IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 April 2011

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED — Appellants

– v –

OFFICE OF COMMUNICATIONS — Respondent

EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED — Interveners (Case 1151)

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD
CABLE & WIRELESS UK — Interveners (Cases 1168 and 1169)

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HEARING DAY ELEVEN

APPEARANCES

Mr. Graham Read QC, Miss Sarah Lee and Mr. Richard Eshwege (instructed by BT Legal) appeared for the Appellant.

Miss Kassie Smith and Mr. Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited

Mr. Javan Herberg QC and Mr. Mark Vinall (instructed by the Office of Communications) appeared for the Respondent.

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

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

Mr. Daniel Beard QC (instructed by Charles Russell LLP) appeared for the Intervener Cable & Wireless UK.

The Intervener Hutchison 3G UK Limited was represented by internal counsel.

The Opal Telecom Ltd did not attend and was not represented.

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MR. READ: Good morning, sir. I am just going to finish off my final ten minutes. Can I mention one thing, sir. We received last night a submission from H3G which I hope the Tribunal itself has received.

THE CHAIRMAN: Somewhere I think it is here.

MR. READ: I do not think I need to say anything more specifically about that. Firstly, I want to hand up two notes. The first of these notes, sir, is what I promised you yesterday, which is our paragraph references where we say we have dealt with the questions that the Tribunal sent on Friday. That is for cross referencing to our main document. Also, sir, in light of the questions I was asked yesterday by Professor Stoneman and yourself, we thought that we would try to set out what we see is the material there. Certainly in respect of Professor Stoneman's question we have set out what we understand to be the evidence relating to this matter, which is on the first page of the document.

Sir, you will see that in fact it does have reference to a particular document, the IRV material which is marked confidential, and we have clearly indicated in the text where that actually is marked confidential. I think there is a non confidential version available for anybody who needs to see it. It is on p.2. So we have dealt with Professor Stoneman's point on the first page of the note.

On the second page of the note at para.4 we deal with the question that you asked yesterday, sir, in respect of the SPs. We have set out the material as we see it on that. We have concluded the note with something that I think must not be overlooked in this case. One of the problems as we perceive it (picking up in para.4 at the bottom of p.3) is that BT has had to spend a lot of time trying to pin down exactly what Ofcom did in the process of the Final Determination. I took you yesterday to a few examples. There are many more in our written submission document that we put forward.

The problem with that is that one can tend to lose sight of how exactly the whole thing fits together. I would not want a single question on SPs to get lost in the general pattern of how we say the effect should be weighted. What we have done in para.5 onwards is recapitulate what we have said very clearly in our reply and we do ask the Tribunal to look at para.65 of our reply which is specifically referred to in para.5 of this note. Then look at the other points we make in there about how we say the welfare analysis should actually have been conducted.

Sir, I am not going to take up any more time specifically taking you through that. I would not want, in this case, the woods to be lost for the concentration on the trees!

Can I then deal with one other point which I think I should make. We have been looking overnight at some of the submissions that have been put forward in the written documents. I do want to make this point because there are criticisms made of the modelling. We do say, sir, that great care has to be taken as to what the criticism is and what the reality of the evidence was on the point. We have dealt with the modelling in some detail in our written submissions. But we do urge upon the Tribunal not simply to accept what is said in the submissions put forward by the MNOs without a very detailed analysis of what we have said in our written document. We simply do not agree with it, but on the other hand, sir, I do not want to take up more time by going through each single one of those criticisms and knocking it on the head, as we say they are all knocked on the head.

There are two final points that I want to address. The first is the question of the 080 appeal. We have dealt with this at para.259 onwards in our written document. I do not want to go through the detail of it, but I do just want to pick up one point, which is Ofcom's suggestion that if, at the end of the day, you think that Ofcom got its 080 Final Determination wrong that this Tribunal should do nothing more than send the whole matter back to Ofcom for Ofcom to reconsider the matter. We say that would be a totally wrong approach to take, given the material the Tribunal has before it now in this case, and that the Tribunal is well in a position to gauge what it thinks that Ofcom should have done in those circumstances. The sole argument that seems to be put forward by Ofcom is they may somehow need to consider it in the broader context of their overall policy remit and their overall issues about public consultation, etc. With the greatest respect, we say that is a completely fallacious point because there is so much material that is there, it is inconceivable that if the whole matter was remitted to them, Ofcom could simply reassess the thing. There would not be any more material than the Tribunal has before it at this stage. So we do say that it would be a complete waste of time to effect that. We are here, the material is there, the Tribunal is in as good a position as Ofcom to reweigh it.

Concluding about the 080 appeal, sir, we do say that on any view they have got it wrong. It is clear they have got it wrong, not only because of the fact that their ground 4 that we were misled and we did not have the opportunity to put the material in when we could have put it in, but also we say it is completely flawed as an analysis because it simply did not concentrate on the finer details that were already before them, even leaving aside the fact (as we say) that they did not get as much information out of us as they should have done. I think that is all I need to say on the 080 appeal.

I have briefly indicated our position on the EE appeal as set out. I do not propose to go over that.

The final point that I want to deal with, sir, is the question of relief. I do not know whether you have had an opportunity of reading para.262?

THE CHAIRMAN: Yes, we have all read it.

MR. READ: Sir, I think it is clear from that that BT's prime position is the dispute resolution process is not to become used as a tactical gain by parties seeking to put appeals into Ofcom, or refer disputes to Ofcom and then put appeals into the Tribunal subsequently. There has to be a commercial risk involved in it. We say that ought to be the primary factor. It would send a very bad message out if parties can effectively defer having to pay more prices because of concerns that they have not had an opportunity to adjust their prices first. Sir, we do understand the concerns of the Tribunal and we fully recognise it, but we say that those concerns have to be weighed against that greater concern. If the Tribunal were still concerned about it we do say there are alternative dates that can be used, and the key alternative date, we say, is when the Notices of Appeals were lodged because at that stage everyone could see where the battle lines were drawn and how exactly the cases were to proceed.

Sir, I think that is probably all I need to say on relief. Were there any further questions the Tribunal wanted to ask of me at this stage?

THE CHAIRMAN: No, Mr. Read.

MR. READ: Those are BT's submissions.

THE CHAIRMAN: Thank you very much. Mr. Beard.

MR. BEARD: Mr. Chairman, in the interests of time these closing remarks on behalf of Cable & Wireless are structured round the questions provided by the Tribunal. I will also, to the extent that there is time, take the Tribunal to one or two particular points in Cable & Wireless' unchallenged evidence from Mr. Harding.

Before turning to provide Cable & Wireless' proposed answers, there are just a couple of remarks to be made. Cable & Wireless are keen to emphasise that whilst we have been lumped together with BT for the purposes of closing, it must be made very clear that we are not friends! Save in the very special sense that my enemy's enemy is my friend. BT is our closest competitor; there is no love between BT and Cable & Wireless. So why are we here supporting BT? The position is simple. Cable & Wireless, as Mr. Harding has set out in his evidence, wants to introduce ladder pricing, wants to change its pricing to MNOs and indeed if BT is going to do so then Cable & Wireless must too. As was noted yesterday,

Cable & Wireless has put in place ladder pricing, but it is effectively suspended pending the outcome of this case.

The concern is the way that dispute resolution is being approach in this case for BT would be precisely the same for Cable & Wireless. Like BT Cable & Wireless has dispute resolution clauses in its contract with MNOs and, so far as we can see, there is no reason why Ofcom would approach the case of Cable & Wireless any differently from the position in relation to BT. So Cable & Wireless a competitor to BT would be lumbered with the same reasoning and in all likelihood the same conclusion. Indeed, this is at the heart of the problem with Ofcom's approach. It sees the existence of dispute resolution provisions as being a sort of trip wire affording total regulatory control and a veto over pricing decisions, and it will adopt that approach in relation to Cable & Wireless, just as it has with BT.

That takes me on to the questions. They are answered on the basis that the outcome of any assessment of relevant factors is uncertain whether as Ofcom found it in the decision or following the evidence that the Tribunal has heard. I should emphasise that Cable & Wireless supports BT's welfare analysis which, of course, removes that uncertainty and therefore would change the complexion of how these questions are answered.

The questions as a whole ask about how dispute resolution should work and should have worked here. Their focus is clearly on the application by Ofcom of its Principle 2. I should make clear Cable & Wireless has no issue with Principle 1, and in relation to Principle 3 we adopt BT's submissions and I will return to it briefly in commenting on Mr. Harding's evidence, but our answers to the questions are in the round, and I will deal with Cable & Wireless' case on how dispute resolution should work in response to the first question and then pick up the remainder of the questions I hope rather more briefly.

The first question that was posed: "In resolving this dispute what factors do the parties say were relevant for Ofcom to take into account?" Cable & Wireless' short answer to this is that it does not say that Ofcom took wrong factors into account, but Cable & Wireless says it erred in its approach to dispute resolution. Furthermore, it failed to attach sufficient weight to the importance of freedom of contract and the promotion of competition. In this case there was no SMP obligation; there was no clear breach of any regulatory obligation. Ofcom concluded that matters were finally balanced; it was uncertain as to the consequences of the price changes. In those circumstances being uncertain Ofcom should have given primacy to freedom to contract and let the changes occur, that is how dispute resolution should work. That is the short answer and now a slightly longer version.

Plainly the starting point for any contractual pricing arrangements is that the parties can contract freely absent any specific legislative or regulatory intervention. That is a fundamental principle of English law, and it is not one that is undermined by the operation of EU law. The fact that there is a dispute resolution mechanism built into a contract does not undermine this basic principle. Of course, and to be clear, Cable & Wireless accepts that the Framework Directive and the Access Directive and the Communications Act provisions, especially sections 3 and 4 mean that Ofcom is not simply an arbitrator between parties just applying domestic contract law, Cable & Wireless' position is that the pendulum does not swing completely the other way, and mean that there is a full scale regulatory investigation and decision.

When we look at the Framework Directive and the Access Directive, they clearly contain two different regulatory mechanisms, which can be applied by national regulatory authorities; indeed, they must be applied by national regulatory authorities. Of course, the first and the most important is the process of market review and identification of positions of SMP. I will not take the Tribunal to the Framework Directive itself given that it is probably tiresomely familiar now, but just for your note the Directive is at A1, authorities bundle 1, tab 8. The relevant provisions in the Framework Directive, to which I would refer the Tribunal, are Articles 14 to 16 which deal with the general provisions for identifying undertakings with significant market power, the market definition procedure, and the market analysis procedure that has to be undertaken in relation to any SMP assessment. Then when one goes back to the Access Directive (authorities 1, tab 6) what one sees in Articles 8 through to 13 of that Directive is a structure for imposing obligations where people have SMP in a particular market in relation to access and interconnection. What is important to note there is that there are a series of provisions that require obligations to be imposed where they are relevant when there has been an SMP finding, so Article 9 deals with an obligation of transparency, Article 10 an obligation of non-discrimination, Article 11 accounting separation, Article 12 specific network facilities and, of course, Article 13 price control and cost-accounting obligations, there is a specific regulatory scheme carefully built in the CRF to deal with these matters. That is a much more intrusive and full regime which can result in price controls.

In contrast, what you have in the Framework and the Access Directive, Framework Directive Article 20, Access Directive Article 5(4) is a dispute resolution mechanism. That is obviously a lighter touch resolution mechanism for dealing with regulatory issues. In passing, whilst I am just talking about the Framework Directive and the Access Directive, it

is just worth noting in relation to Article 8 of the Framework Directive, which is sort of the "daddy" of all of these obligations which run through into s.4 of the Communications Act, that there have been discussions at times about what the relevant priorities are, but in the context of a regulatory scheme which was endeavouring to liberalise telecommunications across the European Union, it is not surprising that Article 8 puts front and centre in Article 8(2) national regulatory authorities "shall promote competition" and then it goes on to identify the ways by which that might happen, and that is a key provision here. It is described as the "first Community requirement" in s.4(3) of the Communications Act (authorities 1, tab 3).

Taking those matters into account, taking the legislative structure into account we say that the right approach to dispute resolution is to consider the contract which gives rise to the mechanism, look at the relevant regulatory considerations and if there is no clear breach of those regulatory provisions you let freedom of contract prevail and the pricing can be imposed. That is consistent with the liberalisation which is, after all, what I say the entire EU regulatory scheme is all about. Indeed, it was rather eloquently described and discussed by Mr. Muysert in a passage that Mr. O'Donoghue referred the Tribunal to yesterday, and he has helpfully set it out in para. 26(9) of his closing submissions, and I will just read a little bit of it.

> "… if you stand back from the whole problem, the European regulatory framework works on the principle that where possible you de-regulate and you pull regulators out of the market. The reason that the system works that way, I believe, the underlying economics is that errors occur. It is very difficult to get decisions right all the time. We actually have quite a poor understanding of some markets, look at the debate over is there a waterbed or is there not a waterbed? It's a fairly simple question, but we don't really know it. So, it's quite easy to make mistakes. Those mistakes are costly, and they tend to be more costly in the long run, so there are dynamic concerns."

I will not read the rest out. The sentiment is there.

The approach Cable & Wireless proposes has other benefits. It limits intervention to cases where a real problem is identified, not a possible one, not one where there is uncertainty that there might be one, a real problem. Plainly, when the regulator comes to consider these matters it has some discretion both in how it analyses matters, and how it identifies problems, we do not get away from that. But if, as here, the regulator says the matter is uncertain it should let the matter go. This approach to dispute resolution prevents the

regulator from ending up in a situation of micromanaging interconnection and access pricing. This interpretation also fits with the four month period for dispute resolution. You can sensibly check whether there is a likely breach of a regulatory issue in that time. You may not be able to do everything, but if there is a real and clear problem you can pick it up. A further benefit of this interpretation is that maintains a real distinction between dispute resolution and SMP conditions being imposed. Indeed, apart from the time taken for resolution, the four month period that is stipulated in relation to dispute resolution, Ofcom has not really explained what the difference is between its approach here and the approach it would take if there were SMP in place. Of course, from Cable & Wireless's perspective, we sit here looking at the behemoth that is BT in fixed line, and say, "Hang on, we are coming into this market, we are trying to compete and yet your analysis is saying we will not be able to set prices as we want in any way, notwithstanding that there is no SMP condition in relation to us".

People have talked about us being a necessary partner to do business with. That is true of every call effectively, given that a call needs two ends. If you want to ring someone there is a necessary partnership with the other end of the line. That is immaterial, frankly, to this analysis.

What we have a situation where these two processes, SMP and dispute resolution, cannot be the same. In one there is a regulatory scheme intended to mitigate the potentially adverse effects of significant market power. In the other, there is not. It would seem clear from basic principles that where there is no SMP in issue the scope and nature of regulatory intervention must be more limited.

Cable & Wireless's approach is also workable and sensible. It restricts the capacity for gaming which Mr. Read has already referred to, the gaming possibility by those seeking to deluge Ofcom with material to make matters uncertain within the four month period. If you structure dispute resolution that you have to make the decision within four months, then you pour in the economics, you pour in the economists, you pour in the data, you make it incredibly hard for anyone to digest anything. You make sure you approach your submissions on the William Burroughs principle of writing, you write your novel, you cut it up, you reorder it, and therefore you create a degree of confusion where everyone has to go around picking out the bits. There is no incentive for clarity. You end up with an incentive for gaming.

The approach adopted by Cable & Wireless avoids that because it says, "If you are going to complain about this contractual arrangement you have got to come forward with some clear

reasons why it is wrong, why it is contrary to those regulatory principles". This fits with the way in which the dispute resolution is structured. It also fits with the wider regulatory powers that Ofcom has. So Ofcom might conclude, as it should have done here, that ladder pricing should be allowed even though it might not be perfect. If it has broader concerns, it concern launch the sort of inquiry that has led to the SNGN.

This interpretation means that a regulator's view of the best does not end up becoming the enemy of the good, which is the real problem that we have got here. You have got a market failure in relation to MNO pricing on these number ranges. Ofcom is saying, "We do not like ladder pricing that much, we think there is a better solution out there". Initially it was the policy preference tending towards geographic pricing for 0845, and so on, and zero for 080. "That was what we liked best and clearly that failed utterly, we have now got a different approach that is being articulated in the SNGN, that would be what we want to do". Of course the MNOs are going to line up and attack that and we will wait for several years to see whether or not that is actually going to come to pass.

Nonetheless, we can see where Ofcom is going with that, but it does not mean that in the interim it should just say, "No, no, no, any improvement should be denied", notwithstanding the fact that it does not actually breach any particular regulatory objective.

So the price change should be able to occur, even though it is imperfect, but it is better, and it should not be stopped just because the regulator has a difference vision for the market in question.

Also, a practical point: as Cable & Wireless has noted in its statement of intervention – and just for your note that is bundle B1, tab 8, p.11, para.4..2.16 – it is all very well suggesting that BT might be able to put forward lots of general information and data in relation to a price change proposal, but that is not true of smaller TCPs. The approach to dispute resolution, the criteria you are applying, must surely be the same when you have dispute resolution mechanism built into all these different contracts where there is no SMP condition (I interpolate). You should not interpret dispute resolution requirements so that they end up effectively prejudicing smaller operators, because they will be less able to meet this unrealistically exacting standard that Ofcom seems to be setting for showing benefit in order to permitted to roll out your own pricing proposals.

So there is a variety of clear advantages to Cable & Wireless's approach, which are consistent with the regulatory scheme, are consistent with sensible regulation, and which together recommend this approach.

It has been suggested that there is authority to help with the understanding of the right approach to dispute resolution. In fact, when one looks at these cases they are of very limited assistance and none of them grapple with the key question facing this Tribunal, which is how should Ofcom undertake a dispute resolution exercise in a case like this? Three cases have been referred to *H3G*, *Orange* and *TRD*, in particular, and I will deal with them in turn. Given time – and I apologise if I skid round the corner slightly on two wheels, but I hope you will bear with me – it is authorities bundle 2, starting with tab 25. I will deal with them chronologically. Starting at para.1, this is all about the question whether H3G has significant market power. So we are dealing with a slightly different question here in any event. We are dealing with the SMP regime. Obviously the references are to the domestic implementation of the European provisions, but it is clear from para.2 that we are dealing with the same regulatory scheme.

If one goes to p.10 of 41, para.35, para.35, what one has here is the summary of the eloquent attacks put forward by H3G in relation to Ofcom's SMP finding. The first was that Ofcom did not carry out a sufficient analysis of prices, Ofcom failed to take account on restraint on H3G's ability to increase prices due to regulation. That was a wonderful argument, regulation hung as a Damoclean sword over you, so you would never sin and therefore you did not need regulation. Argument iii:

> "Ofcom failed to take account, or sufficient account, of the ability of customers (principally BT) to restrain pricing."

That is the key issue that then becomes the focus of the discussion later in the case, effectively a summary ground.

If one then turns on to p.26 of 41, this is where the Tribunal starts dealing with that third ground. It is the countervailing buyer power ground. I am sorry, I realise that for one of the Tribunal this will either be crashingly familiar or cause terrible flashbacks, but either way I will nonetheless just run through it briefly.

PROFESSOR STONEMAN: It is the latter!

MR. BEARD: I feared so! At para.102 there is a quote from the Ofcom determination, and in particular I would note 4.23, because this is, in essence, what Ofcom found in relation to countervailing buyer power:

> "BT is the major buyer of voice call termination on mobile networks. In theory BT might credibly threaten not to purchase termination from an MNO and this would deprive that MNO of the pricing freedom that it derives from its monopoly over termination."

Of course, remember, this is a question about SMP on termination for H3G.

> "In practice, this issue is irrelevant since BT, even if it did have buyer power, has not been able to exert it because of its obligation to complete all calls whatever the terminating network. The reasons for this obligation will be set out in the document End to End Connectivity …"

So there is a specific regulatory requirement on BT of end to end connectivity. Ofcom said that means there is no real countervailing buyer power on the part of BT. Then the Tribunal went on, and if one turns to p.30 of 41 para.118:

> "We consider that in this respect Ofcom's reasoning and Decision are flawed. We consider that there are two errors. The first is the determination or assumption that the end to end connectivity obligation removed any bargaining power BT might otherwise have had, with the effect that likely or possible future commercial scenarios were not considered by Ofcom. The second is an apparent misunderstanding of Ofcom's powers in relation to dispute resolution. Ultimately these two issues are linked."

Then the Tribunal goes on to deal with the first of those reasons and sets out relevant provisions. It emphasises the importance of the end to end connectivity obligation but says it is not the end of the story. Then at p.37 of 41, which is the passage to which the Tribunal has been referred at para.129:

> "There is a second error apparently underlining Ofcom's position on this point ... The error relates to its perception of the limits to its powers in this area as expressed in submissions. Part of the regulatory picture at this stage of the argument is the fact that under the statute Ofcom has ... the power to determine the price of connection if there is a disagreement between the parties about it. As part of his argument in this appeal Mr. Roth sought to argue that Ofcom did not have that power unless it had first made an SMP decision in relation to the party seeking to charge the price."

Mr. Roth was setting out a very high threshold. He is saying you cannot touch pricing in dispute resolution at all. It is only in relation to SMP. We are nowhere near that territory here because everyone accepts that you can engage with pricing issues. There is no doubt about that. The extent to which you can do it is the crucial matter, and the circumstances in which you can start using draconian powers you might have is the key issue here.

The Tribunal then deals with Mr. Roth's argument and in particular what the Tribunal says at the top of p.38 para.131:

> "The first are powers to take steps to ensure end to end connectivity; the second are powers to intervene where SMP has been found. A power to determine a dispute as to connection is capable of falling within both, so it is certainly capable of falling within the former. If it does, the Directive makes it plain SMP is not necessary ... A power to resolve interconnection disputes is well within this wording, and there is no basis, as a matter of construction of art 5 for separating out disputes as to price. Indeed, it would be illogical to do so. Pricing may be at the heart of the dispute; and some disputes about connection may have aspects which are not, by themselves, direct disputes about price, but may have pricing consequences so that one cannot decide one without the other."

That is pretty obviously clear in circumstances where you could just set an extortionate price for interconnection and say yes, we are offering you the price; we are not saying no interconnection. On the basis of Mr. Roth's argument, apparently that would be a pricing dispute which fell outside the scope of the dispute resolution. Here the Tribunal is saying no, that is not the way it works. But the fact that you may have circumstances where pricing issues can be resolved on dispute resolution does not mean either that in every dispute resolution case you have to engage with pricing, or, where pricing issues arise on a dispute resolution, that you have to determine them in a particular way. So H3G does not tell us how we deal with dispute resolution.

Then we move on to Orange at the next tab, 26. Here again, we are dealing not with what we are dealing with today, we are dealing with an ambitious argument again about the scope of powers. As is set out in para.1(1) the preliminary issue that was being dealt with that is being cited in this case is whether there was a dispute between BT and Orange within the meaning of s.185, not how does one resolve the dispute but did it exist. If one turns on to p.9 of 27 we go to a passage that has been cited to the Tribunal already. What we have here is the articulation of Orange's construction of Article 5(4) of the Directive that it said then had to be read into s.185.

> "In summary, they submit that having regard to the underlying rationale of the regulatory framework and the other provisions of the Access Directive it is clear that the Access Directive is intended only to confer on regulators powers to perform specific tasks directed at ensuring that interconnection takes places on reasonable terms. [Final sentence] Orange argues, once interconnection has been established the regulator is not entitled to intervene either on its own initiative or by means of dispute resolution procedure in the ongoing commercial arrangements

between the parties as the terms and conditions under which interconnection takes place."

So this is almost the flipside of Mr. Roth's argument. Here they are saying dispute resolution only applies where there is not any interconnection at all. Then you can have a dispute resolution mechanism saying actually you must interconnect. I should note in passing that paras.56-57 Ofcom relies on H3G which is then debunked by the Tribunal. Again, this is a judgment that will be familiar to one member of the Tribunal. I hope it does not cause too much trauma just to go back through 67-81. These are the conclusions against Orange's very narrow definition of dispute. In particular, para.69 says there is nothing in s.185 that indicates that the phrase should be given a narrow meaning. Then at 70:

"We have considered the effect of the Tribunal's judgment in H3G [to which I have already referred the Tribunal]. We accept that it is clear from that judgment that the Tribunal was considering what Ofcom's role would be in resolving disputes in the context of an established interconnection agreement between BT and H3G ... However, the point was not argued before the Tribunal [Orange was not a party]."

Then it talks at para.71 over the page the second reason for rejecting is the construction of Article 8(4). Then at para.75:

"The third reason why the Tribunal rejects Orange's construction is simply not supported by the wording either of the statutory provisions or the Directives."

So what we find there, when we get through to the conclusion at 81 is that the Tribunal was dealing with a very different matter, a stark jurisdictional question, that again tells us nothing about the way in which dispute resolution should be conducted.

