IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1211/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 October 2014

Before:

MARCUS SMITH QC

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

- and -

EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED
GAMMA TELECOM HOLDINGS LIMITED
TELEFONICA UK LIMITED Potential Interveners

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CASE MANAGEMENT CONFERENCE

A P P E A R AN C E S

Mr. Daniel Beard QC, Miss Sarah Lee and Miss Ligia Osepciu (instructed by BT Legal) appeared on behalf of the Appellants.

Mr. Javan Herberg QC (instructed by Ofcom) appeared on behalf of the Respondents.

Mr. Meredith Pickford and Mr. Philip Woolfe (instructed by EE Limited, Herbert Smith Freehills LLP, Constantine Cannon LLP) appeared on behalf of the Potential Interveners EE Limited, Vodafone Ltd and Hutchison 3G UK Ltd)

Mr. Tim Ward QC and Mr. Robert O'Donoghue (instructed by King & Wood Mallesons LLP) appeared on behalf of the Potential Intervener Telefónica.

The Potential Intervener, Gamma, did not attend and was not represented.

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MR. BEARD: Good morning, Mr. Chairman, I appear in relation to this restored appeal by BT with Miss Lee and Miss Osepciu. To my right are Mr. Herberg for Ofcom, Mr. Ward and Mr. O'Donoghue for Telefonica, and Mr. Pickford and Mr. Woolfe for what I will refer to as the three MNOs.

THE CHAIRMAN: Good morning everyone.

MR. BEARD: Mr. Chairman, you should have, just as a matter of housekeeping, two notice of appeal bundles. You should also have an authorities bundle, and you should have a bundle that is, in my version, labelled bundle of the parties' main documents for this case management conference.

THE CHAIRMAN: Yes, I have all those, Mr. Beard, thank you very much.

MR. BEARD: I will refer to that one as the CMC bundle.

We are, first of all, most grateful to the Tribunal for its agenda. I was going to work through the points in that, but just taking them in a slightly different order, if I may.

I was going to deal with amendments, interventions, and then consequences of the respondent's position leading to matters concerning thoughts of future conduct, and so forth.

THE CHAIRMAN: Yes, Mr. Beard, it is helpful that you should raise the question of the agenda. For my part, can I just say that I have read all your very helpful submissions and digested those, so thank you very much. It did seem to me that perhaps the point that we might want to address first, even though it is logically not in the right order, is this question of remission or not to Ofcom. As I understand the position, there are three nuanced positions, in that your position, that of BT, is that there should be no remission of any issue, including on Principle 3, to Ofcom.

MR. BEARD: Yes.

THE CHAIRMAN: Ofcom's position is more nuanced in that it takes the view that it does not mind which course one takes, but if there should be remission it should be on Principle 3 alone, whereas I think the MNOs position is that there should be remission but that it should be on any matters that might arise effectively allowing Ofcom to hear submissions on any point and remaking its position altogether. That may be a slight over-simplification of the parties' positions, but it did seem to me that, depending on what the parties' precise submissions were and what I decide is the appropriate course, that might actually be an appropriate starting point. I do not want to force the agenda.

MR. BEARD: Let me take it in stages. Obviously, remission is a remedial consequence and here we are at a CMC, so there may be a sense in which we actually need to determine what the process is for making a decision in relation to those matters.

The second point I would make is that the points relating to amendments and interventions are obviously logically prior to anything that is done, in the sense that if the position of the MNOs is, as you summarise it, Mr. Chairman, then logically prior is whether or not they should be permitted to intervene. That is not going to be a long point.

In addition, I think it is relevant in considering those questions about remission and what is done both in relation to particularly what is referred to as Ground 1, limb 2, and Ground 3, just to take a step back and see what has happened here very briefly. I am quite well aware that you have undertaken the review of the materials that have been submitted, and indeed are familiar with much of the background to this case having sat in earlier on 08X and indeed made the orders previously in this. It is germane to the questions of remission how the amendments have been put forward and what has been done here, and indeed what is going to be dealt with by way of further steps.

Could I just deal with those issues very briefly, then I will deal with the central question. It does not appear, in relation to amendments, that there really is any great issue in relation to these matters. Ofcom does not object to the amendments that have been put forward. There were all sorts of initial sounds and fury from the potential interveners, but it transpires that they do not actually object to the substance of the amendments at all.

There is one thing that is perhaps relevant to the point that, sir, you raise, which is, what is it that has been done in relation to these amendments, the matter having come through the Supreme Court, that is of such concern that the MNOs say, "We want the opportunity to reopen everything".

