able to do so we say that we have conducted ourselves responsibly as regulator in relation to this application; that we have raised points that were legitimate albeit that they did not find favour with you, and that in accordance with the submissions that you have no doubt read before now from Ofcom, that an order should be made that costs should lie where they fall. If you are not with us on that, then I say that you should leave the matter for today. That is really for you to consider.

MR. PICKFORD: Madam, if I may reply? We certainly resist the order that costs should lie where they fall today. If the Tribunal is not willing to grant my application we say that the appropriate course is that there is no order for costs and that they are dealt with in due course.

THE CHAIRMAN: Mr. Pickford, it is not this Tribunal's practice to make orders for costs as we go along. It tends to be dealt with in the round at the end of what is inevitably a rather long process, and we do not see any reason particularly to divert from that practice. So we do not propose to say anything about the costs of today and we will deal with it, if requested to do so, at the end of the proceedings.

Thank you very much everybody.