That then takes us to the third case that has been relied upon in this connection, which is at tab 29 which is the *TRD* Core Issues judgment. I will not take the Tribunal through the introductory sections. Obviously, there were a huge number of disputes at issue. There is an extensive setting out of the relevant regulatory provisions and European provisions in particular. This was being dealt with under Article 20 of the Framework Directive and Article 5(4) of the Access Directive. There is a description of the background of the dispute. Could I pick it up at para.84 p.38 (internal numbering). What we have here is a description of what went wrong effectively. Here we have a description of the allegations that Ofcom had failed properly to have regard to its statutory obligations. It is important to recall the circumstances of this case. This is a situation where the MNOs were all subject to an SMP condition in relation to the 2G Determination, not 3G - that had only just started.

In fact, at the time only Vodafone was rolling out 3G termination, or had it operating. The others were rolling it out. In addition to the regulatory obligations on the MNOs, you also have an end to end connectivity obligation on BT. So again, a statutory obligation that had arisen from the regulatory framework. So very different from here. Entirely understandable that the Tribunal would be very concerned that in the context of these obligations that are found to subsist in relation to aspects of this market it is going to be particularly important to identify the operation of the relevant EU law obligations as built into domestic law through ss.3 and 4 of the 2003 Act, and that they have been properly considered and applied.

What one sees when one turns over the page at para.87 is a fairly terse comment about the way in which Ofcom had dealt with these matters:

> "In the Tribunals' judgment, the reasoning set out in the Disputes Determinations clearly shows that Ofcom failed to have sufficient regard to its statutory obligations under sections 3 and 4 of the 2003 Act."

So in this dispute resolution against the background of SMP and end to end connectivity it had not done enough.

> "(88) In other words Ofcom approached the dispute by asking itself whether, looking at the existing regulatory constraints imposed on the parties, there was any reason why BT (or H3G) should **not** pay the charges proposed by the MNOs. Any other considerations arising from Ofcom's statutory duties were therefore relegated to the consideration of whether there were 'overriding policy objectives' which should be taken into account. This approach represented, in the Tribunal's judgment, a fundamental error as the task facing Ofcom in determining these disputes. Ofcom failed to recognise that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law.

So there it is saying fairly clearly 'make sure you apply the statutory obligations properly', but it is not saying how you must do that. Indeed, when one goes on to read the remainder of the judgment what one finds is indications of the recognition that this third way – without sounding too 'Blairite' it – that has been identified by the Tribunal is different and applies a different mechanism from *ex ante* regulation under SMP and, of course, competition *ex post* regulation. For instance in para. 93 there is discussion of the autonomous regulatory process which dispute resolution is that forms part and parcel of the regulatory framework (p.41).

Then there is an interesting discussion of a Court of Appeal decision, *Derbyshire Waste v Blewett* where there is a discussion about how you feed regulatory obligations into a decision making process. *Blewett* was about an EEC Waste Framework Directive. Ofcom, as can be seen from para. 95 over the page, argued the objectives set out in Article 8 of the Framework Directive are of a different status. Interestingly, the Tribunal does not reach any conclusion about how *Bleeitt* and these principles must apply here. It says:

> "Whether or not this is the case, if the Dispute Determinations had set out a careful analysis of the relevant objectives and the Community requirements and gone on to describe valid countervailing reasons for adopting an inconsistent approach, then the Tribunal might have concluded that this ground of appeal was not well founded. As it is, there is insufficient reasoning in the Disputes Determinations as to which objectives – other than the need for the regulator to be consistent – Ofcom considered."

So what is being said here is there may be a range of ways you feed in recognition of your regulatory obligations into the decision making process. We are not telling you precisely how you have to do it in this context, but you did it wrongly here. Now, in addition to that section I will move on, if I may, to pp.44 and 45. Page 44, para. 100, the comment in the last four lines of the page are instructive, that the statutory provisions establishing the dispute resolution procedure do not expressly provide that Ofcom must resolve a dispute by6 setting reasonable terms and conditions. They do not give any guidance as to how Ofcom is to approach its task, and then it says:

> "… but give what we are talking about here, looking at reasonable terms and conditions would be sensible."

But I would highlight para. 101 which is notable, because what is clear from the Tribunal's approach here is that it is recognising that this third way between competition regulation and *ex ante* regulation, dispute regulation fuses two roles, because it says half way down para. 101:

> "First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine the dispute about reasonable rate would carry out. But secondly, because Ofcom is a regulator bound by statutory duties and Community requirements it also means reasonable for the purposes of ensuring those objectives and requirements are achieved."

So if you have a breach of those objectives and requirements, essentially you are not merely an arbitrator, you would have to do something as the decision maker – again, nothing wrong with that.

I will take the Tribunal on to a passage that has been cited by a number of parties, which is at p.74. I should interpolate, Ofcom it appears in this case had sent out a cry for help to the Tribunal and said: "This is all rather difficult, and rather than acceding to the comment of Mr. Justice Ferris that it is all too difficult, we had better give up, could you give us some help?" they asked. So the Tribunal, although it is dealing with rather particular circumstances then goes on to make some more general comments. It should be said that the Tribunal making general comments about the overall structure of matters outside the particular circumstances of cases is an exercise fraught with danger as all courts know. Nonetheless, the Tribunal goes on at para. 177 on p.74 to talk about some of the steps that might be taken.

Paragraph 177 talks about the obligation to negotiate in good faith. Ofcom has made it clear in the guidance it issued in 2004 on dispute resolution it will not accept a dispute without evidence of the failure of meaningful commercial negotiations. It requires parties to provide documentary evidence of the commercial negotiations, and that the company has used its best endeavours to resolve the dispute through commercial negotiations. This stance reflects the wording of recital 32 of the Framework Directive.

Then we come to the passage that has been relied upon:

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

It is suggested that this means that BT has to come forward in the dispute resolution process and prove why it is that its proposals are somehow good, and fulfil all of the regulatory obligations, do not breach them in any way, do not risk a breach of the duties which is a way that has been put yesterday, and that this enormous burden falls on BT to get it all done with in the four month timetable. That sentence is nothing to do with that point at all. What it is to do with is the onus on showing that you have engaged in commercial negotiations, because if you do not do that you are not going to fulfil the criteria in Recital 32 and the Ofcom guidance. Indeed, it is interesting just to read those final two sentences:

> "The onus likes on the party proposing the variation to provide to the other party and to Ofcom the justification for the change in terms upon which the parties have

> hitherto been prepared to do business. This would be the position in any situation where one party to a binding contract proposes a variation of that contract."

It does not require any contract law rocket science to realise that that final sentence does not make sense if it is being suggested that you must somehow approve and justify a variation. A variation to a contract is not a matter of justification, it is a matter of consideration. You have to turn up to a commercial party with whom you have a contract and say: "I want to vary that contract", you might have to persuade them, you will have to negotiate with them, which is what this paragraph is really about, and that is how that sentence makes sense, but you do not have some divine right of variation if you can somehow justify the change, you effectively have to pay them money or promise something and then you can vary a contract. If you try and read that sentence any other way it is just wrong in law.

So all this weight that is placed on 177 somehow shifts the way in which you should understand dispute resolution is taking that sentence wholly out of context. It is not the clearest set of sentences in the world, we accept that, but it is not doing the sort of legwork that O2, EE and Vodafone and, indeed, Ofcom, are suggesting it does. It is a general observation made by the Tribunal in the context, as I say, of that consideration.

Then we go on to 178:

> "The fact that the dispute is referred to Ofcom must mean either that the other contracting party does not accept the justification put forward by the party proposing the variation …"

- so there are counter influences cancelling out that justification or perhaps both. There is a slight feeling here that we are in an abstract world, but nonetheless, Ofcom's first task is therefore to examine the reasons put forward for the proposed changes in terms and decide whether they are justified.

> "In considering this question, OFCOM must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework directives …"

We do not have any issue with, on its face, that paragraph, but what we do say is that that still means that the weight that must be attached to the contract is significant. It still means that if you come forward with a proposal and there is no SMP and Ofcom carries out an analysis of the circumstances, looking at those proposals, looking at the justifications that are put forward, looking at the objections that are put forward, and says that it is quite uncertain, then you let the thing through. That approach is entirely consistent with that

paragraph of the judgment. Indeed, to try and suggest that these paragraphs do any more than that will be to place grossly undue weight on words that really do not sustain that at all. Then finally, just on para.181, p.76, right at the bottom, final sentence, what we get is a reiteration in this discussion of the point that I highlighted earlier, which is this fused role between arbitrator and regulator that you are having in a dispute resolution mechanism, and the arbitral role must then be recognised.

So the approach that Cable & Wireless advocates fits with the Regulatory Framework, it fits with regulatory principle, and it also fits with the case law.

One last thing, it has been raised by various parties: s.190(2), it has been said that that gives you the power to alter prices and contract terms and somehow that tells you how you carry out dispute resolution. Well, it does not. As, Mr. Chairman, you put it yesterday, that would confuse legal powers with the circumstances in which they can be exercised. The fact that you have a power to deal with prices and impose terms does not tell you anything about the way in which you should carry out the dispute resolution exercise and decide whether or not you should accept or reject a proposed set of pricing arrangements. Effectively, dispute resolution is a hybrid process involving consideration of a contract and regulatory objectives and only if, after having considered the relevant factors, Ofcom considers there is a breach of a regulatory obligation, it should then stop it. Where it has carried out that analysis and the outcome is finely balanced and uncertain it should let the pricing run. That is what should have happened here, and did not.

I think I have, therefore, in answering the first question, emphasised the dispute resolution structure and the failure properly to take into account the value of freedom of contract where the outcome was uncertain. There is another issue, an additional criticism of how Ofcom took into account various factors here that is relevant to question 1. It did not give enough weight to the promotion of competition, that key principle in Article 8, not only in thinking about the dispute resolution structure as a whole, as I have already indicated, but actually in the analysis here, because it is worth recalling that precluding ladder pricing actually undermines competition. Why is that? Ofcom thinks there are relatively high levels of competition between MNOs already, albeit that it is a funny sort of competition which allows MNOs to fleece customers on 080 ranges, but we will leave that to one side. In any event, the change in TCP pricing does not reduce the extent of competition between MNOs. If you move to ladder pricing you are not reducing competition to MNOs. No one suggests that. Indeed, it is the whole predicate of the MNOs in Ofcom's arguments about the waterbed effect that there is significant competition there. Mr. Read has dealt with why

that is an overstatement, and I obviously entirely support what he has said about those matters.

Leaving them to one side, ladder pricing does not affect competition between the MNOs, it does not reduce it. As to competition between TCPs, ladder pricing may well have an impact. If they get revenues they will be able to compete against each other for securing SP business and we have explained how the dynamics of that works in our evidence.

Mr. Harding's statement, which is unchallenged, and that is at bundle C2, tab 48, p.4, paras.13 to 18. I am going to come back to Mr. Harding's statement, sir, I will just leave that for the moment.

You would have more headroom for competition between TCPs for SP business and scope for SPs to compete for 08 work, because they would be actually getting potentially more revenue if it is not passed down because the MNOs dropped their pricing.

What you have is a situation where if the prices do not drop as both Cable & Wireless and BT anticipate, you actually get an encouragement of competition. In the alternative scenario, the scenario that caused Ofcom concern where prices are not dropping, you would actually be promoting competition, and Ofcom does not recognise that. It does not give it proper weight.

That is an additional flaw, but our central point is about the dispute resolution mechanism. That is how we answer question 1.

Moving very swiftly through the rest of the questions, are the following factors to be taken into account, question 2? Sub 1, BT's contractual rights, yes, very much so, in circumstances where no SMP analysis carried out, uncertainty of adverse effect on regulatory concerns.

Then 2, aspects of the regulatory regime in which the parties operated, including the fact that price controls appear only to be imposable as SMP conditions and not as general conditions. That is a relevant factor in how you assess dispute resolution. I think I have articulated why that is the case. The fact in this specific case that price controls were not imposed on BT: yes. Of course, "yes" with bells on when you come to Cable & Wireless.

3, statutory obligation on Ofcom to resolve disputes within four months? Yes, plainly not a full regulatory review. The MNOs get themselves into all sort of contortions on this one saying that Ofcom cannot be expected to undertake a detailed inquiry and yet criticise Ofcom when it cannot reach final views. We have explained why it is that the four month timetable fits with our analysis of dispute resolution.

Then 4, BT's intentions when imposing NCCNs. We slight struggle to see the relevance of this one. So far as we can see, it does not really if BT's CEO, Ian Livingstone, sat there stroking a white cat and throwing his head back laughing and saying, "All this lovely money is mine", it does not actually matter to the overall analysis of how you should deal with this particular dispute.

Mr. O'Donoghue suggested that Cable & Wireless intended to get revenue, and this is terribly important. Well, (a) it is not; but (b), as I will come on to briefly, what we said in relation to the documents and in relation to our evidence was, yes, we did expect to get some revenue initially that would enable us to carry out any investments we needed to undertake, but we did expect that the MNOs pricing would fall. That is Mr. Harding's evidence. The documents were not put to Mr. Harding, they were put to a witness of BT. Really, one has to be a little cautious about any weight that one can put in relation to any answers that were given on those matters, which Professor Dobbs clearly could not be expected to comment properly upon.

Sub 5, subsequent extensions of ladder pricing by other TCPs. Actually, here the position is relatively clear, as illustrated by Cable & Wireless. TCPs would move to ladder pricing if they have to. Indeed, they have to if BT is going to do so, because, as Mr. Harding has set out, otherwise BT will have revenue that it can share with SPs. It will therefore be able to trump the other TCPs in the market for those services.

MR. HERBERG: I hesitate to interrupt Mr. Beard, though it is delightful to listen to him, but every party here has had to cut its cloth to meet its time limit. Mr. Beard is already substantially over his time. Every party has had to put in written submissions and not deal orally with the points it would like to make to the Tribunal orally. I just draw attention to that.

THE CHAIRMAN: That is an entirely fair point, Mr. Herberg. How are we doing, Mr. Beard?

MR. BEARD: I should think another five minutes or so.

THE CHAIRMAN: Five minutes will be fine. After that, I think you can reduce your submissions to writing.

MR. BEARD: Sub 6, market service provider hosting, the industry are promoting competition in relation to that. We have already said it is relevant.

Do any of the parties contend that Ofcom, in deciding disputes, took account of relevant factors, irrelevant factors or failed to take account of relevant factors? I believe we have covered that now. It is how they take account of those factors that is crucial. As we have said, there are two factors we think they did not properly consider.

The assumptions in question 4 under dispute resolution process, Ofcom is entitled to impose a resolution that does not reflect parties' rights and obligations, what regard should Ofcom have to parties' private law rights and obligations? As we have said, a lot in this context. What regard should Ofcom have to the regulatory context in which the parties are operating? I think we have already covered why it is that those regulatory issues are relevant.

Question 5, It is accepted that the best that can be done when assessing the potential consequences of the NCCNs is to adopt a broad brush directional approach rather than seeking to be more specific. Well, it is wrong to be too prescriptive about how detailed an analysis one needs in a dispute resolution, but we do note here that we support BT's welfare analysis. Assuming there is a higher degree of uncertainty (question 6), how is Ofcom to deal with the dispute? We are here, having been uncertain and noting that it has not made a finding of any breach of EU regulatory obligations which should have let the thing through.

Just briefly on 7.1 the policy preference. Ofcom called it a policy preference; in essence it is really an expression of how Ofcom, where it has any margin of discretion, will exercise that discretion. It cannot of course wholly change the dispute resolution but the way that it is going to exercise the discretion (as we say in relation to any judgments) is material. Then in 7.2 the question is asked about whether that policy preference can be a new one. Looking at it that way round, what we have got is just a new policy preference as an articulation of how Ofcom exercises it discretion and judgment where it is applicable. I will leave aside (3) and (4).

In relation to question 8, we do say that you can substitute your judgment here. You can accept BT's analysis of welfare and allow the ladder pricing, or you can accept, as Ofcom have found and you may find on the basis of evidence, that matters are uncertain and as such ladder pricing should have been accepted. Then the final question in relation to relief, I leave those matters to Mr. Read.

Given restrictions on time I will not take you through Mr. Harding's evidence but I would highlight two or three points. Paragraphs 13 to 18 deal with competition between TCPs. That is important. That is evidence. Contrary to Mr. O'Donoghue's submission, you do have evidence before you, unchallenged evidence, about the understanding of competition between TCPs and the way in which that affects competition between TCPs.

I would also highlight para.20 the nature of innovation that can happen in relation to SP services. That is actually to do with dial up internet. Just in passing I would note that dial up internet is not the only role for 0845 which seemed to be mooted, or the majority role.

The point that Mr. Read has made about impact on brand of the 08 number ranges, particularly para.25: the activities of websites such as "Say no to 0870" perhaps illustrate the way in which the MNOs' pricing has had a significant impact on brand. At para.28 Mr. Harding talks about why it is he thinks that there will be a drop in pricing by MNOs.

There is a full explanation of why it is that Cable & Wireless have real concerns about the ladder pricing being proposed by Ofcom, and then having discussed matters with Ofcom and analysed the situation, came to the conclusion that it was appropriate that ladder pricing should be in place.

The point I would emphasise here is that the concern that Cable & Wireless had was with the transparency of BT's mechanisms. It had concerns about practicalities of dealing with BT and it resolved them. These were negotiated away. Mr. Clayton yesterday was raising questions about this issue that you cannot reach arrangements, you cannot reach ARP, the practicalities are just overwhelming. You can always make life seem very, very difficult. Strangely enough, commercial entities, when they have an interest in reaching a resolution, just about manage to do so. Sometimes that is with investment. That was what was anticipated would be needed in relation to BT. As it turns out, investment was not needed in relation to BT. In fact, what has been achieved is through negotiation and contractual arrangements. That must be a possibility in relation to all of these matters. There will be a need for some investment, but that is not overwhelming.

So the final points in paras.48 through to 53, just Mr. Harding's experience of dealing with the MNOs in terms of what information they have and the capability of being able to calculate one way or another some sort of ARP.

Unless I can assist the Tribunal further, those are the submissions of Cable & Wireless. I apologise for trespassing on the time of the Tribunal.

PROFESSOR STONEMAN: It is not related to the main part of your submission. You started off by saying Cable & Wireless had put in an NCCN involving ladder pricing and it is in suspension. Could you give us some information upon who else has put in ladder pricing schemes? What does "in suspension" mean? I have a vague recollection of something at a case management conference where in suspension means that the MNOs were not paying it. Does it mean it is an agreed suspension, or is it a unilateral suspension? What does it mean?

MR. BEARD: The first point, I think, is that the MNOs are not paying at the moment. So that is what the suspension means in practical terms.

PROFESSOR STONEMAN: Is that by agreement with Cable & Wireless?

MR. BEARD: In terms of the nature of the agreement, what we have is exchanges with each of the MNOs trying to resolve what the situation is. I am slightly loath to try to characterise the situation that has been achieved with each of the MNOs in terms of some legal terminology. There have been exchanges with MNOs. I imagine there may be some further fighting and discussion with MNOs about how these things work. But the intention of Cable & Wireless was to say: these are our prices, these are when they should have been applied, but given that we have got a situation where we understand that this dispute is subject to appeal we recognise that rather than there being a separate appeal here which you would inevitably bring and would follow on, this is a pragmatic way of dealing with matters.

In terms of ladder pricing, apart from BT and Cable & Wireless, we understand that Gamma, IV Response and Virgin Media all have ladder pricing arrangements.

PROFESSOR STONEMAN: That must cover about 60 or 70 per cent of the market?

MR. BEARD: Those who are better informed than I nod.

PROFESSOR STONEMAN: I can look that up. Thank you.

THE CHAIRMAN: Thank you very much. Yes, Mr. Herberg.

MR. HERBERG: Sir, it now falls to me to deal with the onslaught! Can I start off by adding to the death of the forests by handing up some Ofcom written material. They comprise firstly some closing submissions, secondly by way of an annex answer to the Tribunal's questions which are short, pithy answers and effectively cross refer (where appropriate) to the main submissions where I deal with relevant points. Then there are going to be two further documents. One, I am instructed, is still in the press but it should be with us shortly and certainly by the time I need to refer to it. It is Ofcom's version of Mr. Read's helpful flow of funds diagram, which is not massively different but it has some amendments which I will take the Tribunal through. Then the final document, which really goes with the flow of funds in a sense, is what I have called an Ofcom sources table. What we have sought to do is, as it were, to provide a shortcut for the Tribunal as to how Ofcom dealt, in the Final Determination and indeed in Mr. Myers' second statement where it explains Ofcom's approach, with each of the stages, each of the boxes in the diagram, how it dealt with each of them. I will take the Tribunal to it in due course but effectively we hope it will be a shortcut way of looking at how SPs pass on to callers or whatever, you can see references to the Final Determination and references to Mr. Myers' statement. I will in due course rely on that statement, in particular in support of what our proposition that Mr. Read's attach on

Ofcom's reasoning generally as being non transparent, there being a lack of transparency, as being continuing ambiguity is simply wrong.

If one goes through the Final Determination one can identify each chain in the reasoning. In minor respects it has been clarified or corrected, but we say very minor respects. Huge mountains made out of very small molehills by Mr. Read. There were also, we say, continuing failures to recognise what was always blindingly obvious in the Determination or what has been made blindingly obvious since. We say that a lot of the complaints of obscurity are wrong on their face, but also go nowhere. There will has been no answer to your pertinent question in relation to the transparency submission which was effectively: so what, where does this take us! There has been no indication of any concrete legal answer to that. I will deal with that in due course. I will take you to the table when we have the diagram and show the architecture of Ofcom's response.

THE CHAIRMAN: Mr. Herberg, I appreciate this may not be part of your submissions, but what is progress on the other diagrams that we mentioned yesterday?

MR. HERBERG: Sir, yes. Those are pretty much agreed, such to one party, whom I should not name, saying that they have some pedantic changes to make to it, so we hope that by 2 o'clock pedantic changes will be made and it will be in a position to be handed 'round.

Sir, what I am going to do in closing is to follow the same general overarching approach as opening, I am going to deal first with some issues common to both appeals dealing with the treatment of uncertainty, the contractual position, the burden of proof, the intensity of review, responding to the submissions of other parties on those issues. Then I will deal with EE's appeal and then with BT's appeal.

Sir, we do say that central to these appeals is the question of the appropriate response of the regulator where there is substantial intractable uncertainty as to what follows from the changes which are proposed, changes to the *status quo* which are then challenged through dispute jurisdiction. We recognise that is a central question on the appeal. We addressed in opening in some detail the reasons why what Ofcom was faced with was precisely that situation, was a deeply uncertain and difficult exercise in assessing the effect of the changes, and I am not going to repeat them in detail, but in very short summary the obvious points are first of all that the pricing structure was, as everyone recognises, a radical departure from what went before. It was a departure where the anticipated changes were not able to be compared to any real world evidence, this was effectively a new theoretical construct to justify it, which was not mapped out with real world evidence, and the theoretical construct which had to be looked at and examined by Ofcom was itself a very

complex one relying first of all on difficult questions of actual facts, observable facts such as ARP pricing, but also on speculative assessments of future effects and matters of judgment. So that was the issue which Ofcom was faced with. Those issues of uncertainty are obviously relevant to the BT appeals, but they are also relevant to the EE appeal, because part of EE's submission is that by even entertaining and considering the charge control notices, Ofcom was effectively led into assessing the merits of retail price control, now it has a legal submission that that is wrong, but part of its case and, indeed, an increasingly important part of its case, as its submissions developed, were as a practical matter in doing that Ofcom was doing something which was impossible, impracticable as well as illegitimate, so the uncertainty submissions, as it were, do lie behind at least part of EE's case as well as BT's case, although of course pointing in their submissions to a very different conclusion and outcome.

Sir, we do make the point and, in fairness to Ofcom, I do further make this point up front because it is a matter which is of some concern to Ofcom, the way that BT presented its criticisms of the way Ofcom dealt with uncertainty, particularly in its skeleton, and the way it originally argued the case, perhaps less as the case has developed, went beyond saying that Ofcom, as it were, wrongly failed to resolve uncertainties in its favour or came to wrong conclusions, it effectively alleged that Ofcom had taken refuge in uncertainties, had erected uncertainties in order to defeat its case when some uncertainties were resolved and then it erected others. It disclaimed any allegation of impropriety or bad faith, but such submissions in their nature come very close to some form of bad faith because they are suggesting that rather than simply looking as a responsible regulator should at the problems with which it was faced and trying to resolve them, it had some second order reasoning process of, as it were, attempting to erect uncertainties, taking refuge in them, putting in new ones. We invite the Tribunal in terms to reject that line of attack and, indeed, we submit there was no proper basis for it ever to be made. Ofcom has sought conscientiously in its final determination, and we say this is obvious on the face of the determinations, to grapple with the intractable problems of the case, and there was no basis for the case to be put in that way we say.