It is worth just noting, of course, the Determination is in the bundle, and you will have seen it, sir, it is notice of application bundle 1, tab 11. Here we have the Determination. You have the provisional Decision at tab 9. Plainly this was a matter where Ofcom was very well aware of what was going on in 080, indeed it is the first point in the glossary. If we turn on to p.8, just to remind ourselves what is at issue here, what we have are three number ranges, 1101 and 1107 and 1046 that BT had put forward. It just worth noting in para.2.1, it was one of the MNOs that sent us a dispute submission in relation to these on 14th March 2012. Further down at 2.5 in relation to the other number ladder, it was again a dispute raised by Everything Everywhere. One can turn over the page and see a summary of what was put forward as the basis for that at 2.6.

Obviously the remainder of this Determination is dealing with those issues and the material that had been put in. The point I want to emphasise is that these were disputes that were raised by the MNOs. They were in a position to decide what they wanted to put forward, what grounds they wanted to argue, and what material they wanted to submit to Ofcom in support of those positions. Of course, we then have at the back end of the Decision the conclusion in relation to the various principles. Sir, you will be familiar with that.

It is a dispute determination raised by Everything Everywhere that then BT appeals. Of course, at that time the 08X dispute had been rolling along. The CAT had considered the Ofcom Determination in those matters and had overturned the CAT's Decision, but then that had been reversed by the Court of Appeal.

So when this appeal was lodged, of course the appeal itself included a stay because it said, "The approach that was adopted, the three Principle analysis, that reached the conclusions on Everything Everywhere's dispute, those are precisely the same structures of analyses that have been applied in relation to the 08X disputes, and that is why there should be a stay".

Here it is just worth, as I say, picking up the original Grounds. They are in tab 1 of that bundle. Can we turn to para.35. This is Ground 1 of the grounds of appeal, "Ofcom erred in its reliance on Principle 2".

Here what you will see is in the first half of the paragraph, particularly in the second sentence:

> "In the absence of a designation of SMP, national regulatory authorities may only impose price related obligations on communications providers to the extent that this is necessary to ensure end-to-end connectivity."

Therefore Ofcom erred. That passage is effectively what is now referred to as Ground 1, limb 1. Then:

> "In the alternative, even if Ofcom's analytical framework was properly formulated, Ofcom failed to apply Principle 2 proportionately and having due regard to the principle of minimum intervention underlying the whole CRF."

That is effectively Ground 1, limb 2.

The reason I highlight that is because of these protestations that have been made that there has been some sort of wholesale change to what has been raised in the appeal. It is just not correct. Indeed, that paragraph remains in the amended Grounds.

If one then turns on a page in the original Grounds to Ground 2, that has been subsumed within Ground 1 limb 2 – it was always the flip side of the coin in relation to those matters.

Then, what is Ground 3 in the original grounds is the issue that arose here that actually BT

had put in very substantially more evidence than had occurred in the 08X case. It had gone to the expense and effort of commissioning what is referred to as a 'Monte Carlo Simulation', to go through the whole process of how you could remove uncertainty as to where consumer welfare lay; that is now Ground 2 in relation to the current grounds.

The reason I raise that – there is just one passing remark that I will come back to – BT was, of course, making submissions that Ofcom had got these matters wrong as a matter of law, as it did in the Supreme Court, but it was also submitting material to Ofcom saying, in the alternative: 'if we have got that wrong, and the Supreme Court upholds the Court of Appeal, we are putting in the evidence now because we know we have to, because you are the primary decision maker and that is what you have to do'.

We are effectively the interested party in that dispute, because it was a dispute raised by EE to Ofcom. We come in and we put in material. The point I am making is that we knew, and everybody knew that you had to articulate any arguments you had, even in the alternative, and put in evidence in support of those grounds even if they are in the alternative.

Just for completeness, if we look over the page, we have Ground 4, that is obviously now Ground 3 in relation to practicability.

THE CHAIRMAN: That has remained unchanged?

MR. BEARD: Pretty much so. There is actually the black line version of the Notice of Appeal at tab 41 in the CMC bundle, so if you want to just see how things have been marked up you can turn on to tab 41, and in relation to what is now Ground 3 you will see that at p.32.

There is very limited change there so the substance of it remains the same.

The prior changes are all marked up but, in the main, they are setting out the main regulatory provisions and quoting from the Supreme Court Judgment. What it does not do is raise some new ground. Those are the amendments, I do not see any objection, just a brief introduction to them.

In relation to intervention ----

THE CHAIRMAN: Pausing there, Mr. Beard. I do understand that there is now no objection to your amendments, but I think it would assist because, of course, the Tribunal has actually quite narrow rules regarding when amendments should be permitted, for us just to be clear on the basis of the reason for the amendments under Rule 11. As I understood it you are saying that these amendments are made under 11(3)(a) and I think the MNOs are suggesting that these are amendments made under 11(3)(c), exceptional circumstances.