THE CHAIRMAN: Mr. Herberg, of course we know what you say, but I do not understand Mr. Read to have made a point in those terms, indeed, I think he strictly disavowed that point.

MR. HERBERG: Well, sir, if one goes back to the notices of appeal, and those are documents which perhaps get buried in the avalanche, those points are made in clear terms repeatedly. It is simply not right to say that points were not made, they were made clearly and distinctly

and on repeated occasions. In common with many other people I have not sought to engage in an exercise of archaeology, but the phrases which I am using, 'taking refuge in uncertainty' – matters like that – are all taken from the BT case, and I acknowledge that in closing that is not the way the case was put, but indeed we listed just for your reference, at para. 88 of Ofcom's defence in the 0845 case, five instances of statements of that nature: "exhibiting a desire by Ofcom to say", "without properly considering them", "hiding behind alleged uncertainty", "clear impression that Ofcom has …" there is no need to go through them; we say that was clearly put.

THE CHAIRMAN: We will obviously look at the notice of appeal again.

MR. HERBERG: Sir, yes. Ofcom effectively seeks, of course, to steer its way between the twin challenges from BT, EE and O2. We contend that we were entitled, indeed, we were obliged under the dispute resolution procedure to consider the merits of the NCCNs and that in doing so we were of course not engaging in illegitimate price control. We do contend that we were entitled to take the approach in assessing the NCCNs that in determining whether what was such a novel and far reaching departure from the *status quo* should be permitted, that Ofcom was entitled to require that it be satisfied that the changes would not have a detrimental effect on consumers.

Sir, this is clearly an important submission that I will need to come back to in several contexts, but we do say that that was a legitimate approach which Ofcom full square took in the final determination, and I will take you to where it said that. What I should emphasise at once is that we do not say this purely as a matter of burden of proof, this is not simply an outcome of a contractual analysis, it is not simply a matter of an analysis of where the burden of proof lies to be inferred from the contract, or who brings the complaint or from any other matter, it is rather an outcome of Ofcom's statutory duties, and its legitimate, if not mandated, approach to a situation such as this. Where it is faced with major substantial change from the *status quo* with what are alleged by both parties in support of the change and by those opposing it to be far reaching and relatively radical consequences for other parts of the market for retail pricing, Ofcom is entitled to take the view, we say, that it must be satisfied, not to some high standard, not erecting some 'beyond reasonable doubt' but on a reasonable basis it is required to be satisfied on balance that the changes are not welfare detrimental, they are not going to have a detrimental effect on those whom Ofcom is effectively statutory charged with advancing their interest, citizens and consumers in particular. I will need to deal with that issue with some care and I will need to relate it to

questions of burden of proof and contractual analysis which are clearly relevant and as to how indeed the position is impacted on by those other matters.

Can I perhaps start with the overall regulatory approach that Ofcom adopted and was obliged to adopt. I set out at some length in opening Ofcom's regulatory duties and the hierarchy of the Access Directive and I do not need to repeat those submissions. We say that what is absolutely clear is that, first of all, s.185(1) is the starting point. The jurisdiction arises where the dispute is as to the provision of network access. The dispute may relate to terms or conditions which clearly includes price. That is terms and conditions on which access is or may be provided, so it can relate to existing conditions in an existing contractual arrangement, or proposals for the future. It is either. In relation to that dispute, Ofcom has the absolute widest powers as to how it determines it in formal terms. Section 190(2) sets out, as it were, remedies, but it does not give any real guidance as to how Ofcom approaches its dispute determination role.

Section 190(2)(b) authorises it to give a direction fixing terms or conditions of transactions between the parties to the dispute. There is an ancillary power in 190(2)(d). No limitation or constraint or placed on Ofcom's discretion, save of course, and this is not some proviso, but it is the very root of Ofcom's role, that it must act according to its statutory duties, particularly in s.3 and its Community duties in s.4.

Those are the foundations of Ofcom's role. Those duties of course are of a general nature and themselves confer a wide discretion on Ofcom as to how it interprets those duties and, where they conflict, as to how they are balanced.

Sir, it is effectively, as I understand it, common ground between the parties that in exercising this dispute resolution jurisdiction Ofcom is not acting in the position of a commercial arbitrator or indeed any other form of private dispute resolution function. It is entitled, and indeed obliged, to determine disputes in accordance with its statutory duties, and therefore in accordance with its own regulatory policies, in so far as they, those policies, are applicable, and of course in so far as those policies are the working out of Ofcom's statutory duties. In other words, where Ofcom has, as it were, arrived at a policy preference as to how it conceives that its general duties translate through to the way in which the market should operate, how it wants the market to operate, that is a matter which is plainly of first relevance in its dispute determination role.

A policy may not be in absolute terms, it may be only one of a number of considerations to take into account, it is not the simple answer to the dispute, but we do submit that it follows from the nature of the jurisdiction and Ofcom's duties that a policy preference is relevant.

When I come on to EE's appeal it was notable that in oral submissions Miss Smith even was driven to concede that a policy preference was relevant, albeit, she said, not determinative. We would certainly accept that characterisation.

Sir, we then say that in furthering the interests of citizens and consumers under s.3 in relevant markets Ofcom was entitled to take the view, as it did, that a very important consideration was to ensure that consumers' interests were not harmed by the introduction of such a novel and complex pricing strategy. Sir, the paragraph where this is most clearly set out in the final determination – I do not think I need to take you to it, but I will just read it to you – is para.9.32, where Ofcom said in terms:

> "Given the uncertainty which we have identified as to whether BT's NCCNs would result in a net benefit or net harm to consumers, and in the light over overriding statutory duties to further the interests of consumers, we consider it is appropriate for us to place greater weight on this potential risk to consumers …"

As I have already emphasised, this is not a question of a burden of proof at this stage. This is before we even got on to the contract. This is a question of a sensible and prudent approach to the need to address, understand and quantify in the short determination period the complex multiple potential consequences of the price change instituted by BT.

Sir, it is a consequence of effectively the situation with which Ofcom is presented. There is a status quo. Never mind the contract for now. There is a status quo, which is the existing pricing arrangements. There is a substantial proposal for radical changes brought by BT. Again, never mind the contractual approach. Ofcom has to measure the existing situation against what it can derive from that and what it can anticipate as to the future. It is, in those circumstances, rational, proportionate, and wholly in accordance with the statutory duties to require that it be satisfied that the changes are not going to be detrimental.

Mr. Beard in his submissions talked of the risk of gaming the system, of objections being made that are very complex and confusing to ensure that there is sufficient uncertainty around. The far greater risk of gaming lies the other way round. It is the party which brings the proposal forward, which proposes the change, which is the one which is in control of how complex or simple it is. The risk of gaming is that a party in the position of BT can bring forward a proposal which is so novel, complicated and complex in its terms, so difficult to assess, that it is simply impossible for Ofcom in a four month dispute resolution period to arrive at a clear view, or a sufficiently clear view, to reach a concrete decision on the balance, that this proposal is welfare beneficial or this proposal is welfare detrimental.

The nightmare scenario is that in that situation Ofcom has no alternative but to let the proposal through. That would be we say an abdication of Ofcom's statutory duties to further the interests of consumers, if in such a situation it had to wave through the proposal because it could not arrive at a proper determination of its effects.

Mr. Beard is quite wrong to say that it would lie with the people objecting to make it complicated. If the proposal is straightforward, or relatively clear enough for Ofcom to assess it, then Ofcom is going to be well able to deal with people trying to be obscurantist or difficult or disruptive in opposing that. The crucial question is the measure itself which is proposed – is that simple, is that complicated? That is why Ofcom submit strongly that it is entirely legitimate, to put it at its lowest, for Ofcom to direct itself, that it must be satisfied as to the proposal not being detrimental.

Sir, that is nothing to do with the precautionary principle. There is some suggestion in BT's submissions that Ofcom effectively accepted by a question in cross-examination that it was endorsing some form of precautionary principle. I do not accept that was the case. That is not what was said. I emphasise in any event that that is not what Ofcom is suggesting. The precautionary principle, as I understand it, involves placing a disproportionate weight to the real risk on a factor because the consequence of it occurring is so catastrophic that one, therefore, as a precaution puts outsize weight on it. That is not what Ofcom is suggesting it ought to do in this situation. It is dealing with a situation where it has problems estimating the actual weight, the genuine weight, where it is simply not able to come to a conclusion that the changes are either beneficial or not beneficial with the constraints of the particular process that it has to deal with.

It is to be borne in mind – submissions have been made from the MNOs, EE and others, that the particular difficulty that Ofcom was faced with in this case was that a wholesale change was being justified by changes to the retail market and therefore it brought in retail pricing considerations, it brought in effectively considerations that were more appropriate to SMP market determination, full market determination, and so forth. All of that, we say, does not go to the jurisdiction of Ofcom in grappling with the dispute resolution and the need to reach a decision on the merits, but what it does do is emphasise the difficulty which lies with the proposal itself which is justified in those terms with which Ofcom had to deal.

We do suggest that BT has no legitimate grounds for complaint if the outcome is that its justification for the proposal is so complex, so difficult to assess and ultimately so uncertain that Ofcom takes the view that it cannot accept it on those terms.

So that also ties in with a point in relation to competition which Mr. Beard made a few minutes ago. He set up an antithesis between Ofcom's undoubted duty to promote competition and the nature of a dispute resolution process which is, as it were, intervening, constraining the competitive market and effectively superimposing on contractual duties Ofcom's separate regulatory viewpoint.

Sir, I do not accept that antithesis. Of course that begs the question on the contract and I will come on to that. But even leaving that aside, the start point here is that BT's main rationale/justification for the proposal was precisely that there was a competition failure in this market, that there were significant externalities. That was at root the advantage of BT's pricing proposal; this was a way of driving down retail prices which were wholly high because of a market failure. BT is inviting Ofcom effectively to approve the pricing changes on the basis of a failure of competition, inviting Ofcom to look at its allegations of the failure and to look at its justification of its proposals for curing that. So we do not accept that there is a clean antithesis such as Mr. Beard appears to suggest between Ofcom's role as in some way being antithetical to competition. Of course I do accept (and I will come on to this) that there is a tension between interfering with contractual rights and competition. That is something I will need to address.

THE CHAIRMAN: Are you not conflating two competition points, Mr. Herberg? As I understand it, BT's justification for the ladder pricing that it has sought to introduce relates to a market failure and perceived lack of competition in the MNO retail market, whereas as I understood it, what is one of Mr. Beard's points was that there was competition between TCPs which, assuming that Ofcom's Final Determinations in these matters are carried over to other similar disputes between, say, Cable & Wireless and MNOs, would in effect preclude novel forms of pricing at the wholesale level by TCPs.

MR. HERBERG: Sir, I accept that they are two different markets, but I do not say that my response is to conflate those two matters. In the first instance, of course, Ofcom's Determination will not necessarily prevent justification of other forms of ladder pricing. Indeed, this is what he complains of: that we have accepted that in principle ladder pricing mechanisms are legitimate. Of course, the dispute relating to Cable & Wireless' ladder pricing has not been sent to Ofcom and has not been examined. It is entirely possible that they will not be rejected.

THE CHAIRMAN: Can I just interrupt you there. I am sorry, Mr. Herberg, but presumably were there to be a dispute between Cable & Wireless and an MNO you would apply precisely the same principles that you have done in the 0845/0870 dispute?

MR. HERBERG: Sir, yes. But it has been absolutely clear on the evidence that indeed the MNOs have themselves made the point that it would have been perfectly possible for BT to have devised a series of stepped incentives that would have produced a much clearer price signal. For example, Ofcom itself has accepted that in this case on driving down to the lowest step the changes are welfare beneficial. Any ladder pricing proposal would therefore have to be looked at on the facts. It is by no means clear that even applying the same consistent principles which Ofcom applied in this case, the outcome would be the same in every case. That is the first point. That perhaps does not deal with the meat of Mr. Beard's submission.

The short answer to that is that BT's approach to this case has not been to say: we have a contractual right to make these changes; it does not really matter whether the money ends up in our pockets or goes to the SPs; you should simply allow these changes through. BT has advanced a detailed justification which relies instead in substantial part on curing a market failure in the MNO origination market. When one is characterising Ofcom's intervention as being pro or anti competitive my point is that I am not trying to conflate two things, but I am saying there are two things to take into account here. As well as Mr. Beard's suggestion that we are in some way interfering with contractual rights and therefore one could be anti competition in that way, but there are also pro competitive effects of certainly what BT is inviting Ofcom to do which it did not in fact do, but going the way that BT proposes it. I am not saying that they are the same competitive effect, but they are both relevant to be taken into account.

Of course, I am not accepting that there is interference in the way Mr. Beard sets out, because that depends on the contractual position. But it is an important point to bear in mind when considering the force of those submissions, we say.

THE CHAIRMAN: Mr. Herberg, if you reach a natural point we might rise for five minutes.

MR. HERBERG: Sir, yes. I am moving on to another submission.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Herberg.

MR. HERBERG: Sir, may I then come on to the relevance of the contractual analysis in this case.

I take the contractual matters in two parts. First of all, as I say, the relevance of the analysis in principle and secondly the actual contractual analysis in this case.

Sir, Ofcom certainly does not suggest, as I hope I made clear in opening, that the issue of contractual entitlement to effect a price change is irrelevant to Ofcom in exercising its

dispute resolution role. That is certainly not Ofcom's case. The Tribunal asked me a question directly on that in opening and I responded accordingly.

What the parties have agreed, both as to the substantial terms of the bargain and also of course as to the entitlement of parties to unilaterally change that bargain, are both relevant matters for Ofcom. In some cases they may be highly relevant, or even determinative, depending on other factors. We fully accept that interfering with contractually agreed bargains and commercial reliance on bargains is something which is, in its nature, required to be justified. It may be anti competitive; it may in particular have adverse impact on a whole range of duties which Ofcom is required to have regard to in sections 3 and 4, even without looking at the European framework, we submit the two are entirely in accord on this. Just for example, it could have an effect on the availability in the UK of a wide range of electronic communications, if bargains are easily overthrown, s.3(2)(b) may assist in showing that regulatory activities are transparent, accountable, proportionate, consistent and targeted only at cases where action is needed, s.3(3) will clearly have an impact there. It may assist in promoting competition in the relevant markets, 3(4)(b) reasons identified by Mr. Beard, promote and facilitate the development and use of effective forms of self-regulation – s.3(4)(c) and encourage investment and innovation in relevant markets, 3(4)(d), or one can immediately construct arguments in respect of each of those as to why a policy of readily overthrowing contractually agreed bargains could be deleterious in effect.

The terms of the contract may therefore clearly be a relevant factor, and where the parties have agreed something specific in particular may be entitled to very considerable weight. That, sir, raises the question of what weight, and I need to take that in stages. The first stage, and I think this is now clearly accepted on all sides, is that the contract certainly cannot trump regulation, certainly it is conceded by BT as I understand it in opening (day 1, p.41 line 7) that regulatory considerations can trump contractual rights. In any event, we say that proposition is absolutely clear from the *Orange v Ofcom* decision. You have now been taken to that decision by both Mr. O'Donoghue and Mr. Beard and I do not think I need to go through it in terms again. I accept the submissions that Mr. Beard made on it that it only carries you part of the way and, in particular, t hat case is not really addressing the vexed question of how much weight to give to contractual bargains. It was an important decision which I briefly put before you in opening but did not make submissions on at an earlier stage of the analysis showing the role of the contract, the relevance of the contract in relation to regulatory jurisdiction at all, but it does not take you much further than that, and you have now been taken to the relevant parts. One can perhaps summarise para.77, the

Tribunal held that s.185(1) covers disputes as to the terms on which access may be provided. It effectively is authority for the proposition that Ofcom has jurisdiction to resolve disputes whether or not there is already a contract in place that would otherwise determine the matter and, indeed, whether that contract purports to restrict the circumstances in which a dispute can be referred to Ofcom. The parties cannot effectively oust Ofcom's jurisdiction. It is not necessary, as in this case, there is actually a reference to Ofcom built into the contract because that right of reference is there in any event. It is also not necessary for there to be an immediate apprehension of a risk to interconnection not continuing being interrupted, that is part of a general framework in which the dispute resolution sits as an ultimate objective and it does not have to be shown that determination one way or the other – or lack of a determination – will precipitate an interruption to interconnection. Those are all the clear propositions we take from the Orange decision. What we say one has to focus on looking at the relevance of a contract is the particular contract is the particular contractual provisions in the particular case, and it is going to be a matter of policy judgment and weight as to how much effect they should be given, and my submissions on the contract in this case will relate first actually to what contractual entitlements there are under the contract and then focus on the weight that should be given, even on BT's case, to a generalised unilateral power of amendment as opposed to something much more specific by way of a bargain.

I addressed in opening the contractual structure of the contract. We accept that it is such that BT has at least a prima facie contractual right to introduce the change, and there is a clear distinction between the clause 12 and clause 13 situations. In clause 12 there is a right of what can be characterised as unilateral variation on the face of it, as opposed to clause 13 where there is a provision for an objection in a deadlock situation such as one saw in the *TRD* case. We fully accept that distinction, there is no deadlock position as was the case in *TRD* is another way of putting it.

We say that point of distinction must be taken in context. It is not merely that that initial unilateral power of variation which BT has was always known to be subject to the dispute resolution procedure, it goes further than that. The right to refer to Ofcom is actually acknowledged and woven into the contractual framework, it is not simply tucked away as Mr. Read suggested, somewhere at the back, it is an important part of the contract, the bargain that was being made by the MNOs. Clause 12(3) makes provision for a retrospective variation of BT's prices following an Ofcom determination. 12(5) further makes provision for necessary price alterations following an Ofcom determination. 12(6)

even makes provision for a situation where an Ofcom determination is challenged, and what should happen in that eventuality. Of course, in addition to that there is clause 26 itself which does apply to clause 12 variations – it does not apply to clause 13 – which expressly provides for reference of the dispute to Ofcom if not resolved between the parties.

In one sense what is there to be resolved? On BT's fundamentalist case it can make the change, full stop. Clearly what is being provided for is the right of objection by parties not accepting the unilateral variation.

The evidence, we say, suggests that the MNOs would not conceivably have entered into an agreement on SIA terms without the protection of the right to refer to Ofcom, and that was implicitly accepted by Mr. Kilburn in his third statement at para. 15. The framework for the relationship with all the TPs would look rather different if such a dispute resolution procedure did not exist. That was inevitably right. The commercial reality of this contract, as understood by all parties, was that BT could only effect a change in prices if either it was accepted by the other parties, or failing agreement if Ofcom determined that it was fair and reasonable to do so. If one was describing the overall commercial nature of the contract in respect of these provisions, that we say is a fair way of characterising it. BT will only be able to carry through its change of prices in one way or other.

We say that as against that background the terms of this contract should not be of great significance to the Tribunal and Ofcom was right not to attach great significance to them in determining, as it were, the way that it would deal with a dispute determination and how it would treat particularly the issue of uncertainty.

There are a number of reasons why that is the case. The first point is that clause 12 itself conferring the broad power on BT merely permits it to set a price list for its services effectively, it says nothing about the limits or principles by which it should do so. There has been an assumption in BT's submissions, and that means that, subject only to Ofcom's jurisdiction, it had an unfettered right to do so. The case of *Ludgate Insurance v Citibank* was referred to in that respect, but the situation may not be that straightforward. We note, for example, that O2 has advanced an argument at para.23 of its closing submissions, an argument that, in seeking to influence MNOs' retail prices BT would not be exercising the power for the purposes for which it was conferred. That, you may recall, is in a proviso expressly recognised in para.35 of the *Ludgate Insurance v Citibank* authority to which my learned friend took you. I can just read the relevant qualification, it is familiar in commercial terms in any event.

> "It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited."

There is reference to cases:

> "These cases show that provided that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason …"

etc, the *Wednesbury* qualification, then there is an unfettered right.

Sir, even in those terms there is therefore a potential argument which O2 at least appears to be raising as to the extent to which it might be the case that by charging wholesale prices for the purpose as now alleged at least of controlling retail prices or indeed, as has been suggested originally intended, participating in the MNOs' revenues, BT is doing something which is not for the purpose for which the power was conferred. I do not suggest that is a particularly easy argument, I certainly do not intend to advance or to engage in it further, but one can certainly see the makings, if we were perhaps in a different jurisdiction, of how that argument might begin to play out. One would have to actually analyse what were the proper purposes for which, on its face, a wholly unrestricted power to charge could be exercised, what limits there were to that, whether it was assumed that it would be in some way a cost based approach or whether it was, in reality, the case that BT had an absolute power to quadruple prices overnight to grab profits of the MNOs or to achieve some pricing aim in the retail market. There are substantial questions potentially there as to the ambit of that power.

A second reason for submitting that the terms of the contract are not so significant in a case such as this is perhaps the more fundamental point, which is that we say the existence of a power to change prices should not logically give rise to any presumption that any particular variation put forward by BT is fair and reasonable. Whereas a specific contractual provision is likely to have considerable force with Ofcom on the basis of considerations such as commercial certainty, we say the same cannot be said, or certainly cannot be said with the same force, of a very general power to change prices which all parties are aware when it is introduced is subject to control by Ofcom exercising its fair and reasonable jurisdiction. The point in a sense circular, but it is circular not from my side, sir, it is circular the other way. If reliance is placed on this very generalised power to change prices

the answer comes back, "Yes, but that whole power is subject to the very jurisdiction that we are dealing with".

THE CHAIRMAN: It may be circular, but I see exactly where you are coming from, Mr. Herberg. What we have here – let us leave on one side the possible existence of restrictions to what, on the face of it appears to be an unfettered right, let us park those for the moment. On that basis we have got in clause 12 an unfettered contractual right to vary. One has in the dispute resolution process, particularly under s.190, what appears to be an unfettered right in Ofcom to interfere, irrespective of what the contract says. What we are debating is really the interplay between these two unfettered rights – one public law and one private law.

MR. HERBERG: Sir, yes.

THE CHAIRMAN: Mr. Beard formulated this morning the suggestion that the public law ability to interfere in Ofcom under s.190 should only be exercised if there was a clear breach of the statutory provisions in s.3 and following of the 2003 Act, whereas your position – do correct me if I am wrong – is more that what the contract says is simply one of many factors that feature in the list of matters that Ofcom has to take into account in s.3 and following.

MR. HERBERG: I do say that. That certainly is my case, and my case goes further than that. I do say that in any case the contract will be only one matter which Ofcom has to take into account. In many cases it may be a very significant matter. If the parties, to take an example, have agreed a particular approach to be taken to quantifying the cost of termination and a dispute arises and one of the parties submits that Ofcom ought to take a completely different approach to the cost of termination, then Ofcom would, in ordinary circumstances, give very considerable weight to the fact that the contract specified a particular route. One would have to imagine quite extreme circumstances before it would be appropriate to tear up the bargain and to adopt a different approach. We say that in a situation where all the contract does is to give a general right to make unilateral price changes to BT in circumstances where the contract itself then builds in and relies on the Ofcom fair and reasonable jurisdiction as the protection against that eventuality causing prejudice to the other parties to the contract then it is not a matter of great significance or weight that ought to be placed on Ofcom in deciding how it deals with a dispute resolution that the contract is formulated in that way initially.

THE CHAIRMAN: That does beg the question of how the regulator is to use its powers under s.185 and following, does it not?

MR. HERBERG: Sir, it does, and the short answer to that is that the regulator has to exercise those powers in accordance with its statutory duties, and at that point I go back to my first submission which I expressly did not base on the analysis of the contract or the contractual entitlement of the parties and to the fact that Ofcom is entitled to advance the interests of consumers by taking the view that where there is a major complex price change with potentially very adverse effects across a wide market, potentially the retail market and the wholesale market, it is entitled to approach that on the question of looking at the status quo and requiring to be satisfied on balance that the interests of consumers are not going to be harmed. That is not a submission which I have, in any sense, based on the contract or on the contractual position. The only question, if I am right that that is a legitimate approach for Ofcom to start with, would then be: is there anything in the contract that would have to displace that and say, "Well, you might want to do that, but actually because the contract gives BT a unilateral right, therefore you cannot do that, you have to change the question around and allow BT to do whatever it wants, subject only to being able to assess that this change is actually deleterious". For the reasons which I developed earlier, the nightmare scenario of it then being in the hands of the person making the change to make it is as complicated as possible to incentivise that outcome and for the other reason which I developed in relation to Ofcom's statutory duties, we say that it was a perfectly legitimate approach for Ofcom to take, and there is no basis for this Tribunal to interfere with that and for Ofcom not to displace its preferred approach by reference to the contract in this particular case. In doing so, I do not accept that we are placing an inappropriately low weight on a contractual certainty or commercial bargain. In many cases, where there is a more specific contractual provision, there will be a much greater premium on contractual certainty. Effectively, I do submit that because what we are dealing with here is simply a general power of amendment rather than a specific contractual bargain, we are not adversely impacting on the expectations of the parties, particularly given what reduces to a circular point, that at least one set of parties to the contract were placing their reliance on Ofcom's jurisdiction to protect it against the deleterious effects of the unilateral power.