MR. BEARD: 11(3)(a) such ground is based on matters of law or fact which have come to light since the appeal was made. Without getting into a philosophical judgment about whether a

Supreme Court Judgment is, in fact, a matter of law or a matter of fact, it plainly has come to light subsequent to the lodging of the appeal. It was, of course, anticipated in the appeal itself that there would be a Judgment and that amendment would need to be made, and therefore the original appeal effectively indicated that that was the course that was going to need to be followed. In those circumstances it is very difficult to see why 11(3)(a) does not apply here, and the reason I emphasise the structure of the changes that have been made – I can go through the black line in more detail if that assists – is that, really, all we are doing is setting out what has happened in the Supreme Court Judgment with a view to saying that what we said previously in our appeal, that is right, the highest court has agreed with us. Of course, we could have done just a line saying: "We told you so", but, apart from it looking a little smug, it perhaps does not assist in spelling out the reasoning that has fed into these matters. Therefore, we were trying to be of assistance in amplifying the reasoning there to assist the Tribunal, but we do say it is 11(3)(a).

If it had to be 11(3)(c), well, so be it. The idea that this Tribunal should proceed to deal with these matters on the basis of the previous appeal would obviously, having to have regard to the Supreme Court Judgment, but then not permitting us to make clear how we saw that Supreme Court Judgment fit into the pleadings, would feel a very odd way of proceeding. So, although a subsequent Judgment is not exceptional in the sense it was not predicted it could not have been foreseen, because obviously we did foresee it because we built it in, it would be remarkable if that only got fed in in a reply or in relation to skeleton arguments, which would necessarily be the case here. So, to that extent, the timing issues would make it exceptional, so 11(3)(c) would apply in any event.

The outturn of it is that, one way or another, this Tribunal in determining the appeal that has been set out in the original notice of appeal would have to have regard to the Supreme Court Judgment, therefore, submissions about that have got to be dealt with somewhere. The idea that the Rules of this Tribunal do not admit of the possibility of incorporating that into the basic pleadings, so that the tone is set for the remainder of the proceedings would seem very odd indeed, because all that will happen is it will come in later on.

THE CHAIRMAN: I agree, it may be a formal point, but I just like to have your position on it.

MR. BEARD: That is where we are. We think it is 11(3)(a). We do not think there is a big issue.

To be fair, after the initial sound and fury there was not a formal objection, so far as we see, to any of these matters. Unless I can assist on the amendments I was just going to move on briefly to the interveners.

THE CHAIRMAN: Right.

MR. BEARD: In relation to these issues I will be very brief. BT does not object to any of the MNOs intervening or, indeed, Gamma intervening; we do not think anyone else does, we do not see that Ofcom does – it has suggested it is perfectly happy with the idea. So, unless the Tribunal has particular concerns about it the issue under Rule 16 is not whether or not there should be intervention, it is what the nature, scope and conditionality of any intervention might be if that is appropriate. Those matters, I anticipate, are really the same issues as to what the consequences are of the respondent's position to some extent. I will come on to that directly, but in terms of the formal intervention we do not have any issue with the MNOs intervening, or Gamma.

THE CHAIRMAN: No, but there is a difference, as you say, between the scope of those interventions, and I think you are contending for rather narrower scope than the MNOs would want.

MR. BEARD: What we are saying and, as I say, without anticipating what is going on, what I am going to come to in relation to the consequence of the respondent's position is relatively simple. This is an appeal by BT against a determination by Ofcom of the MNOs own disputes. In those circumstances it falls for this Tribunal to determine that appeal, and in relation to that appeal really there are only two issues that need to be dealt with now, we say. We accept that Ground 1, limb 1, and Ground 2 can be stayed, albeit we do not accept in relation to Ground 1 that as Ofcom suggests, limb 1 is a matter that would require reference to the European Court of Justice. The fact that the Supreme Court did not feel it necessary to determine the matter, does not tell you that that requires reference, but that is a discussion for another day.

In relation to Ground 2, of course, what Ground 2 is is a free-standing argument that says, "Even if the Supreme Court had decided against us, there is a full evidential basis for why there was not uncertainty in relation to consumer welfare and, therefore, even on Ofcom's old test you should have acceded to these letters". Again, we do not see that that needs to be determined in the light of Ground 1, limb 2.