Sir, it has to be borne in mind also that the SIA is in some sense a legacy agreement from a time when BT was effectively the dominant party. It has nothing to do with dominance in this case at all, but it is a contract of long standing which has been amended many times over the years, but the clear evidence, as I said before, is that the parties would not have arrived at this bargain without the belief in Ofcom's power to intervene pursuing its statutory duties as it saw fit. Indeed, it does not take a great deal of foresight to predict that

were this Tribunal to find that the contractual terms giving BT an unrestricted bargain are actually determinative or highly influential on the way that Ofcom has to approach its dispute resolution that we might in the near future see a very substantial dispute as to the SIA itself, a much broader dispute, and parties no longer being prepared to contract on those terms. That is, I would venture to suggest, a very real prospect if the case were to be determined in one direction. It is not a particular reason which should stop the Tribunal adopting an approach which, as a matter of law, it conceived was correct, but it is perhaps significant in relation to the submission that the parties were only contracting on this basis because of particular expectations.

Sir, I do ultimately come back to the point, and it may be that I have sufficiently emphasised this point, that Ofcom does not base itself on these contractual considerations in directing itself as it did at para.9.32 of the final determination, that it was appropriate to focus on the question of harm and to be satisfied that the change would not damage consumer welfare before proceeding.

Sir, one can consider for a moment, what if the Tribunal concludes that the burden should have been on the MNOs. One has to make a number of assumptions. One first assumes that Ofcom has to have a concept of a burden of proof at all in what is a regulatory investigation and a dispute resolution. That may itself be not immediately obvious if effectively Ofcom is investigating the effects and of itself formal notions of burden of proof are not immediately obvious. Just assuming for now that there is to be a burden of proof and secondly, assuming for now that because of the contractual set up the MNOs formally bore the burden of establishing their case which they brought to Ofcom by way of the dispute resolution which they put in, that does not establish BT's case. It would still be wrong to assert that Ofcom misdirected itself in rejecting the NCCNs on the basis that it was not satisfied that they were not welfare detrimental because that would be to confuse the issue of what needed to be satisfied (which I have already addressed) with the question of which party had the burden of proving it.

If the burden was properly on the MNOs it would merely mean (and I am afraid this inescapably involves double negatives) that the burden is on the MNOs to establish that Ofcom could not be satisfied that the change would not damage consumer welfare. That would be the appropriate test. The burden would be on the MNOs to establish that Ofcom could not be satisfied that the change would not damage consumer welfare. It would not follow that the burden was on the MNOs positively to establish that the change would damage consumer welfare. That approach is to conflate the proper approach which Ofcom

can adopt (FD32) with who has the burden of proving whether or not the proper test is satisfied.

We do say, sir, that if the Tribunal is going to place weight on the contractual analysis, then that is the outcome which it comes to. That outcome avoids the nightmare scenario. In a way, it accords with reality in this case. This case did not actually turn on who has the burden of proving a particular fact that could go either way, some binary fact: did the ship sink from one cause or another cause, it must have been one of the two. What this case involved is something completely different. It is a case involving radical uncertainties and what happens in a situation where there is a great measure of uncertainty about exactly what point along the spectrum something happens or what is the particular balance of good and bad effects caused by a particular thing happening at a particular point on that spectrum. Those types of uncertainties are simply not susceptible of being resolved 49/51 per cent one way or the other. It is a much more significant question how Ofcom approached the uncertainty, as to which I have made submissions. I submit Ofcom's approach is right.

The burden, if it is relevant at all, will come in only in the absolutely rare case when Ofcom is teetering on the edge of saying whether it is satisfied or not. Ofcom was not teetering on the edge of saying whether it was satisfied or not, it was absolutely clear that it could not be satisfied in the partial reduction scenario. Sir, we do say that is the appropriate way to have regard to the contractual analysis in this case.

Finally on the issue of burden, I should make the point that the principle of proportionality relied upon by Mr. Read we say just takes the matter no further forward because it effectively begs the question. His principle of proportionality is being applied to BT's presumed contractual rights to make the changes, as he asserts it. He is effectively therefore viewing Ofcom's interference, as he would say, as disproportionately interfering with BT's contractual rights. But it is the familiar rejoinder that BT's contractual rights are expressly subject to Ofcom's dispute resolution jurisdiction. For reasons I have already submitted, Ofcom is entitled to adopt the approach, irrespective of the contractual position and the burden of proof, that it is entitled to be satisfied that the changes were not detrimental before endorsing them. In doing that, Ofcom is acting proportionately towards BT and also towards others whose interests are implicated in the dispute, including consumers.

THE CHAIRMAN: You have drawn a distinction between general or broad contractual rights and specific rights.

MR. HERBERG: Yes, sir.

THE CHAIRMAN: Suppose in this case clause 12 had gone on to enumerate what BT was entitled to do by way of variation and made it clear that BT was entitled to impose ladder pricing at its sole discretion. Let us suppose also that the uncertainties to which you adverted remain the same. Do you say that that would have made a difference to Ofcom's analysis?

MR. HERBERG: It certainly would have been an added consideration which Ofcom would have had to take into account. If the parties had specifically directed their mind to ladder pricing, and had effectively by implication removed that issue from Ofcom's consideration - well, it is wrong to say removed that issue from Ofcom's consideration but given Ofcom a steer as to how, on a dispute determination, it ought to approach the question - that would be something which clearly the parties at least were ad idem over. Ofcom would still have had to consider wider implications of the change. It certainly would not have been a shut out. Ofcom would still have had to consider the matter because it is looking at the welfare of consumers; it is not focusing on the welfare of MNOs in particular here. But it would have been a further factor to weigh up with its other statutory duties, that to intervene where the effect on consumers is uncertain would also have a competing impact on other of its statutory duties, namely upsetting commercial bargains, upsetting commercial certainties on the basis of which people may have made investments etc. That would have been a further matter to bring into the calculus, I suppose.

THE CHAIRMAN: It is implicit in the point you are making that the parties to the agreements, that is to say the MNOs and BT in this case, may very well not have the interests of consumers in mind. That is the role of Ofcom.

MR. HERBERG: Yes, sir, indeed. That is why I made the submission in opening that even in a case where the parties are absolutely agreed on the nature of the dispute and happy to have, as it were, a small difference of opinion which they bring to Ofcom in relation to a contract, Ofcom is not confined to resolving that particular question one way or the other. It could potentially come to a different view which neither party wished to make to the contract. That certainly would be an unusual thing to do, because it would push against many of the duties which Ofcom is subject to in the need to promote competition. One can easily imagine situations, for example, where the agreement itself was perceived to be anti competitive, to give an obvious example, Ofcom certainly would not be rubber stamping what the parties had agreed.

THE CHAIRMAN: Let me give you a further final example - I promise this is the final example. Let us suppose the parties had agreed ladder pricing precisely in the form of the NCCNs

that we have here but a dispute arose as to how can computed the ARP. One can see how that would have easily arisen on the evidence we have had here. The dispute came to Ofcom. Would Ofcom's approach have been any different, given the uncertainties regarding consumer benefit would remain exactly the same?

MR. HERBERG: Sir, in that situation it would change the overall nature of the dispute. Clearly it would have an effect on the arguments relating to ARP. It could hardly be suggested that the parties had such a great difficulty in calculating ARP where they themselves had contemplated in their contractual structure that ARP would have to be calculated. So obviously it would have consequences for the arguments which the parties could run. Ofcom would still have to have regard to consumer welfare, but if one looks at the nature of the arguments which have been made in this case, I venture to suggest it might very well have clarified a number of sub issues which have been brought forward by all the parties as to the operation of the welfare test, what needs to be looked at and what needs to be calculated. We would be starting from a completely different starting point than the one we started from in this case. Many of the MNOs' objections would either fall away, or would fall to be significantly discounted by Ofcom given the contractual background.

THE CHAIRMAN: That may be true, but Ofcom's difficulties, the concerns that Ofcom would have regarding the consumer, would remain pretty much as they exist at the moment.

MR. HERBERG: Sir, they would. I do accept that ultimately the consumer welfare test is not a shut out test that pushes all Ofcom's other duties into the background. There will be disadvantages for consumers, as Mr. Beard pointed out, ultimately in respect of restrictions of competition. That is the whole context and background of the common regulatory framework and the 2003 Act. I do accept that changes in these other matters which you are hypothesising could, as it were, push the balance in respect of the primary question of consumer welfare.

Sir, that is a significant question you ask me, and it is something which I would perhaps like to reflect on a little further with Ofcom before I leave it.

THE CHAIRMAN: Please do so.

MR. HERBERG: I have taken up enough of your very valuable time, sir.

THE CHAIRMAN: I am grateful.

MR. HERBERG: Sir, can I turn to one other preliminary matter which is NTNS review and the nature of this appeal. I dealt with that at some length in opening. I am not going to respond to those submissions. I took you to the case of *Vodafone v. Ofcom* which did emphasise in clear terms that the Tribunal should be slow to overturn decisions where, as here, there may

be a number of different approaches which Ofcom could reasonably adopt, and I made the point that that was absolutely consistent with the Tribunal exercising profound and rigorous scrutiny. We say our formulation is fully consistent with the Court of Appeal in this case. Another way of putting the test perhaps is ultimately the test for the Tribunal under s.192(6) is to detect whether there are any errors in Ofcom's exercise of its discretion. Clearly also it is looking at errors of fact and law, but if we are dealing (as we are) principally under this question of intensity of review with challenge to discretionary decisions, fundamentally the Tribunal's role is to detect errors in Ofcom's errors of discretion which itself implies that this role is not simply to substitute its own judgment for that of Ofcom which it has the potential then to slide into a *de novo* consideration. This only applies of course in circumstances where the Tribunal finds there has not been error made by Ofcom, either in relation to fact, law or discretion. So we do say that para. 65 of the decision of the Court of Appeal in this case is of some significance in endorsing that approach.

You may recall, I will not take you back to it again, that that is the paragraph where the Court of Appeal made reference to licensing decisions and noted that a statutory scheme, which permits an appeal body to present fresh evidence into which by its judgment the Court of Appeal was classifying Ofcom and the Tribunal, and it said:

> "It is not necessarily inconsistent with the appeal body being obliged to have a proper regard for the role of the primary decision maker."

and that was said in relation to introducing the licensing decisions, but the clear implication is that that is the same there as it is in the instant case.

Sir, it is not entirely clear from BT's closing submissions as to how far there is room between the parties or clear what is between the parties on this issue. Mr. Read colloquially put his position as if there is a margin it is a very small one. It is meaningless particularly to qualify it as a small or large one, it will be so context and fact dependent. We do say, and it is para. 16 of BT's closing submissions, it starts off in a relatively uncontroversial terms:

> "(1) It is essential not to lose sight of the fact that the '*merits of the case'* are not synonymous with the '*merits of the decision'* of Ofcom."

Then we do not accept (3):

> "(3) If Ofcom's approach were right, then an appellant would arguably never be able to overturn a decision where the question was one of cost benefit analysis: that would be the antithesis of an appeal on the merits."

That is certainly not Ofcom's suggestion. We are not suggesting that the court can never overturn a decision where the question is one of cost benefit analysis, it is much more

limited than that. The question is whether the Tribunal actually detects an error in Ofcom's approach. If it does not then we do say it would not normally be appropriate for it so substitute its own judgment in matters where effectively there is a disagreement between reasonable approaches, where there is no primary error detected.

It may be in para. 37 of my submissions on this point I have said paras. 16(1), (3) and (4), and I should have said 16(1), (2) and (4) because (2) is exactly the paragraph I have taken you to with which we disagree.

The circumstances in which the Tribunal may consider it appropriate to accord some latitude to Ofcom, or an area of discretion are simply not susceptible to easy definition or characterisation in advance, but we do suggest that they will particularly be cases on the one hand where the area of judgment includes a large policy element, it may be of course that the Tribunal still considers that Ofcom has gone long on policy, but the fact that the matter concerns a weighing of different policy considerations is an indication that one may be in such an area, for example where it involves competing sections 3 and 4 duties.

Secondly, where the challenge is merely to the amount of weight which Ofcom has given to a particular factor in a calculation, and that is absent, of course, any allegation that Ofcom has actually gone wrong as a matter of fact or law, taken a relevant consideration into account. If the sole ground of challenge is that the appellant contends that a different weighing would have been preferable, or a different outcome to the weighing then Ofcom would invite the Tribunal to consider whether or not Ofcom's approach – whether or not it is the Tribunal's preferred approach – is actually a reasonable approach to adopt. That is the nature of the margin of discretion. It recognises Ofcom's role as a primary sectoral regulator but does not abdicate from the Tribunal, does not involve the Tribunal abdicating from its profound and rigorous scrutiny of Ofcom's decisions to see whether there is an error of law, fact or discretion in its approach.

It does bear repetition that it remains for the appellant to demonstrate an error of law, fact or discretion by reference to the grounds of appeal advanced by the parties. We do say that there is a real danger, particularly in a case such as here where the parties are relying on substantial quantities of fresh evidence that was not before Ofcom, there is a seductive tendency for the appeal effectively to transmogrify into a *de novo* hearing, and we do say that some of Mr. Read's submissions do go down that line. I am not renewing any submissions as to the appropriateness or not of *de novo* hearings, but we do say there are points being raised in Mr. Read's submissions which are not in the grounds of appeal challenges to Ofcom's decision on the grounds of law, fact or discretion. One example

which I do give is the point apparently raised late in the day as to the correctness of Ofcom's finding on the cost of origination by MNOs. We say that that does not correspond, contrary to BT's closing submissions, to any error of fact, law or discretion pleaded by BT in its notice of appeal. Can I just take you briefly to this? We do say it is an example of the danger, but it is also in itself an important point because potentially there is a significant point being raised here.

Can I take you back to the 080 notice of appeal in bundle A? In his closing submissions, and the reference is para. 220 of BT's closing written submissions, it raises this point and says that it has always been an issue in the case, it is absolutely clear that this is a ground of appeal, and the footnoted reference. There is no reference at all for the 0845 ground of appeal, but there is a reference for the 080 ground of appeal, and it is to paras. 119 to 120 which are in tab 2 of bundle A. This is part of the ground of appeal attacking Ofcom's conclusion on Principle 2, 'wholly flawed', benefit to consumers. What we have here is effectively a description of some of the new evidence of Mr. Read. "Mr. Read has considered the algebraic formulation of the underlying pricing". It is described at some length. He concludes that:

> "BT has very strong evidence from the prices that have been and are offered to BT … that the maximum plausible marginal cost is well below 3.5ppm. Even if the maximum plausible marginal cost is 3.5ppm, as shown in Figure 3 below, [it] produces a clear and unambiguous incentive on each and every MNO to reduce its retail price on any average retail price between 8.5ppm and 30ppm."

He then illustrates the scenario graphically:

> "… graphic portrayal shows quite clearly that with even a marginal cost for the MNOs of 5 ppm …"

I am now reading para.120 –

> "… there is considerable incentive for prices to 080 callers to fall. However, it is most unlikely that the MNOs marginal could ever be as high as 5 ppm. Ofcom's analysis shows that the *whole* of the originating costs (including fixed costs) were unlikely to exceed 5 ppm. Mr. Read's statement graphically shows … the entire step structure at a much more likely level (but even then heavily conservative) of marginal costs at 3.5 ppm."

So what there is there is clearly a focus on the costs and there is a reference to marginal costs at 3.5 ppm. What there is not in the notice of appeal, or indeed in the evidence

accompanying it, is detailed arguments suggesting much lower pence per minute marginal costs, specific lower marginal costs.

Sir, we say it is not sufficient to rely on remarks made in a witness statement or in a later expert's report. The grounds of appeal setting out the error must set out clearly what is contended, how it is contended that Ofcom has gone wrong and what they should have found. What cannot be done is simply to say the question has been opened up by that general approach and then it is an issue in the case as to what the actual costs are. The Tribunal then launches into, as it were, a *de novo* investigation as to what the proper costs are. That is effectively the approach which BT are suggesting in their closing submissions. At para.221 they say:

> "Accordingly, as this matter was always in the appeal, it would be wrong for the Tribunal to ignore the evidence on the point."

Effectively, they are saying that once there is some question raised as to the appropriate basis for marginal costs the Tribunal has a free ranging investigative role on the issue. We do say that is not the appropriate route.

PROFESSOR STONEMAN: Mr. Herberg, that does create a problem for me. We have two witnesses, one saying that the impact is A and the other one saying the impact is minus A or B, and what the difference between them is is the level of marginal cost. Are we, therefore, to ignore the fact that there is an estimate of marginal cost out there produced by Ofcom, the regulator, and referred to in footnote 793 of a document that will resolve that dispute as far as we are concerned as a Tribunal? Are we to ignore that footnote 793?

MR. HERBERG: Sir, there are certain dangers in resolving it on those bases of which the Tribunal should be aware. The first and most obvious is that if I am right that this was not clearly raised as a substantive issue then other parties may not have put in evidence on this question which might affect your consideration. Indeed, that was a point made by one of the MNOs, I think it was Vodafone, yesterday, or whenever this point was raised, that this was simply not a matter which it had been appreciated was in issue and therefore evidence had not been led. What you were then invited to do by BT was to pick a particular finding in a footnote in a consultation document and to use that as a basis for assessing the change. We say that does beg the question. It must be being argued that Ofcom went wrong as to the figure it used. Therefore, one must, as it were, overturn Ofcom's decision on that limited point and then do a new analysis based on the new figures and the new calculation and see whether the conclusion is reached that you agree with Ofcom, or you do not. That is not, we say, with respect, an appropriate path for the Tribunal to go down precisely

because this is not a thing which is in play in the first place. The evidence which might be before you, were this to have been distinctly raised as a question for investigation, might be very different from this one footnote. We do say precisely that the Tribunal ought to be very careful before it exceeds to the seductive suggestion, "Here is a figure, this is a better basis than Ofcom did it, here is a better route of doing it, this change the calculation rather". That is precisely turning this hearing into a *de novo* reconsideration.

Sir, that perhaps ties into another question which is one of the questions the Tribunal raised in its examination paper for the parties, which is that the Tribunal has to be, or should be aware, we submit, when it is considering fresh evidence that it is hearing an appeal from the limited four month dispute resolution process. It should have regard to what is before Ofcom and take that into account in considering overall the practicalities of the process. Otherwise there is a risk, where there is a vastly more complicated case advanced on appeal, that the Tribunal could end up imposing a standard on Ofcom which was simply impossible to discharge in either this or in a future dispute resolution process, because of course this case has implications for the future as well. If it were the case that the Tribunal were to held effectively by what it decided that what Ofcom ought to have done was, for example, a much more exhaustive analysis of many different factors which Ofcom took a rough and ready view on or did not investigate fully or said were too uncertain to decide, before the Tribunal holds that Ofcom was wrong so to hold it should take very carefully into account what it is practical to require any regulator to do in the context of the dispute resolution process which it was engaged in. There is clearly a temptation when Ofcom has said, "This was too uncertain to decide", to say, "With all this new evidence we can now begin to see that actually one could make a reasonably good stab at this on the balance of probabilities, particularly given that we want to give some weight to BT's commercial bargains". It is a slippery slope towards saying, "We can now see a clearer way through this", but before doing so at the very least we say one has to focus back on the question of whether this demonstrates an error of law or fact or discretion, and in that context one has to look at what is practicable.

Sir, can I come then to EE's appeal, which I will deal with first. The first issue here is as to the points solely taken by O2 as intervener in contradiction to all the parties as to the existence of Ofcom's policy preference in the first place. I then turn to the legitimacy of what we say is a clear policy preference followed by the cost of termination issue.

Sir, we do say that as a general matter O2's arguments have somewhat an air of unreality. The fact is that all other parties were in no doubt as to Ofcom's policy preference and,

standing back from the particular dispute, the whole history of this matter does indicate successive attempts by Ofcom to, as it puts it, restore a geographical link with 08 pricing. It is self-evident, we say, that Ofcom regarded this as desirable policy objective. It appears that part of the focus of Mr. O'Donoghue's objection rests on the fact that the preference is not binding on the MNOs, they are entitled not to reduce prices but instead to comply with Ofcom's transparency or communication of objectives. We say that is no objection at all, it is in the nature of a preference, but it may not be binding that the MNOs are not legally obliged to comply with it. There is no fundamental tension, as Mr. O'Donoghue suggested, in saying, "You are free to do whatever you wish in connection with pricing, but we would prefer you to do something different". It is a perfectly defensible position for a regulator to take.

Sir, I then set out some details in written closing at paras.48 and following of a detailed treatment of the policy preference in respect of each of the three number ranges. I am going to take it relatively shortly, sir, if I may, in oral submissions bearing in mind constraints of time. In relation to 0870 O2 focuses on the 2006 NTS Review, but in para.49 we make a number of points that can be extracted from the NTS Review. The document itself, in opening, para.1.3, referred to a principle that every OCP should charge no more for 0870 calls than national calls to geographic numbers. So the policy was up in the lights at the beginning.

Of course, faced with the objections that it was engaging in price control of non-dominant providers, Ofcom explained that it was only establishing a numbering convention and that OCPs retained their pricing freedom, and so forth. None of that detracts from the policy preference which was clear from the beginning.

There are copious other references which I have extracted from that document:

> "The aim of the proposal was to restore the link by ensuring that 0870 prices the same as the geographic call charges that consumers actually pay."

That is para.4.11; and further statements to the same effect in subsequent paragraphs.

Ofcom originally wanted to require pre-announcements by MNOs, or any OCP, if it was not complying with the preference, but that proved impracticable, to insist on pre-announcements, because apparently pricing announcements might interfere with some automated equipment. So Ofcom then thought again and in the 2009 0870 statement it decided to require better publicity in advertising material. But the terms in which it did so cited in para.(e) on p.21 under para.49 should be noted.

> "We are keenly aware of our statutory duty to minimise the burden of regulation and to ensure that regulatory intervention is proportionate. Ofcom has conceded that it is proportionate to adopt Option B in the first instance. If it becomes apparent that, within 12 months of implementation, the new rules are not having a significant impact on consumer price awareness, Ofcom's intention would be to return to this issue, and to consider what other measures may be appropriate."

I cite further statements from the 0870 statement. Finally on this matter, Mr. O'Donoghue drew attention to differences in the 2004 and 2006 documents. I intervened in cross-examination to point out the difference between the two documents. He went so far as to suggest that Ofcom has cherry picked the 2004 document in support of its preference, whereas when one looks at the actual evolution of policy it would superseded by the 2006 document which clearly said that the objective was transparency only. So we say that is an unfair criticism of Ofcom and the Final Determination. It did not cherry pick. Indeed, just for the Tribunal's note, footnote 30 to para.2.44 of the Final Determination expressly adverted to the increased importance that Ofcom attributed to transparency, noting that in a later 0870 statement "We have also emphasised that transparency was an increasing concern." But that cannot reasonably be read as an abandonment of the policy preference. This is just dealing with the obligations of the MNOs where they do not comply with the policy preference.

Sir, 0845 we say that the NTS review clearly at para.4.153 set out a statement of Ofcom's position and clearly embodied the policy preference. 080, Mr. O'Donoghue did make one specific point which was that there was a difference between the way the policy preference had been expressed, free to caller, and the way it was expressed in the 080 Final Determination: free or as close to free as possible. He suggested that, as it were, the addendum "or as close to free as possible" was both new and vacuous.

Sir, we say it does not involve any great thinking to establish that if Ofcom's preference is that 080 calls are free, then recognising a reality where MNOs are charging a lot for them, huge amounts more than zero, a more reasonable way of formulating the same preference can be "free or as close to free as possible" because then you are getting closer to Ofcom's policy preference. It is not an amendment or a new policy preference.

As close to free as possible, Ofcom certainly does not accept the suggestion, if that is what was made, that the MNOs' current retail prices might in some sense already be as close to free as possible. The overwhelming evidence is that mobile companies were retaining far

more than the cost of origination beyond doubt in the case. Therefore, it was not moving the goalposts or changing its policy preference in setting it out in that way.

THE CHAIRMAN: The National Telephone Numbering plan itself was a statement of Ofcom's preferences regarding particular numbers. Does that constitute a statement of Ofcom's preferences?

MR. HERBERG: Sir, it does. I must be careful. You might have a document that genuinely gave people a choice: you can charge this way if you want, or you can give a transparency indication. But we say read as a whole, it is clearly embodied in the numbering plan that it was an aspiration for how the numbers ought to be regarded. It was not simply giving people a free alternative between different routes; it was actually describing the number ranges by reference to Ofcom's preference as to what should be charged for those numbers. That was the whole point of number ranges. We do say that the way it has developed it embodies an expression of the policy preference. Really, Mr. O'Donoghue's point is that MNOs were not obliged to comply with it. We fully accept that and we say it does not go to the issue of policy preference.

Sir, can I then turn to perhaps the more substantial question of entitlement to rely on policy preference. This is, of course, EE's first major ground of appeal. EE submitted that Ofcom has placed unjustified reliance on its policy preference. I addressed that in some detail in opening. I give references in my written argument. The position has perhaps mutated a little on this argument. We have trouble in seeing how it can possibly hold the line in its current form. The way Miss Smith put it yesterday (day 10 p.53 line 22), she said:

> " ... it is not our case that the policy preference was an irrelevant consideration, that Ofcom could not and should not have taken into account. Our case, under this head of our appeal, is that it was illegitimate for Ofcom to have treated its policy preference as a potentially determinative factor in the dispute ..."

So we say that is simply not a tenable distinction to draw. There is no such thing as a relevant consideration which is not potentially determinative. As soon as Miss Smith accepts that the policy preference was a relevant consideration, as she now appears to have done (which is not the way it was formulated before), she must logically be conceding that it is going to be potentially determinative.

THE CHAIRMAN: 50-50 and all the other matters.

MR. HERBERG: It follows as a matter of logic. So we have difficulty in seeing where this argument is left. It seems to us it has entirely collapsed. I have set out in closing on p.25 a response to an earlier version of the EE case, and I do not think I need to repeat that. It

sought to make a distinction between motivation and effect. For the reasons I set out before, that version does not work either. But on the present version it appears now to have been accepted that the policy preference is relevant and therefore it must logically be potentially determinative, even if it is given very small weight.

EE's case, as originally formulated, was that Ofcom was not permitted to use its dispute resolution function to seek to indirectly control retail prices where, as a matter of EU law, it is not permitted to impose retail price controls directly. That was the original hard edged approach. We made the response that even that faces an insuperable objection that Ofcom is not imposing caps or price control. That is a submission I have already made and it stands to that formulation of the argument.

We do submit that Ofcom's role is such that it is obliged to assess whether the charge which BT has introduced is fair and reasonable. That must involve, among other things, consideration as to whether it is in the interests of consumers overall if MNOs' retail prices come down as a result of the proposed charge. It is obliged to make an assessment of that. I refer to the core issues judgment. In doing so, the Tribunal would naturally expect to see some express consideration by Ofcom of how the proposed resolution accords with its objectives. If Ofcom comes to the conclusion that one beneficial feature of the NCCNs is that they would be likely to result in parties reducing their prices, or would result in benefits to callers through improved SP services, it cannot possibly legitimately ignore that or decline to take it into account in its welfare analysis. That would be to arrive at a false estimation of the overall welfare benefits or disbenefits of the charges. It seems that it is in response to that submission that Miss Smith has conceded the relevance of the policy preference. But we say that that takes her out of the frying pan and into the fire.

Sir, there is another response which can be made briefly, which is that the attack on the weight given by Ofcom to the policy preference or to it being taken into account at all must fail for the reason that the policy preference is a shorthand for substantive considerations which Ofcom took into account. Those substantive considerations, as the Tribunal is aware, relate to the significant market failure that Ofcom perceived, based on the horizontal and vertical externalities and the other matters which have been referred to in the Tribunal.

Even if Ofcom was meant to disregard its pre-existing policy preference, it is quite another thing to say that those considerations are themselves irrelevant to Ofcom. They cannot be irrelevant; they must logically be matters which Ofcom can take into account. If that is the case, then effectively the policy preference comes in through the back door in any event. Ofcom would have reached the same conclusions, to give greater weight to the direct effect

and so forth, by reference to these particular factors as it would by reference to the policy preference. So it is very difficult to see how the attack on the policy preference can take you anywhere.

It has not been suggested that the particular matters which Ofcom was concerned about in relation to policy preferences are themselves of no weight or irrelevant. Mr. Muysert was asked about them and he freely accepted that there could be good reasons for Ofcom to have concerns about vertical externality. He also accepted that the horizontal externality was a valid concern. There is no dispute about that at all. His point was that the better way to address those problems would be through action on the retail side. But it is submitted that point goes nowhere because Ofcom did not have a free choice in this matter as to what was the best route of dealing with the market failure; it had to entertain the dispute before it on the basis of the particular charge control notice and assess that; it was not optimising a market approach and I have made submissions on that.

I should add as a footnote to that, that like EE Ofcom itself had substantial doubts as to the efficacy of the alleviating effect of the NCCNs on the externalities, because it had real concerns that the causes of market failure – price confusion, lack of visibility and so forth – would substantially persist, would not be greatly cured at least by a partial reduction.

Sir, that is a completely different matter, that goes to weight and is a matter which needs to be taken into account in the welfare calculus, it simply does not affect the EE on this appeal at all, that is a matter of judgment as to how far, even if there is a market failure, the proposals go in assisting.

Can I then turn to EE's other main ground of appeal, which is Ofcom's treatment of the cost of termination? Once again I give references in the transcript to where I addressed that matter in opening because I do not intend to repeat the submissions there made. We do say that in reality this ground does not really concern Ofcom's treatment of BT's cost of termination at all. There is no real dispute that in the 0845 final determination Ofcom did properly take into account BT's termination costs by proxy with the fixed TCP operators in the 0870 determination. Indeed, that approach was suggested by EE itself (as T-Mobile as it then was) and that is final determination paras. 4.42 to 4.47. The real issue here is whether or not Ofcom was entitled to contemplate and therefore investigate allowing BT to receive additional sums by way of the notices on the assumption that the prices would not fall to the lowest step on the basis that the sums would be passed through to the service providers by way of revenue share. It was really revenue share that was the route, as it were, by which the cost of termination was to be departed from. Because that is the real

issue, rather than anything specifically relating to the cost of termination, we say that there is no material flaw in the 080 final determination which did not expressly deal with BT's cost of termination whether by proxy or otherwise, that omission is simply not a relevant issue because the same fundamental question – BT's ground of appeal in relation to 080 – would be exactly the same if BT had done the same as it had done in 0845, it would not have changed anything. In a sense one can see why Ofcom did not deal with it because it was a given that there was an existing charge which no one was disputing which related to cost of termination subject to existing adjustments and the real question was whether the change was permitted, and whether the change was permitted did not actually relate to what was the precise cost of termination. So that is now an irrelevant issue.

We say then that EE's case on the cost of termination is really a very limited one because it does not suggest that Ofcom was, as a matter of principle obliged to judge the NCCNs purely by reference to the cost of termination. Its case really is that Ofcom's justification for entertaining even the possibility of the move away from cost oriented pricing was not strong enough, it is really a weight based challenge. It argues that the fact of the unaddressed and 'uninternalised' externalities were not sufficient to justify entertaining ladder pricing as an alternative to cost based charge.

We say that this does really come down to a matter of weight, which Ofcom attributed to its policy preference or more strictly the factors which lay behind the policy preference. It may therefore be an argument in respect of which the Tribunal should recognise that Ofcom was entitled to some degree of latitude in choosing between reasonable policy responses.

Sir, in any event, we say that the question of permitting revenue share as an objective is something of a red herring. As I made clear in opening the possibility of revenue share was not a justification for Ofcom's policy preference or for the possibility of ladder pricing. Ofcom did give extra weight to the direct effect to reflect its policy preferences because the rebalancing would contribute towards eliminating externalities, but it did not give extra weight to the indirect effect to reflect any preference for increased revenue share going through to the SPs. What it merely did was to count revenue share as part of the welfare calculation and in doing even that it did so on a very limited basis. It only, as it were, gave equal weight to that revenue share to the effect that it judged that it would actually be passed through to callers at the end of the day. It gave a severely discounted weight to revenue share insofar as it remained with the SPs. Of course, it gave no weight at all to any revenue which remained with BT. So effectively, given that indirect effect was balancing the direct effect in the welfare calculation. By giving no weight to moneys which remained

with BT, and therefore to moneys which BT had in excess of its termination charges Ofcom was effectively putting a big negative bias against any such scenario being appropriate and being permitted. It was really doing what EE seeks, we were agreeing with EE, indeed, if this money is simply going to go to BT and let it keep much more than its cost of termination, then this is showing bias against allowing the proposal through.

The only other way EE's complaint effectively is put is that simply in principle the potential departure from cost reflexivity cannot be justified by reference to the existence of unaddressed externalities in a two-sided market. There is no magic here to it being a two-sided market or not, that was clearly a step in an argument. What is important is that you have externalities and, indeed, market failure in the two-sided market.

We say that the justification for Ofcom's reliance is compellingly set out in Mr. Myers' second statement – a long treatment of it – at paras. 97 to 178 in bundle C2, tab 28. It has not effectively been challenged at the level of principle by evidence from Mr. Muysert or, indeed, elsewhere. As I have already pointed out Mr. Muysert accepted that Ofcom could legitimately perceive a market failure problem in two-sided markets with significant vertical and horizontal externalities. He did not quarrel with there being a problem at all. He claimed indeed that he was not in a position to agree or disagree, that was not the focus of his report, he was looking at how he ought to deal with it, how he ought to treat it. He accepted further that it could be desirable for 08 retail prices to be reduced by tariff rebalancing with mobile geographic prices. Again, he said he was not in a position to judge that. and his point that there might be a different or better way to deal with that on the retail side might be a proposition with which Ofcom agrees, but it was not the focus of this objection.

EE's further grounds relating to discrimination and practicability I addressed in opening, and practicability in particular, and Ofcom do not propose to make further submissions. On that basis I leave the EE appeal and turn to BT's appeal.

The first issue in relation to that is the vexed question of the correct welfare approach: total welfare versus consumer welfare. BT's approach to the total welfare argument, we say, has some varied. Originally in the notice of appeal we advocated what I described as an "absolutist total welfare perspective" in which all revenue transfers were to be taken into account to produce a welfare as much as consumer welfare. But that certainly was not the position which Professor Dobbs advocated in his report.

BT certainly now appears to accept that it was at least open to Ofcom to different weights and different benefits to different recipients, even if not the same recipients. I have sought

to identify BT's arguments under three headings. Firstly, that Ofcom should have used a total welfare analysis giving at least some weight to BT's interests. That is not Professor Dobbs' position, but it appears to be advocated. Secondly, that Ofcom should have used what is strictly speaking, I think, a version of the consumer welfare approach that happens to give equal weight to all benefits to all telecom customers regardless of whether they accrue those benefits *qua* customers or *qua* employees, shareholders, or in any other role. Although theoretically you are adopting a consumer welfare approach because pretty much everyone has a phone, in Professor Dobbs' words, therefore you end up with something which looks very much like total welfare because effectively almost all interests are included, subject to various problems which we come on to.

The third argument was a much more specific and limited one, which was that Ofcom should not have given greater weight to the interests of MNO business customers than it gave to the interests of service providers.

Sir, I can take the first two of these approaches together. They might be called two variants on a total welfare approach. The first point to note is that even putting its own evidence at its highest, BT's experts did not actually support such a case in the sense that they did not support a case that Ofcom erred in adopting the approach that it took. The highest they put it was that they, personally, as economists, would prefer a different approach. I should perhaps emphasise that Ofcom's submission that it acted entirely properly in adopting its consumer welfare approach is not based on any philosophical or economic *a priori* argument of what is the appropriate or most desirable arguments. It is grounded squarely in its statutory duties and in its obligations under the legislation and Directives.

Sir, the first point is that Professor Dobbs did not suggest that Ofcom's approach was anything that a regulator should not adopt. I have set out in my closing under para.67 at some length an exchange with Professor Dobbs. What was absolutely clear from that exchange was that he accepted, first of all, that many regulators do not take his approach, his version of total welfare mediation to consumer welfare. He said:

> "… it seems to me that what I have done this annex is to point out that this is a fairly conventional approach that economists have. It is true that many regulators do not take this approach, but that does not alter the fact that it has some force, and I was presenting the case for that position."

Then I asked him, or pointed out to him, the importance further down:

> "It is therefore very important for the Tribunal to understand whether you are simply talking about potential different approaches; you, as an expert

economist, think it would be more rational and sensible to prefer your approach, but do accept that many regulators take something akin to Ofcom's approach, and that it is something that reasonable people can disagree about?

A I would entirely agree with that and that is why the final section of the Dobbs' 7 report looks at the consequences of, if you like, two extreme versions …"

And on he went. He fully accepted that there were different legitimate approaches. He was not of course approaching it from a legal perspective, but simply looking at it, if one was entitled to look at this way, as a free and open policy choice for Ofcom.

Then BT's own evidence it is clear, we would say, that Ofcom's consumer welfare approach was perfectly within the band of reasonable approaches and does not disclose any error of approach by Ofcom, on BT's own evidence.

We refer further to Dr. Maldoom's evidence where he did not take the position any further – day 7, p.4.

So, sir, we say that, even without more, BT's case would be in serious difficulties on the question of total welfare. In fact, we say the position of course is not a free choice between different welfare theories. Section 3 of the Act imposes principal duties on Ofcom which are simply not consistent with, and certainly do not remotely require, a total welfare approach. The Tribunal will of course be well familiar, the interests which must be furthered by way of principal duties of Ofcom are citizens in relation to communications matters where "citizens" are "all members of the public in United Kingdom – s.3(14).

Then secondly, "consumers in relevant markets". You will recall that by s.405(1) "consumers" has the meaning given to it in subsection (5), which provides a definition encompassing "persons" in relation to the provision of a service, facility or apparatus.

Sir, it might be convenient just before the short adjournment to look at that particular provision in s.405, which is in authorities bundle 1, tab 3.. Section 405, sir, is right at the back, it is p.5 of 6 of the last item in tab 3. One sees there:

"(5) For the purposes of this Act persons are consumers in a market for a service, facility or apparatus, if they are:

(a) persons to whom the service, facility or apparatus is provided, made available or supplied (whether in their personal capacity or for the purposes of, or in connection with, their businesses) …"

I will come back to that parenthetical clarification in a moment.

"(b) persons for whose benefit the service, facility or apparatus is provided, made available or supplied or for whose benefit persons falling within paragraph (a) arrange for it to be provided, made available or supplied;

(c) persons whom the person providing the service or making the facility available, or the supplier of the apparatus, is seeking to make into persons falling within paragraph (a) or (b); or

(d) persons who wish to become [such] persons …"

Sir, what we say is absolutely clear from that compendious definition is that, first of all, producers, i.e. those providing the service, facility or apparatus, are not caught, they are not included. That would include BT and the MNOs.

Secondly, what is absolutely clear is that consumers may be persons, i.e. legal or natural persons, receiving a service in a personal or in a business capacity. This, we say, clearly authorises the taking into account of welfare gains by businesses in their capacity of consumers of phone services. It must be recalled that this definition is of consumers in a market for a service, in relation to the provision of a service.

Thirdly, sir, consumers in relevant markets. It makes it clear that consumers are counted when they are acting as consumers. An example is SPs in receiving hosting services are consumers, or businesses making and receiving mobile phone calls are consumers. But BT's shareholders, who happen to have a phone, are not consumers in respect of dividends paid by b t.

Sir, if that is convenient moment?

THE CHAIRMAN: Yes, thank you, Mr. Herberg, two o'clock.

(Adjourned for a short time)

MR. HERBERG: Good afternoon, sir. I had hoped to be able to hand up to you this chart, but I am just told that a further hitch and vexation has arisen and there might be another problem with it. Certainly you will have it today, before the end of the afternoon, I promise you that.

Sir, before the short adjournment I was dealing with total welfare versus a consumer welfare approach. Just to finish off on that submission very briefly, for the avoidance of doubt Ofcom does not of course contend that producer interests/producer welfare are irrelevant for all of Ofcom's statutory duties. They flow into all sorts of duties potentially. What we say BT cannot possibly do is to contend that an approach which embodied Ofcom's principal duties in this case was misguided or wrong. The basis of the attack has very much been on the principle that total welfare ought to be adopted as the model. It has

not been an attack on the basis of: you have failed to capture this particular other interest that can only be caught by producer welfare, for example.

There is one reference, for example, in the footnote 10 to Professor Dobbs' report 7: the desirability of encouraging investment and innovation in relevant markets. It is not suggested that it has been ignored, but it is suggested that is a relevant consideration. True it is. Ofcom would contend that that has indeed been captured and taken into account in this case, for example, in its treatment of the indirect effect, giving more weight to revenues which are passed on to consumers of SP services to improve the quality of the services rather than those which are held by SPs and not distributed. Sir, that is not really the focus or the nature of BT's attack on this ground.

The other problem, if further problems were needed with total welfare approach, is of course that it would be totally impracticable to apply in practice in a case such as this. I put to Professor Dobbs in cross-examination, and he did not appear to have given any thought and certainly did not have any realistic answer (and nor does BT in its closing submissions) to the obvious problems of the wide geographical remit of a company such as BT. One would have to do an exercise of stripping out welfare benefits in so far as they were flowing outside the United Kingdom probably, because the focus is on the United Kingdom. There might be interesting community-wide questions. There would be an extremely complicated process with stakeholder interests, employee interests and so forth, given the organisation. That would not be the end of it. There would then arise complicated weighting questions. Because BT accepts that different weights can be given to different interests, if you were going to admit in a much wider range of producer interests into your calculation, you would then have of course complex questions as to what weight you ought to give to all those different interests. So if the Tribunal were to prefer such an approach, that would be a task which it would have the pleasure of undertaking, or worse still, remitting to Ofcom to determine. But for reasons I have already submitted, we say it is simply not a tenable approach.

Sir, we do say that if the Tribunal does accept that Ofcom's consumer welfare approach was the right one, then that does have very substantial implications for BT's case on the welfare analysis in the round. As I developed further when I addressed the welfare analysis, both Professor Dobbs and Dr. Maldoom relied very heavily on the total welfare perspective in reaching their conclusions that outside the full reduction scenario it was nevertheless still possible to say that the overall welfare effect can reliably be found to be beneficial. They relied heavily on the total welfare analysis.

Of course, even on the total welfare analysis, Ofcom does not accept that that is the case. You will recall in the cross-examination of Professor Dobbs I put to him at some length the efficiency calculations which he had disregarded. It was no criticism of his approach, but he expressly said he was disregarding efficiency considerations from his calculation on the total welfare analysis. I put to him at some length that once you reintroduce those efficiency considerations the position is so obvious you then do have competing effects to which there is no a priori obvious answer which he accepted.

Of course, BT's case is far weaker on the consumer welfare approach because what it does is take certain things out of scope to the detriment of BT, thus the mobile tariff package effect remains in scope because that is an effect on consumers, but parts of the indirect effect are not counted. In so far as revenues stay with BT they are not counted; in so far as revenues go to SPs they are given markedly reduced weight. It is only if to the extent that the benefits flow all the way to callers that they are given, as it were, equal and balancing weight to the detriment in the mobile tariff package effect. So on the consumer welfare analysis BT's case immediately gets significantly more difficult and the analysis of Professor Dobbs and Dr. Maldoom, we say, does not begin to establish that in the partial welfare scenario the results overall must be positive. Sir, I will come to that in a little more detail.

Now, I turn against that background, to the welfare calculation itself. Sir, what I do under this head is first to consider the various effects which Ofcom took into account, and secondly to address how they were assessed in the different scenarios. We do not accept that our analysis failed to take into account any relevant considerations or did the opposite. It might be helpful at this stage to take you to the amended chart which Ofcom has produced and the document which lies behind that, which is annexes 2 and 3 to the skeleton. The chart is being handed up now. I thought it had already been handed up. (Handed) Sir, the chart is very little different from the one originally produced by Mr. Read. I will take you to the changes. It looks even slightly more (as someone else labelled it) like Spaghetti Junction, but the changes are not substantial because Mr. Read's analysis captured the principal effects. The differences effectively are firstly one sees the large arrow going vertically down the page in the middle.

I am sorry, sir, it has been made clear to me there are a number of charts in front of you. The one I would invite you to go to is the partial reduction scenario chart. Effectively, we produced one scenario showing full reduction, and one scenario showing no reduction. Those two are perhaps helpful because it illustrates the submissions that have been made as

to how one effect or other drops out on each of those two extreme scenarios. So there is no revenue passed through on one, and the other way on the no reduction scenario - there is only revenue passed through and no reduction that way. What one has on the partial reduction scenario is integration of the two sets of effects on the one chart. It is that to which I was going to take you.

One has the main arrow going down from the call revenues lost to the mobile companies, and the principal effects one sees at the bottom of the page. We have now added in on the left hand of the two effects the volume increase before brand enhancement effects. That is Box J now. That sets alongside the increased demand by callers caused by improvements in brand quality, which is Box K. Those are the two potential externalities. Of course, they are both taken into account in the direct effect, although in different ways. The volume increase before brand enhancement is simply part of the direct effect, whereas the brand quality is taken into account by greater weight on the direct effect. I will come back to that. Sir, that is one addition. The other changes are on the left hand side of the diagram. This is more illustrative than a correction to Mr. Read's diagram. It is to split up the benefits to SP customers into two different sources, both of which lead to improved quality and services. The first is by the volume increase, including the brand enhancement from J and K - the volume driven quality effect. We have called that box 6A, but then quite separately from that there is the effect via the indirect effect on callers from simply the revenue driven quality effect, more money goes through to SPs and they spend more money on SP services and that creates a benefit on that route. That of course is an indirect effect, unlike 6B is an indirect effect, 6A, as you may recall Mr. Myers explained, was given the greater weight through the direct effect. That is the overall scheme as it were, and we reject the suggestion made in what we respectfully suggest are extravagant terms in BT's closing, that Ofcom has changed its focus, has effectively created a different case in retrospect or has done anything other than clarify in relatively minor ways what was always in the final determination as to the analytical framework adopted. Of course, it is a complicated schemer and of course the explication of it and the analysis of it in the final determination is complicated and not straightforward but that primarily lies we say with the nature of the change proposed by BT in the framework which was required to identify all the different effects which follow through, nothing to do with Ofcom's analysis which caused that. In passing, the suggestion that this case overall has been complicated by the fact that in the 080 case very early on it maybe BT was not clear as to the scope until the draft determination came out is, we say, simply far fetched. There was a very limited period until the draft determination 080 case

that BT may not have realised the scope of the Ofcom investigation. That was clarified right back at that early stage and the complexity which has developed in this case has all occurred well since then, and the suggestion in some way this whole journey on which the parties have engaged flows back to that allegedly misleading consequence at the beginning is, we say, simply not sustainable.

What we say is significant is that BT have failed to identify any factor that they say should have been taken into account but was not taken into account in the diagram. Effectively there is, as I understand it, no complaint once it is properly understood what Ofcom did. There is no complaint as to the schemer, of course there is complaint about the weighing and the conclusions reached, but there is no complaint as to this mode of analysis. The complaints really turn into complaints about lack of transparency and allegations of that nature. Ofcom emphatically does not admit, or all but admit, a lack of transparency, it is not accepted, but it goes back to the 'so what?' question. BT's whole complaints on that score really do not lead to any place on this appeal that is going to assist the Tribunal, and I make that point in para. 77 of my closing. The point was put fairly and squarely by you, sir, what difference does it make? Why does it matter? BT does not provide a satisfactory answer and one only has to look at para. 61 of its skeleton, its most recent formulation which we say does not end up giving any indication of the consequence of the complaints.

Can I turn then to the way Ofcom weighed the different welfare interests. We say that Ofcom gave a correct, or proper (which is all it needs to show) weight to the different effects and I address each effect in turn. I start off with the extra weight that was given to the direct effect. The extra weight was given to reflect the vertical and horizontal externalities and the lack of consumer price awareness. BT in its closing submissions claimed that the final determination did not explain how Ofcom had dealt with box K, brand quality externality, and I give the reference to that, and refer to Mr. Myers' acceptance in cross-examination that it is not explicitly stated in the final determination. This is an example, we say of BT being very selective in what it looks at to make a point that is not a good point in the first place. They studiously omit the fact that Mr. Myers, in re-examination, had his attention drawn to para. 7.103 of the final determination where Ofcom had responded to an argument by Dr. Maldoom relating precisely to this effect by saying that we put greater weight on the direct effect in part for this reason. It is absolutely clear from the final determination therefore that Ofcom had taken this into account, and the attack on the final determination was completely unfounded. BT simply ignore the clarification in making the allegation.