In those circumstances we say that the matters that the Tribunal needs to deal with are Ground 1, limb 2. It needs to determine the appeal in relation to that, and in relation to Ground 3, the practicability point. We say those are matters that are put before you, and in the circumstances what we have is a situation where, in relation to Ground 1, limb 2, Ofcom carried out a very extensive analysis of all submissions that were put in by all of the parties in relation to these matters, in relation to the MNOs' own disputes that they had liberty to put in what they wanted on these matters. It reached an assessment on those issues, but

essentially it misconstrued how that assessment fitted within the legal framework. The Supreme Court has said that that assessment, the one that Ofcom reached saying there is uncertainty in relation to consumer welfare, rather than meaning that you stop the NCCNs, you permit the NCCNs.

We say when it comes to it this one is going to be relatively simple for the CAT to determine as the appeal body, and it will be the corollary of our submissions that on any such appeal there is no need for any remittal.

THE CHAIRMAN: Let us park remittal for the moment, but just concentrating on the response to Ground 1, limb 2. Ofcom have said it does not resist the matter, but also says that this should not be taken a concession of each and every submission made under this head.

MR. BEARD: Fair enough.

THE CHAIRMAN: Is your position that were this matter to proceed to a substantive hearing here in this Tribunal, the interveners should not be permitted to address the Tribunal on Ground 1, limb 2?

MR. BEARD: No, we are perfectly happy for them to address. Addressing is fine. It is what they want to add in relation to Ground 1, limb 2, that is the issue. What we anticipate is that the MNOs are going to say there are a whole bunch of different bases on which Ofcom's conclusion on Ground 1, limb 2, might have been reached. In their submissions they talk about contractual issues, they start saying there is a vast range of other evidence that could be deployed in relation to these matters. That is what we want to do. Then they refer to Lord Justice Toulson's judgment in the 08X case and say, "Look, if Ofcom are backing out of this, that means that we are the knights that will come cantering in to the rescue of this decision, and if we are the ones that are doing that then we can decide where we charge, how we charge, and what weapons we use".

We say that is just wrong. That is not what Lord Justice Toulson said at all. Indeed, it would make a complete mockery of an appeal process if that were right. Perhaps the best thing to do is just look at Lord Justice Toulson's judgment, because we say that is explicating the situation in relation to, in particular, the submission of further evidence, but in doing so it stays with the basic proposition that when this Tribunal is dealing with an appeal, it is dealing with the appeal as determined by the regulator. It is not sitting there allowing vast amounts of new evidence, certainly not new bases for the decision to be supported. The situation in 08X was actually very different.

THE CHAIRMAN: Let us take it in stages, Mr. Beard. I think what you are saying is that you have got no problem with addressing the Tribunal on that. Do you have a problem with the

MNOs using evidence that was before Ofcom in support of their submissions, but perhaps using it in a different way to the manner in which Ofcom used it - not new evidence, but evidence that was before Ofcom on this Decision?

MR. BEARD: We do not know what they are doing with that. That is the problem.

THE CHAIRMAN: That will be the point of their pleadings in response. I do appreciate that we are ----

MR. BEARD: We are not trying to keep them out of putting in pleadings in response at all.

THE CHAIRMAN: That is an early stage, but it does seem to me that it may be necessary that we actually get the MNOs to put their cards on the table so that we know what points we are dealing with.

MR. BEARD: That may well be right. That is part of the difficulty with this. We are not objecting to them intervening. To our minds, and perhaps we are a little simplistic, it seemed to us that, there having been an assessment by Ofcom in relation to these matters and there being a legal conclusion reached by the Supreme Court in relation to that assessment, in those circumstances the matter is going to be very simple.

The MNOs can stand up and say, "No, no, no, it is not very simple", but the basis on which they say that we struggle to see at the moment. We are not saying in principle they cannot say anything, we just lack the creativity to understand what it is that they might say, consistent with the fact that it is Ofcom's Decision under appeal, and that although Ofcom is now saying we do not have a difficulty with essentially Ground 1, limb 2, being the basis on which the case is disposed of, but in those circumstances the MNOs cannot come forward and start putting forward a different basis for this Decision.

When you say, Mr. Chairman, they might rely on the same evidence for different purposes, if they start doing that in order to try and put forward a different basis for Ofcom's Decision, yes, we would have a problem with that. If, on the other hand, they are saying, "If you look at this evidence you can see where Ofcom was going in relation to these matters, we think that somehow changes the way in which the Supreme Court legal analysis works", obviously they can put that contention forward. We do not understand how that takes them anywhere, because of course there was an assessment by Ofcom, and that conclusion was not one that they were trying to, at least in the alternative, unpick in the dispute resolution process.