Mr. Myers acknowledged the benefit to fixed line callers was not expressly articulated in the final determination but his evidence on that was that it was implicit in Ofcom's analysis and I give the reference on that score.

There is then the issue about whether the extra weight was merely a tie break. Again, this is beginning to resemble archaeology. We say it should have simply been apparent to a fair minded and careful reader from the start that this was not a tie-break situation. There are two passages to which BT refer which are consistent with both readings, but there is a footnote which makes the position absolutely clear which is only consistent with it not being a tie-break. The whole suggestion of a tie-break is a very odd one in the first place because it would be obviously hugely illogical to say: "Yes, one effect is more important than the other", and then say: "But we are only going to take into account in the highly unusual situation where there is a tie-break". It clearly would be an error and one can see why BT is attached to it because it is right it would be an error. But, with the greatest respect, reading the decision clearly it makes it absolutely plain what Ofcom was doing at the time, and I do at para. 15 I am afraid go into some archaeology which I will not refer to the Tribunal. BT in closing, we say, gives a thoroughly confused and misrepresents the position at para. 188(1), and we set out there why that is the case, but I will not take up the Tribunal's time. It is footnote 17.

BT's suggestion that the net effect of tariff rebalancing was positive, and the suggestion that this was never articulated in the final determination is simply wrong. It is absolutely clear that Ofcom proceeded on the basis that tariff rebalancing was good in accordance with the policy preference and that the net effect of those effects alone was therefore positive. We point out that this is shown by para. 4.32 of the final determination: "We have a clear preference for a balance of prices involving lower 0845 and 0870 call prices." 8.150: "Rebalance structure and price which involves a reduction in 08450/0870 price down to the bottom tier." "Would benefit consumers and by Ofcom's conclusion that the full reduction scenario, in which tariff rebalancing was the only relevant effect would be welfare beneficial." That is one of the reasons for the greater weight on the direct effect. The position is quite clear.

We then move to the indirect effect. I have already made the submission to you that the revenue share was no part of Ofcom's policy preference, and therefore no additional weight was given to the indirect effect. BT appears to suggest in para. 16(viii) of its written closing that the making of termination payments to TCPs was "in line with Ofcom's policy preference" apparently on the basis that it provides service providers with monetary

compensation for failure to follow the policy preference. That is certainly no part of Ofcom's reasoning. Ofcom's preference is clearly and simply that callers should pay less for 08 calls, not that revenue sharing should be enhanced on those number ranges.

Indeed, sir, you asked a question of Mr. Read in closing as to why revenue share was being taken into account at all in circumstances where it was not part of the policy preference to deliver revenue flow to SPs. The short answer to the question is that we had to take account of the indirect effect insofar as it was a benefit to consumers, but we say that we did so in a context, first where we placed less weight on the indirect effect relative to the direct effect, because the direct effect was weighted whereas the indirect effect was not; and secondly, the way that we looked at the indirect effect was through a jaundiced eye – if I can put it that way – we looked very carefully to see whether the money was passed through from BT to the SPs, even then it was given less weight and we really tried to focus on what would actually pass through to consumers. That is the way Ofcom dealt with it, and it had the overall consequence that while some weight was still given to revenue passed through it was limited and targeted weight in circumstances where it actually benefited consumers.

Sir, then there is the issue, as I have just referred to, of giving less weight on benefits to SPs which are not passed through to callers. This was on the basis that SPs are consumers within the meaning of 2003 Act. That was recognised by Ofcom, but they gave less weight to them. We say that was an entirely proper approach. BT's written closing, para.49(1)(i) says that Ofcom was guilty of a misunderstanding as to the meaning of "consumer". We say Ofcom gave itself an impeccable self-direction that service providers as well as callers were, in fact, consumers – final determination, para.4.21. I have already taken you to the definition in the Act and pointed out how they fall within that definition.

It does not follow that all consumers have to be given equal weight, as BT appears to accept. We say that Ofcom clearly and convincingly justified its decision to give SPs less weight. It would have been quite wrong, we say, to have dealt with according to Dr. Maldoom's suggestion that there ought to have been an unopened box, and that once money reached SPs it ought to have been counted without any disaggregation We say that would have been an inappropriate approach. It was right to open the box. Mr. Myers, in evidence, explained in some detail, and I quote it at para.88(b), two different reasons why that was the case. This was as to why SPs should be given less weight compared to business customers who were mobile users. It was suggested to be an inconsistency between the two category since they are both businesses. He identified two relevant differences between them, firstly, that business customers were callers and their welfare

interests were being valued in that capacity; whereas SPs, on the other hand, are only consumers in respect of their consuming of the hosting services.

Secondly, he made the point that there was effectively a conflict of interest between the callers and service providers. If the service providers were retaining monies and not applying them for the benefit of the callers, then those were simply being absorbed into the main businesses of SPs, were not even telecoms in the main, were banks, or whatever, whether they were distributed to their shareholders or applied to their general businesses, banking or whatever, that was an interest which Ofcom was quite legitimately able to place less weight on.

Sir, BT says, para.100(1)(ii) of its closing, that the SP "box" should not be unpacked because there are all sorts of possible benefits: new services, quality improvements, and innovation. We say that is precisely the reason why the box should be unpacked. We were sorting out the extent to which those SP benefits would be applied in those sorts of ways, through benefits to callers, and the extent to which it would not. It would apply for the benefit of their general customers, banking or otherwise, or indeed sent through to their shareholders, or otherwise.

At para.52(3) of the written closing, BT suggested that Ofcom's approach to SPs is "at odds with SNGN and the focus it gives to SPs". We again say that is quite wrong. What we have been calling the NGCS consultation document makes precisely the same distinction between SPs and callers – and I give a reference to para.A1.5, p.118:

> "… we are aware that in some circumstances there may be trade-offs between the interests of these two groups of consumers. In the event that SPs' interests conflict those of callers then we consider that callers' interests have primacy."

It is precisely the same distinction being made.

Sir, we then come on to complaints that are made as to the weight placed on the mobile tariff package effect, and the suggestion was made in this context in closing by BT that, in contrast and in contradiction to the approach in the final determination, in the NGCS consultation it says "minimal weight was given to the mobile tariff package effect". Sir, we say this is simply a misreading of the NGCS consultation document and a failure to take into account the different context of the proposals under the NGCS consultation. As Professor Stoneman observed when this point was made on day 10, p.83, line 2, the proposals in the NGCS document involved price control, they are not the same proposals as in the NCCNs. Because of that:

> "… there is no waterbed effect [X] at all, because the price control does not pass any extra revenue over to BT."

So there is a whole element of the mobile tariff package effect which is simply not going to exist. The only waterbed effect involved is, in effect, [W]. This is equivalent to the "total reduction" scenario where Ofcom, of course, found that the presence of such a waterbed did not prevent the scenario from being welfare beneficial overall. So the difference really is illusory. Indeed, even against that background the NGCS consultation did consider in various places the MTPE, including an extended discussion, just for your reference, at A7.65 to A7.94 in relation to 080 and the significant discussions elsewhere in annex 7 for 0845 and 0870.

Then in annex 4 there is a considerable discussion of variable termination rates, including the conclusion at A4.86, which I have set out in para.90(c) of my skeleton, and I do not need to go through that. It recognises the potential for:

> "… an undesirable tariff package effect, i.e. higher prices and reduced volume of other services offered by OCPs."

There is no suggestion there of any different weight being placed, let alone any different treatment of that effect.

Sir, I come then to Ofcom's conclusions on the magnitude of the various effects. The overall nature of Ofcom's conclusions is, of course, well familiar to the Tribunal, as to the magnitude of the direct effect being uncertain, the MTPE being significant, although its precise speed and scale is uncertain.

As for indirect effect, while there may be some sufficient competitive pressure on BT to ensure that some benefits are passed on over time to SPs, it is not necessarily clear that callers to 0845/0870 numbers will necessarily benefit. There was no clear profit based incentive for the fixed tariff package effect.

Sir, before I go further, I should perhaps have shown the Tribunal – I omitted to do so, I was going to take you to this after I had shown you the diagram – the other annex, the document annex C. I should just briefly show you what is in it. I am not going to take you to the detail of it, but I hope it might be a helpful document. What it effectively does, it seeks to summarise the relevant findings from the final determination and, where relevant, from Mr. Myers' second statement in relation to each effect. One sees that we start on the first page with the direct effects. The definition is given by reference to the final determination. Then a reference to what is in it, including the direct effect is Myers box J. So these are cross-references to the partial reduction sheet with all the amendments to Mr. Read's

diagram. Then there is reference to the conclusion on the direct effect. One then starts to work through the boxes. On the second page we have the good and bad waterbed. We have a definition of the mobile tariff package effect. We see the reference to where Ofcom distinguished between those two effects, and then we see the relevant quotations as to the size of the waterbed, and concluding over the page para.9.6, that it is significant, although precise and scale are uncertain. We have sought to include the principal references to each of these effects. We then go to pass through from BT and other TCPs of course to service providers – in other words, we are looking at pass through to box 5 on the next page. I am sorry these pages are not numbered, but the pass through to box 5 captures of course three things. It captures the box 1 revenues received by BT from termination charges. It also captures two other effects. It covers Mr. Myers' new box J, the volume increase before brand enhancement; and it also covers box K, the volume driven quality effect. It is then set out how Ofcom treated all of these. Ofcom treated service providers as consumers, it gave service providers retention less weight. Then over the page it dealt with the extent of the pass through from TCPs to SPs. I might at that point pause, sir. It might be worth just noting (because it is a point that has at times in this case got lost) that the nature of Ofcom's conclusion, which is in the last paragraph in that large box on the page you have just reached in the category passed through from TCPs to SPs and Ofcom concluded that:

> "… we consider it likely that in due course competitive pressures would encourage some pass-on of increased termination revenue to SPs, whether in the form of lower prices or improved quality of hosting services. There may, however, be a time lag before this competitive pressure builds up. In addition, the pass on to SPs may require renegotiations of contracts and this may take some time to occur, depending on the duration of the existing contracts."

I simply take the opportunity to refer to that, sir, because there has been some assumption, on my part as much as anyone else's, that effectively that box is ticked and there was pass through from BT to the SPs and the only question to concentrate on was the question of SPs passing on to callers. But it is right to recognise the very tentative and time lag nature of Ofcom's conclusion, if I can put it that way, that even that first stage of the pass through was doubtful and uncertain as to extent and as to timing. If one was actually going to sit down and do a quantitative analysis of the whole chart and try to produce figures, matters such as this, which had almost been passed over, would suddenly loom large: how big, how long and when? It is to take into consideration one particular uncertainty, but the multiplication by the number of boxes and the number of channels illustrates the nature of

the problem, we say, which Ofcom faced in doing anything quantitative at all with the welfare calculus.

Sir, one then has the conclusion on the indirect effect. There is a slightly elliptical statement at the bottom: "not limited to indirect effect". That is simply because of course we are dealing here with Boxes J and K as well, which are direct effects which are nevertheless being passed through to SPs. Of course, going back to the diagram, Boxes J and K have a feed through to the SPs themselves.

One then, just going briefly through the rest of this chart, has pass throughs from SPs to callers, the next step down the line from Box 5 to Box 6. One sees the definition of indirect effects, one sees Mr. Myers' correction (it is an actual correction) to the definition included by placing weight on the direct effect. One then sees the assessment of the pass through from SPs to callers. The relevant passage is given at some length. Then the conclusion on the indirect effect at the bottom of the next page.

One goes on then to deal with the fact that Ofcom's consideration of the pass through was not limited to the indirect effects. It also had to include the direct effect Boxes J and K as above. The relevant passages from the Determination are identified, and from Mr. Myers' statement and the pass through of Box 6A benefits to callers, more likely than pass through of 6B benefits (quote given).

Then I am going to go on fairly briefly. One then has Box K dealt with: increased demand caused by improvement in brand quality leading to extra weight on the direct effect. Of course, some of these boxes are dealt with more than once because they are relevant as pass through to another effect, but this is where it is dealt with as a separate interest on its own. How it is dealt with, extra weight on the direct effect, references in FD given. The explanation for the extra weight, references to the policy preference. Then over the page, Box 4, we have the fixed tariff package effect. Again, relevant passages from the Final Determination identified leading to the conclusion that it was not a box which would have a substantial pass through effect.

Then last of all (I will not take you through in detail) is how Ofcom assessed the overall effect and we have the conclusion as to the overall effect, the nature of Ofcom's analysis of the effects, and the overall conclusion on Principle 2, including on the very last page our judgment in respect of Principle 2 that it is therefore:

> " … finely balanced. We recognise the possibility that consumers could benefit … However, we also recognise the risk of harm to consumers … particularly in the light of our conclusions on the Mobile tariff package effect."

Sir, while I am there, we reject the suggestion that there is something contradictory between saying that the conclusion is finely balanced and Ofcom's conclusion as to uncertainty. Sir, it is quite clear that in the context what they are saying is that there is a difficult balance between the possibility of harm and the possibility of benefit, and it is a difficult calculation. It is clear that in the full reduction scenario it is actually going to be welfare positive and actually it is quite clear that moving up the scale it is going to continue to be positive and then stop being positive, and then becoming negative. The difficulty is that with the uncertainty one cannot tell where the tipping point (as it has been labelled) is. That is the sense in which it is being said to be finely balanced, not that we can almost tell but we cannot quite because it is just on the wrong side of the uncertainty line. That is clearly not what is meant.

Sir, BT criticise Ofcom's failure to quantify the magnitude of the effects in the round. Ofcom took that decision deliberately and not by way of failure but by way of a deliberate decision. At para.92 I set out the passage from the Final Determination 7.89 why it did not do so.

> "We have not attempted to quantify precisely the overall effect of the [three] effects as we do not consider that such an exercise would yield sufficiently reliable results to be informative on the basis of the evidence before us. However, our analysis is informed by a view of the following: (a) the direction of each of the effects; (b) the evidence on the potential scale of the effects; (c) inter relationship between the effects;(d) the bounds of the relevant sizes of the effects."

We say that Ofcom did all that it could, short of a quantitative analysis and indeed came up with conclusions as to the full and no reduction scenarios. But it recognised the limits of what it could do on the information before it and declined in the circumstances to make any quantification where it could not do so. BT's criticism is that any weighting exercise is only meaningful if it is in some sense quantitative, at least with magnitude and Ofcom could and should have looked at where the tipping point would be.

Sir, we say this is a completely unrealistic submission. The tipping point can only be identified if it is possible to identify all effects. It is submitted that the evidence before Ofcom, and indeed now before the Tribunal, simply does not permit this to be done. At para.93 of the closing submissions I have set out at some length (which I do not read now but I invite the Tribunal to read at some point) Mr. Myers' explanation in cross-examination on that point. It is the difficulties as to why that simply was not possible in the circumstances.

Indeed, we say that the various attempts to quantify even each individual effect within the total welfare calculations are themselves extremely illuminating about the impossibility of the overall calculation. I then set out, I fear at some length (and I will take the Tribunal to it fairly shortly because it is of crucial importance to our resistance to BT's case), the particular difficulties of calculating each of the effects. I first address the attempts to qualify the direct effect. Sir, that I am not going to deal with in submission. I have set out in short summary some of the difficulty. That is a matter that the MNOs have specifically addressed in detail. What I do under para.95 of my skeleton is just, as it were, to set out some of the principal sources of difficulty in the calculation of the direct effect. I will leave any further submissions to Miss Smith in reply.

There is then the attempt to quantify the mobile tariff package effect. As Mr. Myers noted, even in market reviews of mobile termination where the waterbed effect is of considerable significance, Ofcom has not there done more than a qualitative indication of the size of the waterbed effect. It had not thought to quantify or to put a tight range of per centage terms on that. That is in the context of probably the largest market review that Ofcom conducts every four years.

Sir, Dr. Maldoom, unlike Mr. Myers, was willing, as he put it, to put his head above the parapet. What happened to his head I perhaps ought not to describe, but we do submit that it did not produce anything in the nature of useful evidence for this Tribunal. He contended that a waterbed of 80 per cent or more is inconceivable, in his evidence. Indeed, any waterbed effect stronger than 50 per cent would be implausible, and anything significantly stronger than one third at odds with the Competition Commission's views in 2009, it was fairly specific and concrete evidence. We say it was apparent under cross-examination from Miss Smith that he had misinterpreted the Competition Commission's decision and that the Commission had proceeded on the basis of a much larger water bed effect, and the reference is given. His insistence that his view about the 80 per cent waterbed being inconceivable was not just based on the Competition Commission evidence, was very difficult to understand he was not able to identify where it came from. In response to a question from the Chairman (day 7, p.37, line 11) he suggested that 80 per cent was "meant to be a representation of a degree of consensus about the incompleteness of the waterbed", an explanation which is rather difficult to reconcile with his description of the 80 per cent as being "inconceivable". When it was put to him that he derived it from measuring Mr. Myers' illustrative figure 8 he accepted it was (day 7, p.37, line 20), it was:

" … a number which is sufficiently different from 100 which again also has the convenience of being a number which is that implied by Mr. Myers' figure."

We invite the Tribunal to perhaps consider that this part of Dr. Maldoom's evidence was simply unsatisfactory, and certainly provided no assistance.

Professor Dobbs asserted, in his seventh report, para.119 that Professor Valletti's and the rest of the empirical work strongly supports the proposition that if a waterbed exists it is, brackets, significantly less than 100 per cent.

When he was cross-examined by Miss Smith he said he had briefly reviewed Professor Valletti's work. He said "I would hesitate to say that I have looked closely at the work. I would not wish to profess to be an expert on the empirical evidence at all."

(day 8, p.23, line 22 and 28 to 29) We say that puts his evidence in context and we also say there is no basis for the proposition which he sought to derive from Professor Valletti's work.

Dr. Walker contended that the waterbed was close to or at 100 per cent (Walker 3, para. 55). Ofcom for its part would not go quite so far as to say there is evidence to support that categorical statement either the other way. We refer to cross-examination in that regard. But it is noteworthy that Mr. Read's cross-examination on this point was conducted on the basis that there was a lack of empirical evidence rather than involving putting some different positive case to Dr. Walker. He was not suggesting: "Look, you have this wrong because you can see from my expert's report or from other source that actually it is different." He was saying: "Look, your view cannot be sustainable, there is a lack of empirical evidence". The Tribunal might think that the witness best placed to deal with the size of the waterbed was Professor Valletti, who is the author of the one published peer review study on the subject. His view was that the evidence for the existence of waterbed evidence was quite strong and robust, (para. 50 of his report) although it was not possible to infer from the Genakos and Valletti paper whether or not the waterbed for 08 calls in the UK was 100 per cent or not was the way he put it (day 8, pp. 77 to 94). In the light of all that, sir, we say that Mr. Read's closing submission was somewhat to the far side of optimistic in asserting that there is really no demonstrable evidence that says the waterbed is going to be massively significant, full stop. That is simply not a submission that is borne out by the evidence. It is also notable that he did not put anything resembling that proposition to Dr. Valletti. He did not even put to the principal expert on the matter the proposition which he invites the Tribunal to find in his closing submissions. That is clearly, we say, unsustainable.

Can I then turn to "Attempts to quantify the indirect effect". Ofcom's view was that it was not clear whether and to what extent service providers will improve the availability or quality of their services in response to the increased revenue share. They said that because many SPs are likely to have chosen their number ranges in large part due to the call price they expect OCPs to offer, not because of the revenue share based on evidence (final determination para. 9.28). This approach was challenged by Dr. Maldoom, and the reason he gave for challenging it, para. 33 of his seventh report, is that he has good reason to expect most SPs operating in the low price or free 08 ranges to face competition, otherwise they would not have chosen one of these number prefixes for their services but rather a higher priced one. He said it meant that we should expect the ultimate recipients of this revenue flow to be in the main but not exclusively consumers of SP services.

We say that that just does not work, it is inherently implausible to say that one can draw inferences of this sort from the mere fact that SPs had not chosen a premium rate number. I put the point to Dr. Maldoom, you may recall at some point and we say that the point simply does not flow. In any case, Ofcom's conclusion, to which I have referred above, was supported by evidence referred to in the final determination, annex 3, 5.225, and you will recall there were a whole number of reasons identified there for the choice of SP, numbers chosen for simple local and national 08 pricing message, ease of routing calls, number portability to help customers remember numbers and, crucially, the finding in the survey that most claim they would not miss the income if it was not there. You may think that that is the best piece of evidence as to the question of the indirect effect at this point of what the SPs are likely to do. The NGCS review also contained material on that point to which I refer.

In his oral evidence Dr. Maldoom accepted that it was uncertain as to what the situation was with pass-through, this was in response to my cross-examination (day 6, p.62), and he said that the survey data says what the survey data says. He did not have anything he could put against it. It may be that there are quite a lot of SPs that respond in this manner (day 6, p.71). We say that that is the state of the evidence and, to put it at its lowest, it absolutely supports Ofcom's conclusion.

There are then attacks on Ofcom's attempts to quantify, or that it should have attempted to quantify the detriment from externalities and the benefit from their alleviation. This is where we come to the £500 million figure in the table to which Dr. Maldoom referred, p.192 of the NGCS consultation. Ofcom has recognised from the beginning and put this point in its submissions that of course the two different figures of the fixed detriment and

the mobile detriment are dangerous to work with because of course the detriment to the fixed line callers can come from the over pricing of mobile services, so one cannot simply focus on one box rather than the other box. But Mr. Myers did give careful evidence in relation to this (day 5, pp.10 to 12). He explained that one might say that the £66 million – this is a rather long quotation, I will not read it out in full, I set it out at para. 108 of my skeleton argument. He starts off suggesting that: "… one might say that the £66 million relating to mobile related calls would be the more relevant number" but accepts that it is a little more complicated than that. He recognises the effect on both numbers potentially of the high cost of mobile origination. He does explain that £66 million may not be the correct number but it is a much better starting point for analysis than £563 million.

> "It is not, in fact, an estimate of the likely benefit of any policy proposal either set out in this document or indeed what one might expect the effect of the NCCNs to be."

So that is coming on to the second point because as well as the quantification of what the detriment is at the moment there is the further and at least equally vexed question of what degree of alleviation of that detriment will actually flow from the proposals, and that is a matter on which, again, further down the quotation Mr. Myers gave, we say, persuasive evidence.

> "Even the most effective remedy, I don't think we would expect to remove all of this detriment. In fact, it might remove significantly less than this full amount. We'd still expect at the end of any remedy, the likely benefit of any remedy would reduce the gap between perceived and actual price, but not entirely remove it. I think, furthermore, it is important to bear in mind the nature of this market failure, this lack of price awareness."

Sir, without reading in detail the essential point is that the externality is, to a large extent, based on lack of price awareness, people just do not know what the price of these services are; that is not going not going to be cured by a partial reduction. It is also caused by price confusion. Reduction of disparity in prices might make some difference, but even on the best case scenario of a reduction to the lowest step there is still going to be a significant disparity between the prices charged on mobile services and the geographic prices represented by Ofcom's policy preference, and so there is still going to be price confusion. These are the main reasons why any alleviation is going to be limited. There is clearly logical and convincing reasoning and neither Mr. Myers nor indeed anyone else in this case has tried to put any figure on the extent of the alleviation, least of all BT, which is seeking

to contend at all points that Ofcom should have done a quantification exercise. Nevertheless, it is the best one can do, we submit. One can see there is clearly an effect. There will be some alleviation and there will be, therefore, a positive effect, but it is very difficult to capture it in quantitative terms at all, indeed impossible, we say.

PROFESSOR STONEMAN: Mr. Herberg, could you clarify something for me? It refers to the policy preference and this phrase "geographic prices". What does that mean? Does it mean BT's geographic prices, or does it mean the OCPs' geographic prices?

MR. HERBERG: Sir, it does mean BT's geographic prices.

PROFESSOR STONEMAN: You are being – I should take some advice.

MR. HERBERG: People sitting in the Gods, not to coin a phrase, are saying something to me. (After a pause) It is my error. It is a misleading phrase because I am really focusing on 0845/0870, but the point is it is not, it is the mobile companies' geographic prices, the price it would cost to call the equivalent geographic number from a mobile phone. So for 0870 you will recall that the geographic comparison is the national one, and for 0845 it is the local rate, but it is not the local rate of calling on a BT phone, it is the local rate of calling on a mobile phone.

PROFESSOR STONEMAN: I think there might be some further submissions on that!

MISS SMITH: The point is simply that with mobile phones you do not have local and national rates, because there are no geographic numbers, as such.

MR. HERBERG: (After a pause) Sir, I am instructed that it is the equivalent to whatever would be the mobile charge for that call. It is absolutely right, as Miss Smith points out, that where there is no distinction between local and national rate then of course the rate will be the same in each case, which might mean that it is even less convenient shorthand to use than it otherwise would have been.

PROFESSOR STONEMAN: I think the important point is that it is the rate of the OCP for an equivalent call that is not an 0800 number.

MR. HERBERG: Sir, yes.

PROFESSOR STONEMAN: And it might be included in a package as well.

MR. HERBERG: Indeed, that is certainly right.

THE CHAIRMAN: I quite take your package point, Mr. Herberg, but looking at the description of 0845 in the national telephone numbering plan, it reads:

> "Special services basic rates charged before discount and call packages at BT's standard call retail price for BT customs, inclusive of value added tax (the price charged by other originating communications providers may vary)."

It seemed to me that the bracketed words were intended to refer to the freedom on mobile telephone operators to charge, as it were, what they pleased, a point that I discussed in opening.

MR. HERBERG: Indeed, that is a point that I accepted and made in relation to Mr. O'Donoghue's submissions that the fact that there was the recognition that they could charge more was built into the plan.

THE CHAIRMAN: Surely, but in terms of the objective, as it were, as to what the 0845 number is supposed to do, what it says on the tin, it seemed to me that the reference was actually BT's standard local call retail price.

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

THE CHAIRMAN: We will probably be rising at some point, do you want to take instructions then?

MR. HERBERG: I think that is convenient. I was simply moving to where I had originally suggested, but before trying to venture another answer that will be further corrected, let me take instructions.

THE CHAIRMAN: The only point I would throw into the mix is that given the objective is clarity to the caller, it would be more sensible to have a uniform rate that is BT's rate rather than a whole range of different rates, depending on who one is contracting with.

MR. HERBERG: Sir, it could do, but it might be thought on policy terms that it would be equally clear to the caller if they knew the call was going to be the same as an equivalent call they would make. It would be as clear as having to pin to BT's particular call prices.

THE CHAIRMAN: That is a fair point. I will leave you to take instructions.

MR. HERBERG: Sir, I was then going to move on to the welfare analysis, which is what I have referred to as the scenario based assessment – in other words, on the three different scenarios. Ofcom reached clear and conclusive conclusions, if that is not a tortology, in relation to two of the three scenarios, the full reduction and the no reduction scenario, as we know, and the uncertain welfare outcome, which is contested, applies to the partial reduction scenario.

It should be said that whereas the no reduction scenario was an unlikely event, Ofcom concluded, but if it did occur it would have an overall negative effect for consumers.

It is the intermediate case, the partial scenario, the real certainty which is attacked arose. Ofcom's conclusion, as we know, is that the overall effect on consumers depends on the relative sizes of the offsetting effects, even though we place more weight on the direct effect

and the mobile tariff package effect because of our policy preference for 0845/0870 prices to be aligned with geographic call prices.

Sir, we say that given the difficulties in the assessment of the individual components, that was not surprising. Indeed, it was an inescapable conclusion for Ofcom to reach overall in relation to the partial reduction scenario given the difficulties in relation to components. Of course, all the components are in play in the partial reduction scenario.

Professor Dobbs described the position in his evidence, day 7, p.94, himself recognising the difficulties. He said:

> "The first is you have to measure those things, and the second thing is you have to weight them. And then I think that in somebody's head, when they make a decision, they have to add those magnitudes weighted appropriately … I would agree that it's difficult to do. I would also argue that one can something about the two extreme points, that is to say the 12.5p point and the other point …"

What he means is full reduction and no reduction.

> "So we do know something about relevant magnitudes. We don't know a lot, but we know something. We can say that, you 'This is significantly larger than that'. By how much? That can be debated."

Sir, we say that is a pretty unstable basis on which to start a case criticising Ofcom for excessive uncertainty in its conclusion on partial reduction scenario.

The partial reduction scenario, it is accepted, would address the externalities to a limited extent, to uncertain limited extents, the point just made.

BT suggested that there had been wrong treatment of the externalities and in para.85(2) of its written closing it alleges that Mr. Myers, as it says, "eventually admitted that, subject to the length of time of implementation and cost, [the NCCNs] could be a useful staging point towards the final destination of 08X calls", which is a tempting way of suggesting it is good, it is going part of the way, one can endorse this as going part of the way there. Sir, that is not an entirely correct characterisation in the first place of Mr. Myers' comments. He made a comment specifically on 080 calls only, transcript day 6, p.21, line 12, which shows that Mr. Read's question related only to 080. His comment on 0845/0870 calls was:

> "It does not seem to me that BT's NCCNs are necessarily a desirable staging post …"

Day 6, p.21, lines 3 to 4. He also expressed reservations about the efficacy of a piecemeal approach. So the mere interposition of, as it were, a staging post does not assist, we say.

Sir, Dr. Maldoom of course did seek to criticise Ofcom's welfare assessment on the partial reduction scenario saying that it was based on unrealistic assumptions – para.36. However, we say, as already submitted, that Dr. Maldoom's own assumptions about the size of the waterbed and about the extent of the pass through are unsubstantiated. His inferences about what Ofcom's assumptions actually were, were effectively based on seeking to extract information from Mr. Myers' figure 8, illustrative 8, which were fairly obviously never intended to convey. It is submitted that his eventual conclusion, after it had been put to him the nature of the Myers diagram and had been put to him that he really could not therefore draw the conclusions that he had, he refused to accept that. He said: I still consider that I can draw these conclusions from the ratios on the chart. We say that is an insupportive and a totally incomprehensible conclusion that he reached. There was no basis for him not to accept. He would not have to accept any blame in having interpreted the diagram as it was. The clear fact was that one would expect a dispassionate expert, when faced with the situation with which he was faced in the witness box, to accept that his conclusions were unreliable, given the flawed basis on which they were based.

BT's written closing suggests that it still has some difficulty in accepting the illustrative nature of the diagram. It describes it in para.193 as "Ofcom's only attempt to give some quantitative measure to its reasoning". It is very difficult to understand how that description can possibly be given to the diagram in the light of the evidence which Mr. Myers gave. He certainly was not cross-examined as to the honesty or accuracy of his evidence. It was an absolutely unsustainable submission, we suggest.

It was pointed out, of course, to Dr. Maldoom in cross-examination that it would be highly surprising for Mr. Myers to have attempted any such quantitative exposition as it would flow totally contrary to his evidence, and indeed BT's evidence, and indeed Ofcom's evidence, and indeed the attack which BT makes on Ofcom which is a failure to engage in any quantitative analysis. But nevertheless, he maintained his position. We do say that the inferences BT seek to draw in para.194.5 of its skeleton are therefore baseless. I do say that the final sentence in para.194.4 should be specifically rebutted. It alleges that Mr. Myers did not say that the effects on the diagram were incommensurate, but it seeks to support this surprising statement with a reference to the cross-examination of Dr. Maldoom. No such question was even put to Mr. Myers. It is a completely inappropriate submission, we say.

Sir, one might speculate as to why both BT's witnesses and BT itself have this very great attachment to wanting to seek to derive something quantitative out of Mr. Myers' evidence. I venture to suggest that it is because it is the only thing they have. BT itself has developed

no quantitative case as to the size of these effects. Despite the criticism of Ofcom failing to do so, it is not as if there is a competing case sitting there saying you should have found X per cent here, Y per cent there. No such case has been developed, we say for pretty obvious reasons.

Sir, turning to Professor Dobbs' evidence, in terms of identifying the break even point in the welfare analysis, Professor Dobbs in Dobbs 7 para.153 sought to attribute to Ofcom a break even point of 14.6ppm, once again in reliance on the Myers not to scale illustrative diagram. In the light of Mr. Myers' evidence Professor Dobbs at least did accept that one could not infer this (day 7 p.84 line 32). It was finally accepted by Professor Dobbs that that was the case. Once again, the only specific evidence in BT's case as to specific numbers, specific pricing effects was in fact derived from the Myers illustrative diagram and did not come from any BT source.

Sir, it was put to Professor Dobbs that because one does not have the empirical data one is driven to saying that the point of intersection may be here, more likely to be further away, for whatever particular reason you may advance. But one cannot say by reference to this particular data: I am drawing the point of intersection here. He agreed with that. So that is where one ends up once one removes the false support of the illegitimately derived numbers. Professor Dobbs also accepted that a debate can be had as to how big the efficiency loss from the mobile tariff package effect is compared to the gain that you get from the externality. That might be quite contested in the partial reduction scenario.

Sir, BT contends effectively for a shortcut. They say that Ofcom could and should have reached the conclusion that the NCCNs were overall net beneficial without needing to consider in any detail the issues relating to the direct effect or the extent of the price reductions according to BT's modelling. Sir, the way they attempt to reach that shortcut is effectively the total welfare analysis. It is para.105/106 of the closing, but you will recall the way it is put in Professor Dobbs' evidence.

Sir, we say of course that is open to the objection that it is inconsistent with Ofcom's statutory duties, but we also submit that it became clear in the cross-examination of Professor Dobbs that even those apparently simple conclusions about the welfare analysis on the total welfare basis were based on wishing away the very complications that make the thing difficult, namely the efficiency effects, which of course had (as I put to Professor Dobbs) different effects on the mobile tariff package effect and direct effect and indirect effect. Once the efficiency effects are in play, the apparently simple conclusions dissolve and one is left again with questions of needing to quantify the relative size of the different

effects. I refer to day 7 pp.88-89. Sir, I will not take the Tribunal to it now, but that is one reference that might repay examination in due course because that page, really we say, strikes away at the last remaining support of any suggestion that one can work one's way through this welfare analysis on the partial reduction scenario.

Sir, BT's alternative case is then that if it does not fall completely to 12.49ppm it is certainly going to fall to the next best thing, which is to have a range of prices going down to 12.49, or, if it does not quite go there, to 17.49. Sir, this is closing submissions. That comes back to precisely the point I was making earlier on about how the tipping point is really quite crucial because if one looks at that scenario then we say it must have been the case that the tipping point was crossed and even on a partial welfare analysis, one must assume the overall benefits were sufficient to have allowed the NCCNs.

Sir, we say, given the very real problems of the welfare analysis, there is no basis for suggesting that a tipping point was necessarily crossed at 17.49 p. It is quite clear that that is within the scale of radically uncertain increases from the 12.49 conclusion which Ofcom was able to reach. There is no basis in the expert evidence or otherwise in BT's evidence which suggests that one can have any degree of confidence - and I again I rebut any suggestion that Ofcom was adopting a high standard; it was simply looking at whether it could reach meaningful conclusions in arriving at a view on where one got to in the partial welfare analysis. We do say that therefore in conclusion as soon as one moves away from the bottom step, as soon as one moves away from 12.5ppm the situation becomes radically uncertain and there is no error of fact or discretion in Ofcom's judgment that it could not make relevant conclusions about that level.

Sir, I can then, I hope, sweep up the remaining matters relatively briefly. We do put a small reminder at paras.123-125 of our written submissions that there is still a competition effect conclusion by Ofcom which has been all but ignored in the course of all the submissions. That is no criticism because of course the parties have had a lot on their plates. But it also does not find its way at all, as far as we could see, into BT's written submissions, although I will be corrected if I am wrong because I have not traversed every page of every document of BT or otherwise.

There is a real issue on Principle 2 in terms of the potential to materially distort competition in the transit market. You will recall the point there is a potential route of use of transit routing to avoid identification of the OCP accurately in some circumstances. This could result in the choice of transit provider being made with a view to paying lower termination charges. It was a matter on which Mr. Kilburn was cross-examined because he had

proposed a solution in his fourth witness statement that BT would notice a change in traffic volume, seek a commercial solution, or if necessary invoke Ofcom's dispute resolution process. He accepted in cross-examination that he did not agree that it was a distortion (day 4 p.45 line 24). He did not agree it was a distortion: "I can't address something I don't believe exists."

Sir, if there is a distortion then it is clear that no solution was being proposed. We do say that as it stands, Ofcom's concerns as expressed in the Final Determination on this issue have not been addressed.

Sir, there was then the question of distinctions with the 080 case and the 080 appeal. I should disclaim at the outset any ambition on the part of Ofcom or myself to arrive at a position where the 080 case is remitted. That is not the object of this. It is not as if Ofcom wants it back! It is, however, appropriate to point out that there are certain relevant differences between the 0845/0870 cases and the 080 appeal which could, depending on the Tribunal's findings, give reasons for the Tribunal to think that course was appropriate rather than simply making any decision itself.

Sir, we readily accept that the evidence and the analysis has moved on very substantially from the position of the 080 Final Determination. Just one example is that Ofcom's conclusion in the 080 Final Determination that it was not convinced that Principle 1 would be met is not a conclusion that Ofcom would seek to uphold.

I did draw attention in opening and no party has grappled with this technical difficulty that much of the evidence and which the Tribunal will no doubt be considering and relying on in its conclusions on 0845/0870 is not evidence in the 080 appeal at all, it would simply be illegitimate for the Tribunal as a formal matter to rely on that evidence, and no one has sought to admit it. It is a technical objection but that was why we suggested that 0845/0870 should be treated by the Tribunal as effectively a lead case. Whether it needs to do something different on 080 will depend on the findings and all we do at para. 128 of my written closing is to remind the Tribunal of a number of potential points of difference between 080 and 0845 between (a) and (d), the most significant is probably (c) because the first two are probably in favour of BT and therefore would not be relevant unless BT lost and there was some reason it ought to be considered further. Point (c) is that in the 080 final determination Ofcom concluded that to be fair and reasonable any termination charge should avoid a disincentive effect on MNOs to zero rate 080 calls. In other words, there was an argument that it might be the case that the introduction of the lower charges would actually act as a disincentive on MNOs doing what they are now doing which is to zero rate

a lot of calls to charity helplines and so forth and there was an additional condition there that it ought not to have that effect. The nature of such effect would depend on the calls on which the termination charge is levied, how the average retail price is derived would have to be the subject of negotiations. It is simply a question that does not arise in the other cases, and we just simply draw attention to it therefore as a potential follow on unaddressed fact. I freely admit that it is a relatively small consideration in the scale of things but it is nevertheless a potentially real consideration and one which Ofcom might want to take into account in statutory duties

Ofcom happily does not take a position as to whether any relief should be backdated, we leave that to the parties. We can see that there are legitimate arguments going both ways, the mere fact that it has not come into force – with a normal case if a party chooses not to comply with a price change then that would not of course be a good reason for not backdating, but there maybe particular considerations in this case depending on how time would have passed, even if there had not been a dispute resolution process given the time needed for the things to feed through, etc, there may be good reasons for the MNOs' submissions to have some force, but we really leave that to the parties. (After a pause) Sir, I am being given some more information on the matter which I undertook to answer, but rather than give that to you now I would prefer to look at it myself first and if necessary I will offer clarification hereafter.

THE CHAIRMAN: I take it that subject to any questions those are your submissions?

MR. HERBERG: Indeed, I was about to say that.

THE CHAIRMAN: We will rise for 10 minutes to give you the opportunity to take instructions on that matter. If you happen to have those charts we would take them away and look at them.

MR. HERBERG: Sir, yes. I will endeavour to do that, so you have the opportunity to seek any clarification.

THE CHAIRMAN: Exactly, if we have any ----

MR. HERBERG: I will try and see where we have got to on that.

THE CHAIRMAN: If they are there you can give them to Mr. Hurley. Or if you have them now?

MR. HERBERG: It looks like they are here. (Same handed) Maybe that is something else I can look over during the 10 minute adjournment, otherwise I fear any questions on this might be difficult.

THE CHAIRMAN: We will say half past three, you have quite a lot on your plate, I think, now.

MR. HERBERG: I am grateful.

THE CHAIRMAN: Then we will deal with you and have the replies of 15 minutes each from EE and BT.

MR. READ: Sir, effectively there is a lot that has been replied to in my document, I do not obviously want to go on a particularly long time, but I would say 20, 25 minutes in my case.

MR. HERBERG: If I may say so, that was not the basis – everyone has had a lot of matters to deal with.

MR. READ: It is either that or else you are going to get a written reply, and I would rather avoid that if at all possible not only for my reasons but also it will just inevitably multiply as the document goes on.

THE CHAIRMAN: We will talk about that when we rise, thank you very much.

MISS SMITH: On that point, on the 15 minutes I have effectively now been handed the baton to defend Ofcom's decision against BT's appeal on the direct effect, and on Professor Dobbs' modelling, and I also remind the Tribunal that I went short on my closing submissions by about 15 minutes. I hope not to go beyond my allotted 15 minutes, but if I do given what has just been said then I hope I will be granted some indulgence.

THE CHAIRMAN: Yes, I noted a certain shaking of the head at that point, but can I make one thing clear, clearly we are going to have to go through the evidence of the experts with a considerable degree of care and that is going to take some time, and I can imagine that were you to seek to address us on evidential points you would be rather longer than 15 minutes.

MISS SMITH: Sir, I am not seeking to do that, and on the direct effect we have dealt with that in quite a great deal of detail in the note we handed up in closing and particularly Professor Dobbs' modelling in that note, and it may be that I can simply refer you to particular parts of that note and urge you to read it in good time in due course.

THE CHAIRMAN: Very well, thank you. Half past three.

(Short break)

THE CHAIRMAN: Mr. Herberg?

MR. HERBERG: Can I, refreshed by that break, attempt to give further and better answers to the questions which I was asked. In relation to Professor Stoneman's question I really should have been able to answer, I think I was 'demob happy'. The short answer is probably that the best summary of this is the 0845 final determination para.1.19. In short summary it is the case that the policy preference for OCPs in respect of 0845 and 0870 is that they should charge whatever their prices are for calls to fixed geographic companies. So in relation to mobile operators and, indeed, many fixed line tariffs as well the calls will be at the same

rate. It is set out in slightly greater length at 1.19 of the final determination and, of course, this does not apply to 080 at all because they are all free.

THE CHAIRMAN: And that is how the National Telephone Numbering Plan should be read?

MR. HERBERG: Sir, it is. That information does not all come from the plan because the way it is expressed, 0845 which, of course, has not had the attempted restoration of the geographic link because of the dial-up internet problem. 0845 – it simply states in relation to what they call 'special services basic rate, they are charged at BT's standard local call, retail price for BT customers. So it simply does not address in the actual plan how it is to be charged to persons other than BT's customers, and one has to go beyond that document to the other sources which are identified in my submissions for the reference.

THE CHAIRMAN: Thank you.

MR. HERBERG: The other matter is that you should now have the overview document and it includes, I certainly will not try and take the Tribunal through it in a lot of detail, not since I have had a very small role in its preparation. If the Tribunal wants further information then, of course, we are here to assist, but we have tried to include in that both the pathways and then the payment pathway and also commercial arrangements, and regulation applicable to each of the diagrams.

THE CHAIRMAN: Thank you. We have looked at it very briefly and do not have any immediate questions, but it looked to be precisely the sort of document that we thought would help us when trying to write our judgment.

MR. HERBERG: I am glad to hear it, sir.

THE CHAIRMAN: Thank you very much.

MR. HERBERG: Subject to any further questions to me those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Herberg. We have discussed reply submissions and I think the order is that EE go first and BT then go last. We are going to set a limit of 15 minutes each, subject to this rider, that if Miss Smith exceeds 15 minutes then Mr. Read's time is extended by a similar amount! The invitation of written submissions, if you feel the need for them, either of you, then feel free.

MISS SMITH: Sir, thank you very much for that indication. I hope I will not take more than the allotted 15 minutes. I only wish to address three issues – to respond to Ofcom's submissions on our appeal first, to make some very short submissions on the standard interconnect agreement and then some submissions in response to BT's appeal in our secondary role.

Dealing with the first point, Mr. Herberg's submission in closing this morning that our "retail price control by the back door argument had entirely collapsed" (and I quote him), first of all, I would like to remind you of what I actually said yesterday on the transcript, day 10, p.53, lines 22 to 27. I said:

> "… it is not our case that the policy preference was an irrelevant consideration, that Ofcom could not and should not have taken into account. Our case, under this head of our appeal, is that it was illegitimate for Ofcom to have treated its policy preference as a potentially determinative factor in the dispute between the mobile operators and BT and thereby …"

I emphasise "thereby" –

> "… seek to regulate indirectly that which it could not yet regulate directly."

The relevant question, I say, is how is the policy preference used by Ofcom in its determination? We say that it cannot and should not be treated by Ofcom as a potentially determinative consideration. That is the policy preference should not be used by Ofcom so as to override the clear position in European law that retail prices should only be subject to price control after a market review and a finding of significant market power.

As I have already indicated, both the stated purpose and actual effect of Ofcom's policy preference is to do this. Ofcom's case on these determinations is that it will allow a particular wholesale charging structure if that wholesale charging structure can be shown to have the effect of reducing retail prices to a particular level – that is below 12.5 ppm and 8.5 ppm. That in effect is its case, that in the full reduction scenario it would approve the wholesale tariff structure. We say this is an indirect control on retail prices, and you cannot escape that conclusion – Ofcom cannot escape that conclusion – by saying that this result is consistent with their policy preference, or with a desire to address market failure in retail markets.

This argument is linked with our cost orientation ground of appeal. We say Ofcom should properly have considered wholesale termination charges which were the subject, and the only subject, of the dispute, separately from the retail market issues. This is what the European Common Regulatory Framework says. Where prices – in this case retail prices – which are not the subject of the dispute, where you are dealing with such prices, you should only impose controls on them following a full market review and a finding of SMP.

Moving then to the second issue that I wish to address in reply, that is the Standard Interconnect Agreement between BT and the whole of the rest of the telecoms industry, we adopt Mr. Herberg's submissions on this, but I only want to make the following brief

additional points. First, one should not and cannot consider or treat the SIA as a standard commercial agreement. The telecoms industry is a highly unusual and highly regulated industry. There is no true freedom of contract, as Mr. Beard would have it, definitely not in a sense normally understood.

The SIA is a relic of BT's historical position as an incumbent monopoly provider. All other communication providers had to enter into an agreement with BT in order to obtain access to, and interconnection with BT's network. BT still remains the hub through which all access and interconnection is effected, either as the transit provider or as, in this case, the termination provider. Even at the present day, BT has significant market power in a number of markets, even if there is no current finding of SMP in NTS termination. Of course, the Standard Interconnect Agreement covers all of those markets. There is no separate SIA for NTS termination.

Mobile operators such as EE have no choice but to sign the SIA if they want to deal with BT. There is also the point that all terminating communications providers, including Cable & Wireless have significant market power over the termination of geographic calls. By definition, if you wish to terminate a call on a particular network, that network provider has SMP as regards the termination of that call.

Even with NTS calls and non-geographic number calls where there is no current finding of SMP, mobile operators such as EE must deal with BT. If my client wants to enable one of its customers to call a particular 08 number which is hosted by BT, EE has no choice but to terminate that call with BT. BT is an essential trading partner for mobile operators in the position of my client.

I think it is relevant to take you back in this regard, and I can read it out rather than digging out the file, to recital 6 of the Access Directive, which for your note is in authorities 1, tab 6. In that recital the European law recognises this inequality of bargaining power, and it recognises the role that the regulator needs to take in such a market to ensure access and interconnection and interests of consumers. Recital 6 says:

> "In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users."

That, we say, must be the starting point in any consideration of even a contract in this case. One needs to start with the background of the type of industry and the regulatory background before moving on to look at the contract and particular terms.

THE CHAIRMAN: Miss Smith, are you suggesting or submitting that clause 12 is in some way atypical? I ask this because the sense I got from Mr. Beard's submissions this morning was that the Cable & Wireless contract was broadly similar.

MISS SMITH: I would have to take instructions before I can respond to that, but my understanding from my client's point of view as to its relationship with Cable & Wireless is that although it has a direct interconnect agreement with Cable & Wireless, for the purposes of non-geographic number calls, all of its calls that terminate on Cable & Wireless are transitted via BT. In fact, it is Standard Interconnect Agreement with BT that deals with the position there.

THE CHAIRMAN: I quite see. The purpose of transit is to avoid the unnecessary complexity of everyone having to contract with everyone else.

MISS SMITH: BT is effectively, and that is why the unusual nature of the Standard Interconnect Agreement is that it is not a bilateral agreement, it is an agreement between BT and the rest of the industry?

THE CHAIRMAN: So BT as transit is effectively acting as a kind of clearer, so that you do not have to contract, as I say, everyone with everybody else. That is why I am asking the question about Cable & Wireless's terms, because it seems to me that the consequence you are seeking to draw from that submission, that everyone has to enter into the Standard Interconnect Agreement, is that clause 12 is somehow in some sense unusual and you are forced into it because you have to sign up to the SIA to get the benefit of transit. That is why I am interested in, as it were, Cable & Wireless's terms and conditions as a cross-check.