I go back to the fact that the MNOs were at liberty to put forward any argument they wanted in relation to the dispute, and if they did not do that then there is not a good basis on which they can shift the regulator's Decision which is the subject of this appeal.

THE CHAIRMAN: You see, Mr. Beard, I am wondering how far this is not actually a rule 22 point - in other words, we wait and see what the MNOs put, and if they suddenly adduce a whole raft of new evidence saying that Ofcom's Decision can be justified on the basis of this new evidence, you would no doubt say, "I object", because this is wrong, and we would make a determination under rule 22 one way or the other. No doubt everyone would have arguments about that, but we would have this argument on the basis of an articulated point. I quite understand where you are coming from, but the trouble is you are slightly shadow-boxing here.

MR. BEARD: Of course, this is the best we can do.

THE CHAIRMAN: It is no criticism of either side. The fact is that we are at an early stage here. What would help me though is why you say this is perhaps an argument like the construction argument, which is run at 23(a), I think, of the three MNOs' written submissions. I do not know, because like you we have not seen what the MNOs say in full form, but I anticipate this might be a point that could be made without evidence. Would you say that that is a point that the MNOs cannot make, and, if so, why?

MR. BEARD: We do not understand in what way that goes to support Ofcom's Decision. Ofcom's Decision was made on a certain basis. The MNOs could have put forward any contractual points they wanted in that dispute. It is not that that this contract is novel, it has been around for a long, long time. Indeed, it has been referred to in umpteen Tribunal judgments over the years. They did not do that. That was their choice. They were the contractual counterparties to BT. If they had not liked the contract, take it on. That is fine. Equally, these are matters that if they choose not to raise them in the context of the dispute, they cannot then say, "Actually, this is an alternative basis".

The reason we say this is if you look at the case law in relation to what a regulator can do in relation to its decision, it is plain that a regulator could not turn up and go, "We have made a complete Horlicks of the welfare assessment, but look over here at the contract point". That would not be a good basis for them defending their Decision, not at all. Indeed, what we have is very clearly in the case law of the Tribunal, as approved by the Court of Appeal and as dealt with in the Court of Appeal's judgment, a clear indication of the restrictions on a regulator in admitting any fresh evidence in support of the Decision.

Of course they can put in rebuttal evidence, but bear in mind the Court of Appeal judgment in relation to 08X was a decision about what an appellant could put in, not what a regulator could put in. What was said in that decision was that BT had effectively - Ofcom will no doubt say misunderstood, BT say been misled - as to what it was that was being inquired

into in the 08X case and that it submitted evidence late in that process that Ofcom refused to consider.

THE CHAIRMAN: I am very familiar with the case, yes.

MR. BEARD: You are cryingly familiar with these matters, I know. I recognise that they are familiar, but I do emphasise, this is a judgment that was about appellants putting in evidence in circumstances where they tried to put in expert evidence late in the process and Ofcom said: "No, we are not looking at that because it is so late in the process." It is not to do with the idea that a regulator can put in more material. So the idea that MNOs and Telefónica float, which is if you look at the postscript to Lord Justice Toulson's Judgment where they say that if Ofcom is not defending it we can come in and defend it, suddenly it is carte blanche as to what they can put in and what lines they can run, and what sort of evidence they can submit, that is plainly wrong. There is nothing in Lord Justice Toulson's Judgment that suggests that at all. It is a conflation that both the MNOs and Telefónica make in their submissions: "Look, we can defend if Ofcom are not defending Ground 1 limb 2, and therefore we can defend as we want. We can raise these new grounds, we can raise issues on contract, we can raise issues on consumer welfare that were never put to Ofcom and were not determined by Ofcom. We can put in all sorts of new evidence in relation to these matters. That is all fine because we are defending Ofcom, and Lord Justice Toulson said we can." That is not what Lord Justice Toulson has said at all. Indeed, it would have been completely contrary to the logic of the role of this appellate body, and, indeed, the logic of the constraints on a regulator, where the Regulator itself is not defending a decision, that somehow third parties have more liberty than the Regulator.

Is it worth just turning up the 08X ----

THE CHAIRMAN: I have it at the end of the MNOs submissions at para. 30.

MR. BEARD: Yes, parts of it are included there. I think it is just worth bearing in mind a couple of points if I may. Tab 12 of the authorities bundle is the full version.

THE CHAIRMAN: I will get the full version out.

MR. BEARD: As I say, I have already emphasised the factors, Mr. Chairman, you are well aware that this is concerned with BT's appeal, and BT's attempt to put in fresh evidence, and articulates what Ofcom's complaint is, that the CAT had allowed BT to introduce evidence on the appeal that had not been presented to Ofcom.

Then you work through the joys of the statutory framework, various of the provisions, and the dispute itself.

From 39 through to 43, you have that articulation of what happened at the end of the dispute process whereby BT was trying to submit expert evidence within the time frame of the dispute, and Ofcom were saying: "No, this is all too late. You put it in on 27th January, they made their determination on 5th February, so presumably it was well prepared by then, just given the practicalities of these things. We are not taking that stuff into account". BT said: "We did not understand what it was that you were really dealing with in this dispute, we thought you were dealing with things in general principle not in relation to detail. If you are going into the detail we need this expert evidence." Hence BT's appeal that is then summarised from para. 45 onwards.

Obviously, Mr. Chairman, you are familiar with the findings of the CAT in relation to these matters, but if I just pick it up at para. 61 – I am only skimming through the arguments: "The construction for which Ofcom contends", which, of course, was the construction that no fresh evidence at all could ever be admitted:

> "… would be capable of causing real injustice, because it would preclude the appeal body from considering evidence even if it were highly material and if the party seeking to rely upon it could not be criticised for not having adduced it earlier."

Two points just to draw from that sentence. First, it is about the regulator and, secondly, it is circumstances where the party seeking to rely on it could not be criticised for failing to have adduced it earlier.

> "It would be possible to meet that objection by saying that the limitation contended for by Ofcom should be subject to an exception in cases where it would cause injustice, but that is the *Ladd v Marshall* approach to which I will come."

Just picking up at 63:

> "There are differences in wording between the Competition Act 1998 and the Communications Act 2003, but the CAT has a similar function under both Acts. The same rules apply and Parliament must be taken to have been aware of the approach taken by the CAT towards the determination of appeals from the relevant regulator."

Then there is a reference to T-Mobile about Ofcom were referring to the fact, Lord Justice Jacob emphasised that the CAT was an appellate body but that has been put in context. Paragraph 65:

> "A statutory scheme which permits an appeal body to receive fresh evidence is not necessarily inconsistent with the appeal body being obliged to have proper regard for the role of the primary decision-maker".

So it is not absolutely black and white. Then we have the consideration of *Ladd v Marshall* from para. 68. Just picking it up at para. 71:

> "Ofcom submitted in its skeleton argument that an unfettered right to adduce fresh evidence on appeal might cause parties to avoid proper engagement with Ofcom during the dispute resolution process. No party has an unfettered right to adduce fresh evidence on appeal to the CAT, and there is force in Ms. Rose's argument that parties ought to be encouraged to present their case to Ofcom as fully as the circumstances permit."

We do not understand, for example, in relation to those contract matters, and any material that wanted to be submitted in relation to those, or, indeed, in relation to any consumer welfare matters, why those issues could not have been raised previously.

We recognise, in relation to the contract matters, for example, that the MNOs were working on a misapprehension as to what the law was. We see that. But, this was precisely what BT was putting in issue. It was saying: "This is not the way in which you should interpret these matters."

Paragraph 72:

> "The court was asked by Ofcom to give clear guidance to the CAT about the exercise of its power to admit fresh evidence. Before the CAT there was argument whether it was for the party seeking to adduce fresh evidence to show why it should be given permission to do so, or was for the opposing party to show why permission should not be granted. Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show good reason why the CAT should admit it."

This may go to a Rule 22 issue, I quite accept, but I just emphasise that.

> "The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test."

Then he refers to the fact that circumstances are infinitely variable. He refers to the fact that the CAT is a specialist Tribunal, and he also refers to the overall approach to exercise its powers in such a way that expense is saved and that appeals are dealt with expeditiously and

fairly. I would just pick up that last point because I do not think we should get away from the fact that this is, and 08X has been, an extraordinarily long running process, where the MNOs and Telefónica have fought tooth and nail at every stage of the process, notwithstanding the fact that dispute resolution should happen quickly and this submission that they are putting in now one needs to be alive to the fact that there is a game going on here that the MNOs want to reopen vast amounts of matters that they could have dealt with before Ofcom previously, and the CAT should properly take that into account in the way that it is exercising any discretion.

Paragraph 75 says that it is in the circumstances:

> "that for most of the short period allowed for the dispute resolution process BT was under a misapprehension, induced by Ofcom, and that was critical to the way that these things were dealt with."

Then at para. 81:

> "The question whether Ofcom acted unfairly by determining that the specific charges introduced in NCCN 956 had not been shown to be reasonable, when Ofcom had previously indicated that it did not intend to decide the question at that stage, is an issue in the appeal before the CAT and it would be wrong for this court to express a view about the substance of that issue. However, it seems to me that it is likely to give rise to the question whether BT suffered prejudice as a result of Ofcom's change of position. If so, it is difficult to see how the CAT will be able to assess the question of prejudice without at least looking at the evidence …"

- which BT says should have gone in.