MISS SMITH: I may have to check the position on exactly what the interconnect agreement between Cable & Wireless and EE says. We have not focused on that because of the situation in this case.

THE CHAIRMAN: No, indeed.

MISS SMITH: I do not think it is in evidence.

THE CHAIRMAN: No, the contract is not in the files.

MISS SMITH: The question as to clause 12 and our understanding about whether – this perhaps does not go to the point about it being atypical, but the role that BT plays, as a hub, providing the interconnection and access between people such as my client and Cable &

Wireless, if that is why in clause 12 BT needs the power to amend prices without each operator having an immediate veto because it is dealing with the situation across. We say it is of limited relevance to how one should approach the question of a dispute.

MR. BEARD: I was just going to say, in relation to the transiting arrangement, it is quite right that much MNO traffic does transit through BT to Cable & Wireless, so that in practice you end up with a situation where it is dealing with BT a lot of the time, Cable & Wireless. But that does not get away from the fact that there are bilateral contracts involving arrangements that include dispute resolution clauses as well. So I think although Miss Smith is quite right in relation to volumes of traffic, I think in relation to Everything Everywhere, from what those instructing me tell me, that does not obviate the more general problem and the impact it must have on the interpretation of dispute resolution. Thank you. I am sorry, Miss Smith.

THE CHAIRMAN: That is helpful, Mr. Beard. It might be helpful if the standard form Cable & Wireless contract could be produced. Would that be a problem?

MR. BEARD: If there were such a thing as a standard form then yes, but I think that the truth is, as was made evident by the fact that Mr. O'Donoghue did not actually realise that O2 in fact had a contract with Cable & Wireless, what one has is a large number of contracts that have been developed over some long time. There are variations in the terms. I am very happy to arrange for those contracts to be provided to the Tribunal if that would be of assistance, but what I would be concerned to do would not be selecting one and saying: these precise words are a standard term, because my understanding from those instructing me is that they vary. As I say, I can provide them all if you would like them; I can select if that would be preferred, but I am concerned that I would not be representing that this amounted to a standard contract.

THE CHAIRMAN: I understand. By "all" how many are you referring to?

MR. BEARD: I think it would only be five.

MR. O'DONOGHUE: Sir, we would be interested to see the O2 contract!

MR. BEARD: It is news to me!

MR. O'DONOGHUE: It does not exist!

MR. BEARD: I am very happy to assist with that. I can get the contracts gathered and provided to the Tribunal.

THE CHAIRMAN: That would be very helpful, Mr. Beard, thank you.

MR. BEARD: I do not know whether other people want copies of them and whether there may be confidentiality issues if they do.

THE CHAIRMAN: I anticipate there will be, at least as to terms.

MR. BEARD: I will ensure that there are copies provided confidentially to members.

THE CHAIRMAN: Thank you. Miss Smith.

MISS SMITH: Thank you, sir. I think the only point I want to make on that is the stark contrast in the position between Cable & Wireless and BT. Cable & Wireless has a number of bilateral contracts negotiated individually between the parties. We are dealing here with the BT standard interconnect agreement.

Then, if I may, to the last point that I wanted to deal with, which is in BT's appeal. I would like, if I may (and I promise this is the very last two page note to hand up) in response to the statement by Mr. Read that Mr. Read made yesterday that the average retail price for the purposes of the wholesale tariff is the average of all 080 calls and not just BT hosted 080 calls. That is contrary to the understanding that at least my clients had until this statement was made on day ten of this hearing. That position does have implications for, we say, Professor Dobbs' model at the very least. We explain in this note very briefly why, if that is the case, that the ARP as an average of all 08 calls on particular numbers ranges, that watered down and even further confuses the incentives to cut retail prices that might arise from Professor Dobbs' model, but I do not think I need to say more on that note than that.

Also, I need to address the point that was made a number of times by Mr. Read yesterday and also repeated by Mr. Beard as regards, with Mr. Read, his witness Mr. Reid of BT, Mr. Beard made the point as regards his witness, Mr. Harding, that no-one had challenged their evidence. We explained our position on witnesses in opening and no point should be taken on the fact that we did not cross-examine every witness on every point. I just want to make that clear. In particular as regards BT's witnesses Mr. Reid and Mr. Richards, their evidence had been effectively overtaken by the subsequent evidence of Professor Dobbs and Dr. Maldoom and we decided that in that situation a practical and proportionate approach was not to call them for cross-examination.

May I just make a point on para.10 of Mr. Read's closing for BT. The point was also made by Mr. Beard. BT says that no-one has suggested the hosting market is not competitive. That led to some discussion yesterday afternoon. Our point on this is simple: irrespective of the amount of competition in the hosting market, once a service provider has selected a terminating communications providers (TCP) someone in the position of my client has no choice over termination. The OCP has to send the call to a TCP that the service provider has selected. That gives the TCP, as I have already explained, some degree of market power or creates a bottleneck, whether you consider termination hosting as a two sided market, or whatever. One has to keep those points distinct.

Also, some points were made in paras.80 to 85 of BT's written closing as regards the competitive mobile market. Some points were made on bundles of calls. We just want to make the position clear. Our submission is, in line with the evidence, that consumers value other services more than 08 calls. One needs to be careful not to confuse the situation of competition for bundles of services (that is how we say competition mobile networks works) and the situation of there being inclusive monthly call bundles of minutes or texts. We just need to stress, I think, that it is worth clarifying that difference between the two, and we should not try to elide the two issues.

Then direct effect and Professor Dobbs' modelling. Most of the points are addressed in our written note that we handed in yesterday, and you will see how we deal with them there. I am not going to repeat them; they can be read. I think there are two short points that I need to address further. First of all, the question of marginal cost which is set out or addressed in para.220 of BT's written closing. That is explicitly addressed in paras.47 to 50 of the note that we handed in yesterday. I would refer you in particular to para.50 of our note (if you do have it in front of you). We make the point (and this responds effectively to footnote 595 p.330 of the Simplifying Non Geographic Numbers Consultation), as we set out there, that it would be wrong for the Tribunal to rely on the figures referred to in those paragraphs, or indeed to seek to make any definitive finding as to the level of the MNOs' marginal costs.

We make the point that the level of marginal costs is highly controversial and of considerable significance to our clients. The figures given in the consultation are precisely that, for illustrative purposes only and themselves based on figures that were produced in a consultation document. We say as well (and I will make good this point) that BT did not plead a case on the MNOs' marginal costs. We say the proper starting point must be the findings in Ofcom's Determinations. Then we make the point that in any event, even using Professor Dobbs' reasonable ranges of between zero to 3ppm marginal cost and average retail prices of below 25ppm there is still a real risk that prices will not fall to below 12.5ppm. We rely on Dr. Walker's table 1 in his second report.

Mr. Herberg has already addressed this point, but I do think that I need to stress it again that the position as we understand it is as follows. It was only in BT's oral opening in this hearing that it was suggested that marginal costs could be as low as 0.5 to 0.7ppm. Before that point, the evidence in Mr. Reid's statement and Professor Dobbs' statement (as repeated in para.220 of BT's written closing) and repeated in BT's Notices of Appeal that Mr. Herberg took you to, was that costs were likely to be less than 3.5ppm. As we say in

our note, we do not agree that that is a reasonable range in any event. Marginal costs may be higher, but even on this range, Dr. Walker's tables show that the prices on substantial proportions of calls would not fall to 12.5ppm. We have to stress that we have not had the opportunity to put in evidence on the submission made orally by Mr. Read that marginal costs would be as low as 0.5ppm or 0.7ppm. Of course, if the Tribunal proposes to make a decision in that regard, then we would need to have the opportunity to address that issue properly.

Finally, I would like to address very shortly the issue of how far, if at all, any retail price reductions incentivised by BT's NCCNs might actually ameliorate the market failure identified by Ofcom which predominantly arises from a lack of consumer awareness of NTS call prices.

In para.243(1) of BT's written closing BT addresses the fact that Professor Dobbs' model only shows an incentive to drop to an average price level of 12.5ppm or 8.5ppm and that there might still be price dispersal around that average price level. BT suggests that there is nothing in that point because (and they rely on the evidence of Professor Dobbs in this regard) as average prices drop closer to zero you cannot have so much price dispersal. Of course, at its very best, Professor Dobbs' model shows an incentive to drop to an average price level of 12.5 ppm or 8.5ppm, and there is of course the possibility for a great deal of price dispersal. A large range of actual charges around an average of 12.5ppm, so that is, we say, not a good point.

Finally, para. 246 of BT's written closing, they make the point that even on the low marginal costs and ARPs which they set out in para. 245, so even on these marginal costs of 0.5ppm with which, of course, we do not agree, it is said that the price would at worst be likely to fall to either 17.49ppm, or 12.49ppm, and they say that such a reduction is plainly worth their beneficial. We say that is not the case. In order to prove that the NCCNs lead to a net – and I stress 'net' benefit to consumer welfare on Ofcom's case, they must drop to the lowest tier.

Sir, unless I can help you further those are my submissions.

THE CHAIRMAN: Thank you very much.

MR. READ: I think I have twenty two and a half minutes. Can I start by saying it is very easy to be beguiled by the document and the submissions that Mr. Herberg has put before you, but we do express a considerable concern that the Tribunal takes extreme care with what is actually in that document because we think it does not accurately reflect the position. If I can just give you two examples of this: the first is that there is criticism about BT not cross-

examining a positive case on the MTPE. With the greatest of respect, the evidence was very clear that there was no empirical evidence for the market, for the area that the Tribunal is actually being asked to look at, namely the origination of NTS calls. All the evidence was looking at the termination rates and the market, and Professor Valletti (we set it out in our submission) accepted in the course of his evidence that in fact it was not necessarily the same position, so there was not a need to put a positive case and the suggestion that somehow or other BT does not have a positive case on that point in our respectful submission is just wrong.

Similarly, there was reference to Mr. Myers and his evidence on the staging point that prices fell and whether or not that would be a staging point forwards. What has happened is that the answer before has ended up as the answer subsequent in Ofcom's submissions and we do say, sir, that you need to look very carefully at the precise sequence of the evidence to actually get the real flavour of what was being said, so we put a very strong caveat down that, as with all these submissions, it is essential to go back to the material that is actually either in the transcripts or in the documents themselves, and not to be tempted to short circuit it by just accepting what the parties have actually said. Likewise, another example – I will just finish off on this – competitive effects. I am not actually sure whether this reference has actually got into our closing document or not, but certainly Mr. Kilburn addressed the whole point of competitive effects in day 4, p.50, line 3 onwards. Again, we say that if it has got burrowed away on a piece of paper somewhere it should not, it is actually very clear on the transcript what he is saying on that and what BT's case is on that point.

Can I briefly deal with the nightmare scenario that Mr. Herberg tried to beguile the Tribunal with saying that effectively somehow or other gaming might be put forward by a party in order to swamp Ofcom with a decision and therefore if, effectively, as we say Mr. Beard correctly submitted, that uncertainty is not a reason for Ofcom to effectively throw out proposed contractual rights, or contractual rights that are actually there, we say that nightmare scenario is in our respectful submission completely wrong. First, it is not the case here and you should not be listening to the siren call of what might possibly happen in some case in the future. This is the case that you actually have before you and we say, as Mr. Beard correctly put it, that Ofcom effectively got the uncertainty the wrong way around.

Secondly, if it really is a bad thing for Ofcom, Ofcom has a wealth of powers to deal with such a problem case. One knows, for example, if they really think there is a problem with it

they can extend the time period for exceptional reasons. You will recall that in the PPC case that was 15 months from start to finish. Likewise, Ofcom has other powers to use alternative means under s.138 and 186(3), and that can include, for example, own initiative investigations and Competition Act case, so we do not accept in any way the sort of nightmare scenario that Mr. Herberg was suggesting should impact in any way on the way that Ofcom should actually approach the way of dealing with these issues on contractual rights.

Mr. Herberg also suggested that BT had not dealt with the Tribunal's point about: so what, if Ofcom did not state the position clearly in the final determination? BT has made its case, we think, very clear on this. Transparency is absolutely crucial in a regulator's decision, and if there is clearly an error that is a vitiating factor of the decision in itself, and we have set out our submissions on that at some length at paras. 59 to 61 in our closing and also our para.16. We have referred to the Competition Commission case and we have referred to the *Tesco* case, and we would also refer back to what we said in our skeleton argument about the *Napp* case, which is what Ofcom cannot do in this case is add reasons subsequently. That is wrong; a regulator cannot justify a decision by adding things subsequently. So we say that if it is not clear in the final determination then that is an error that overturns the decision and we succeed in any event on that basis.

In that connection I should say that we are somewhat concerned again by the document put in by Ofcom in respect of where they say everything was dealt with in the final determination. If I could just give two examples of this. The first point to note is the number of times, in fact, the reference is not to the final determination but there are references to Mr. Myers' second statement, so if I can ask you just to look at the fourth page in on that as a clear example of this. It is headed "Box [1] – Box]5] Pass-Through from BT (TCPs) to SPs", and you can see in the second row on that page, "Ofcom gave SP retention (box [7]) less weight" and there is no reference to the final determination, there is only a reference to Mr. Myers' second statement. We say that is quite significant in itself because it actually demonstrates the point that we make about Ofcom not having properly dealt with it.

Likewise, if I can take you on to the tenth page in this document

MR. HERBERG: Just to be completely accurate, I do not want to interrupt and take his twenty two and a half minutes, on that first page he is looking in the wrong box, back on p.4 there is a reference to table 9.1 and annex 3 of the final determination in the box on the bottom of the page.

THE CHAIRMAN: Mr. Read, if it helps we are certainly not going to be taking these submissions as holy writ, we will be using them ----

MR. READ: I think Mr. Herberg has actually just made my point, in fact, because what he is demonstrating is that this document in fact cannot be read without reading various passages in the final determination because that ultimately is where the Tribunal has to look at it and, of course, the danger is it is very nice to put it in little boxes but it does not actually demonstrate the full effect and the full flavour. You will recall, sir, that I did refer yesterday to day 6, p.70, lines 5 to 7 and line 26, when I was cross-examining Mr. Myers. The full flavour of what actually went on is not condensed into these boxes so I do say again that as regards this document it is very easy to take it at face value, I am sure the Tribunal certainly will not be tempted to do that, or at least I hope it should not.

THE CHAIRMAN: No.

MR. READ: Perhaps I should just add one other reference very quickly to this. The point about the position is made very clear about the problems that BT and experts face in this, and it was made very clear in Dr. Maldoom's seventh report, and I will give the reference for the transcript, para.60, his seventh report, C1, tab 14, p.24, where he makes it quite clear that the confusion that was created for him to actually carry out the analysis because of the way that the matter was not clearly set out in the original document.

Can I just deal with one or two short contractual points. The first point is that it was suggested that BT fully accept that contract can trump regulation. As an absolutist term we do not disagree with that, but the trouble is that you have to be very careful about the circumstances in which you actually apply it. We have dealt at some length with this in our closing document at paras.17 to 26, and also at day 10, p.69, line 4, to p.71, line 15. That is BT's case. BT has dealt with the point that was raised, we say, and the position of whether contract can trump regulation has to be viewed in the light of what we have actually said there.

Can I also mention that Mr. Herberg referred to the Standard Interconnect Agreement, clauses 2.3 and 2.6 and the references to determinations in there.

THE CHAIRMAN: Clause 12 you mean, I think, Mr. Read.

MR. READ: I am sorry, I have forgotten what I have said. Clause 12.3 to 12.6, and I am sorry if I got that wrong. Those clauses relate to retrospection and they cannot be read other than in the light of what clause 13 is doing because effectively it is changes further up the line in clause 13 that allows BT to retrospectively change the prices in clause 12. It is a very clear cut scheme, but it does take some time to actually understand it. We have touched on it in

footnote 49 of our closing submission, but the core point about it is that those clauses 12.3 to 12.6 have to be very carefully read, and they do not make the points that Mr. Herberg was making earlier. I could give you a fuller exposition of that but I do not really think I have got to do so. As I say, the point is noted in footnote 49.

The point about capriciousness and whether or not there might be a claim in any event to say that BT could not unilaterally change these prices, I think, sir, that if anybody were to try arguing that somehow or other in a situation where BT says that the MNOs are charging way, way above what was intended under the original NTS scheme, I think if anyone tried to say that BT was being "capricious" or "perverse" under its contract terms in making that unilateral change, they might very shortly be on the end of a CPR Part 24 application because we just say it does not muster.

Finally, can I say that whatever happens in the future about the Standard Interconnect Agreement is irrelevant to the purposes of deciding the position today. I do want to say, because I will be told by the Gods if I do not make this point, that unlike the contentions that have been put forward that somehow it is a legacy contract and it is a relic from the past is simply untenable. This is a document that is constantly changing and updating and mutating, not least because all the parties in the industry are trying to achieve that the document be changed. So the concept that somehow this is a blowback to the past really does not cut mustard. Indeed, we would say that a lot of the points that were being made, for example, by Miss Smith just a few moments ago about, "This is an essential contract" is no more or less essential than the type of contracts they have to have with Cable & Wireless in any event. It is a fact of life that if you want to terminate a call on a particular person who has the particular caller on their network, be it SP or other residential caller, then you have to contract or deal with them, or alternatively find some other way of routing that call to them. So there is not anything peculiar in this situation.

THE CHAIRMAN: No, but just to be clear, the purpose of transit is to avoid the need to have a complete network of contracts bilaterally between all the different communications providers in the UK, so that you have a degree of contractual simplicity.

MR. READ: That is right, but it is also absolutely correct to say that BT is no longer a significantly greater transit provider than it was originally. As you will appreciate, and as Mr. Beard has made the point, Cable & Wireless are very active in this particular market anyway. I fully understand the point that you have made about the transit market, but to draw the inference from that that somehow BT is monolith with which people have to contract is simply, in our respectful submission, untenable.

Can I then very briefly deal with the welfare analysis. Obviously, underlying all of this is Ofcom's approach to it, and the starting point, we say, is that all the economists accept in this case that a total welfare analysis is the normal approach. Of course it can be limited, but if a regulator is going to impose a limitation upon it he has to give a proper explanation of the basis on which that is being done. The answer of Professor Dobbs that is quoted in Ofcom's closing document, he was talking in the context of regulators generally and was not talking specifically about this particular situation.

So the question, therefore, is whether Ofcom can limit that approach in the circumstances of the case – i.e. the total welfare approach. The point that we want to make is that nowhere in the final determination is there any indication as to how and why they have taken the approach that they finally ended up with. For example, references to end users. There are not any in the final determination. We only see that in the context of Mr. Myers' statement. Indeed, when one looks at the final determination – for example, paras.4.8 and 4.9, it is quite clear that what is being talked about is looking at the two sets of consumers without any reference as to how exactly those two sets of consumers should be weighted against each other, and certainly we say there is not the unpicking of the SP box that now appears.

The other point I want to make on Ofcom's welfare analysis, because they have spent a lot of time looking at the Communications Act in their closing submissions, is that nowhere do they deal with Article 8 of the Framework Directive which, to plagiarise Mr. Beard's way of putting it, is "the daddy of all obligations". We say, and we made this point on day 1, p.34, line 13, to p.35, line 19, and at p.36, line 18 to line 28, that what has not happened in this case is there has not been any proper analysis of this in the light of Article 8 of the Framework Directive. We say that Ofcom cannot simply push that to one side because Article 8 is very clear, that one should be looking at users rather than necessarily consumers.

There is another point that I want to make about this. Ofcom's focus on consumers in a relevant market, as their document indicates, is quite revealing in itself, because if one is focusing on consumers in the relevant market, then it is callers on the 0845/0870 numbers that are relevant not all the MNOs. That is precisely what Ofcom have looked at when they have come to look at the MTPE. They have looked at all MNO consumers.

We say that, in fact, on Ofcom's own approach that it has set out in its final determination, it just does not work.

I want to make three other final points about the welfare analysis. Even if the focus was on consumers as Ofcom says it was, BT's experts did not, as was suggested at para.73, fail to

demonstrate a beneficial outcome. One of the core reasons why we say that is because they all make the point that Ofcom placed far too much emphasis on the MTPE. That is BT's closing at paras.114 and 116. All of them in terms have said that effectively the analysis got skewed because of the way that Ofcom weighted the MTPE against the other effects. I think it was suggested also that the suggestion about producer surplus was not part of BT's case. There was a lot of what I might call pleading points being put forward and we do not accept them. For example, in respect of producer surplus we just, for the transcript reference, ask you to refer to para.117 of BT's Notice, 117.2(a) of BT's Notice of Appeal in B1 tab 3 p.45, and para.125 of the same Notice of Appeal at B1 tab 3 p.48.

The final point on this was that there was the suggestion that the UK point, that in fact no-one seemed to have taken it into account, there was all this effects that a total welfare analysis overlooked, namely the money bleeding out of the system. We say that really is clutching at straws because if that was the case then one might expect it to be mentioned specifically in the Final Determination and we do not see it anywhere in the Final Determination. But in any event, assume a foreign owned SP, which is not particularly unlikely, given that, the weighting that Ofcom gives on its analysis should mean that they should get significantly less. But of course there is no discussion of that in the Final Determination.

We do say also that Ofcom is charged, we would say, with ensuring that its policy preference actually is followed through. That policy preference is to try to make sure that non geographic calls work, and that the NTS system works. So again we do not say that there is much added to that.

I just want to make three final points. The first is that, as I say, there are a number of pleading points that have been raised against us. One of those was the old question of bad faith, the allegations that Ofcom effectively had an inclination to defer to its Simplifying Non Geographic Numbers. I do not want to get into the archaeology of this, but we do strongly oppose what Ofcom have actually said about that. We do not accept that we made any allegation of bad faith in our original Notice of Appeal. We certainly were not intending to do that. If you go back to what we said, we were making the point very clearly in the context (I will give you two examples for the transcript: paras.51 and 55 B1 tab 3 p.22, and paras.87 to 89 B1 tab 3 p.36). What in essence BT's case is is that there is an element of effectively a subconscious regulatory creep, that Ofcom really would prefer (and it may be doing it subconsciously) to defer to a better forum. We do not say there is anything wrong in suggesting that at all.

THE CHAIRMAN: Mr. Read, I think you made matters very clear in opening. We will look at the Notice of Appeal and see what it says, but speaking before having done that, we are not sure how far allegations of bad faith would help in this case.

MR. READ: We do not either, but our concern is that there is no suggestion in the judgment that effectively BT is making improper suggestions.

THE CHAIRMAN: Mr. Read, you have made your position very clear.

MR. READ: Yes. Can I just briefly deal with marginal costs. It has been suggested that the problem with marginal costs is that nobody knew what it was about it, and it was not an issue in the case and therefore it cannot be dealt with. I am just going to take you to one reference. I do ask you to take volume B1 tab 5 which is Ofcom's defence to BT's Notice of Appeal in the 0845 case. Can I ask you to turn to p.16 para.32.3.2. It says in terms:

> "Although Professor Dobbs now states that '*when one considers a sensible range for marginal cost (0.2ppm) and for pre-NCCN 08x retail prices (10-30ppm),*[the retail prices] *the analysis shows strong incentives toward price reductions towards the 'bottom rung' of the ladder.*'"

This has always been an issue in the case. Indeed, if you go to Mr. Pratt's analysis in Annex 1 and Annex 2 you see that he has used 0 to 1.9ppm as his basis for his material for the marginal costs, so marginal costs of 0 to 1.9ppm. I do not want to spend time arguing further over this point, but we do say it is completely wrong the suggestion that somehow or other marginal costs at that sort of level were not a core feature of this case.

Finally, sir, can I make one point about the position of the 080 case. Although Mr. Herberg said that no-one has grappled with the problem of what is the position of the evidence in the 0845 vis-à-vis the 080 case, I think it is fair to say that everyone in this case has assumed that the two would be co-joined which is the very reason why there was a consolidated reply rather than have separate replies to deal with the separate evidence. So we just think that that is a bad point.

May I take one moment? (Pause) Sir, those are my points.

THE CHAIRMAN: Thank you very much, Mr. Read. Thank you all very much. We have been greatly helped by your submissions. It will come as no surprise that we will reserve judgment.

PROFESSOR STONEMAN: For Mr. Clayton and myself, this is our last case for the CAT, our term of office has finished. So next time you come up to argue with one another (which you have done on numerous occasions in my career) you will have some new faces to try to persuade. Thank you and goodbye.

MR. READ: Sir, perhaps as a senior silk here I should actually say how grateful we are to both of you for the years you have put in. I know that Mr. Clayton has been involved with cases that I have been involved in before. I have certainly read numerous of your judgments in the past. We are very grateful, I am sure, for all the efforts you have put in in dealing with these sometimes very complicated cases.

PROFESSOR STONEMAN: Thank you.

THE CHAIRMAN: Thank you very much.