That is an interesting reason because that is saying that it was an unfair process point that was being raised, but in order for an unfair process point to give rise to a substantive unfairness, BT had to show that it would have had something else to say if it had had the opportunity, and this evidence in question went to that point and therefore should be admitted.

Then in 83 is the conclusion, saying that there is no good reason in the light of these factors not to allow the appellant to adduce fresh evidence.

Then we get to the postscript upon which so much weight is placed in the MNOs and Telefonica's submissions, and I just ask you, Mr. Chairman, just to re-read that, I know you are familiar with it. In 87, which is really the critical paragraph:

> "There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect

> Ofcom's approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a Respondent to the appeal."

That is fair enough.

But para.86 where Lord Justice Toulson says:

> "The Chancellor asked Ms Rose why in the circumstances Ofcom should feel a need to take part on the hearing of the appeal, instead of leaving the interested parties to battle it out. Ms Rose took instructions and it seems to be a matter of practice."

So that is why, in the circumstances, in 87, Lord Justice Toulson said that it is a practice for Ofcom to be named as a respondent but it does not follow that it needs to take an active part in the appeal.

That does not suddenly change the scope of what can be admitted or what can be the basis of the defence of the appeal, because the person who is defending it is essentially stepped out and is a sort of subrogation almost. We then say that the position in relation to those matters is rather clear, and we have just brought along one example of the position in relation to Competition Act 1998 evidence. The reason we say that is relevant is obviously the approach adopted by Lord Justice Toulson in particular in para.63, if I could just pass up a copy. It is just a tiny extract of the magnificent opus that is the *Dairy* judgment, and therefore we only took a small part of it. (Same handed)

This is relatively early on in the judgment, at para.123 and 124. Broadly, it is, I think, a summary of where the Tribunal has got to in relation to evidence on appeal:

> ".. if there is an appeal to the Tribunal, the Tribunal must determine the appeal '*on the merits by reference to the grounds of appeal set out in the notice of appeal*'… The Tribunal's Rules do not draw any distinction between the appellants and respondents so far as adducing evidence is concerned."

which is correct.

> "They give the Tribunal a wide discretion … the Tribunal Rules also empower the Tribunal to call for evidence under its own initiative …
>
> The following points emerge from the Tribunal's case law as regards adducing new evidence.

(a) an appellant may challenge a decision on any ground it so wishes and may do so on the basis of evidence that was not available to the OFT when it took the decision."

So that is the position of the appellant, and that is *Napp*.

"(b) the OFT should normally be prepared to defend an impugned decision on the basis on the basis of the material before it when it took that decision."

Again *Napp*. Just noting those *Napp* dates, of course, that goes to Lord Justice Toulson's point about how those matters could be taken into account by Parliament when the Communications Act went through.

"(c) it is not the task of an appellant, nor the Tribunal, to supplement the evidence relied on by the OFT."

That is *Durkan.*

"(d) there is a rebuttable presumption against permitting the OFT …"

and here we interpolate Ofcom -

"… to advance a new case or rely on new evidence that could properly have been made available or relied on during the investigation."

We say if that is the case for Ofcom, it must be the case for the MNOs and Telefonica.

"(e) the above presumption is justified by the fact that an appeal is brought against the decision as taken, and the Tribunal's task is to review, on the merits, that decision, not a subsequently enhanced or re-cast version of the decision; it also ensures that the procedural requirements of the administrative procedure are respected.

(f) the presumption is rebuttable to account for circumstances where, for example, an appellant makes a new allegation or produces new evidence …"

- "an appellant makes a new allegation or produces new evidence" -

"… such that the OFT is permitted to adduce rebuttal evidence on appeal (as opposed to adducing evidence that was necessary to prove the infringement found in a decision); and

(g) the Tribunal must be vigilant to ensure the fairness of the appeal process. The procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under 1.1 of the CPR."

It is because of that that we say this sort of wholesale, "We want to put in more, we want to run new arguments", is just inappropriate. Even if they can subrogate themselves to the Decision of Ofcom, if Ofcom are not defending in relation to Ground 1, limb 2, it does not

mean that they have got a wholesale opportunity in relation to it. As I say, it is important in circumstances where this is not actually a challenge in relation to Ofcom's assessment of the facts, it is exercise of its judgment. This is how is it categorised within law. That is the issue that is being fed through from the Supreme Court in relation to Ground 1, limb 2.

I have already drawn your attention to the fact that, of course, in this case everyone knew that you had to argue in the alternative in the dispute. That is why we put in the Monte Carlo analysis.

Much as it is delightful for telecommunications companies to support the impoverished economics industry in London, there is not generally a need to deal with these matters and commission economics work if, in fact, you are going to find that those matters can be picked up later in relation to an appeal. That was not what happened here. We knew that if we were wrong on the law we needed to put in other evidence so we had an alternative argument, and we went to the expense and trouble of doing that. That is what the MNOs could have done in relation to any of these matters. They did not, and in those circumstances, even if this Tribunal is to say, "We are going to postpone for another day, we will wait and we will see what the MNOs actually come forward, we will consider on a Rule 22 basis when they put in their intervention notices because we do not know their cases yet", we say, and we put down a marker, that it is not appropriate to change the rules in relation to what can be argued and what evidence can be submitted. We deal with that in the light of the submissions that have been made which seem to suggest that that is what the MNOs want to do here.

THE CHAIRMAN: Mr. Beard, are you simply putting down a marker, or are you seeking to define the ambit of the intervention of the MNOs? I can see that one could, in general terms, say that you are permitted to intervene to such an extent but not to any other extent.

MR. BEARD: If the Tribunal wishes to constrain the terms of the intervention to say, "You can intervene in support of Ofcom's Decision and you can make arguments in support of Ofcom's Decision", then we say that is fine, albeit we say that is implicit in the nature of any intervention anywhere, because an intervener takes the case as it is between the principal parties and that is the same in the CAT as it is anywhere else. In those circumstances, spelling out that condition in the intervention seems to us unnecessary. What we are doing here is articulating what that in practice means. Saying that that is necessary to be spelled out by way of conditions, we do not say you have to go through the tortuous drafting exercise of compiling an order that deals with that because we say it is implicit. We do think that it is important to highlight to the Tribunal where we come from

in relation to these matters, because we say that is what intervention means in this Tribunal, what the limits on intervention and what can be done by way of intervention mean.

It is also important, going back to the first point that you raised, sir, which is about remittal - should this be remitted? We say, no, absolutely not, this is an appeal before this Tribunal, to be determined by this Tribunal, on the basis of a dispute raised by the MNOs, determined by Ofcom, that BT has appealed. There is nothing special about that. The fact that the MNOs, having lost in the Supreme Court 08X, now want to try and cause 1,000 flowers to bloom in relation to this matter and send it out to pasture, we say that is not the appropriate course, and we say it is not consistent with the case law of the Tribunal or indeed principles of justice and fairness in relation to appeal proceedings.

We say that this Tribunal needs to deal with Ground 1, limb 2. We say it is terribly easy to deal with on the substance. We are not saying the MNOs cannot turn up and say no. We do not see what they have to say, and at this stage if what they really want to say is, "Let us have a new case, let us have a wholesale new pile of evidence", we say that would be objectionable.

THE CHAIRMAN: As I see it, Mr. Beard, you are making two slightly different points. I think what you are saying is, first, that to the extent that any party, whether it be Ofcom or an intervening party like the MNOs, identifies a new ground for attacking the NCCNs, which was not actually part of the dispute which Ofcom decided, then that is out of court *ipso facto*, and that deals with the contractual point. In other words, the fact that the NCCNs may or may not have been valid according to the terms of standard interconnect agreement is not a matter that was raised in the dispute before Ofcom, and is not a matter that can be raised now because it is simply not part of Ofcom's Decision.

MR. BEARD: Yes.

THE CHAIRMAN: The second point, but rather different, is that the role of the Tribunal under s.195(2) is to decide the appeal on the merits but by reference to the grounds of the appeal set out in the notice of appeal, and you identified those grounds.

An intervener can respond to some or all of those grounds, and it can do so using the evidence which was before Ofcom. If and to the extent that there is further additional evidence, new evidence, that was not before Ofcom, then that is subject to Rule 22 and to the points that you have helpfully drawn my attention to in the *Tesco Stores* case.

MR. BEARD: Yes, that is right, and the only caveat I was placing was this: obviously in relation to this case, and it is a matter for argument on the substance, what has actually been done is an assessment by Ofcom, and the conclusion having been reached it was a matter of legal

categorisation. So we find it very hard to see what it is the MNOs say about the evidence that was before Ofcom that somehow will conjure up an argument. We are not for a moment suggesting that they are not inordinately creative in relation to these matters, and therefore we are not saying that they cannot have anything to say here and that they must be kept out of an intervention, because it is perfectly right that they should be able to intervene. We do make those points about what the scope of any proper intervention would be without saying, "You need to attach specific Rule 16 conditions", because we say that is just the nature of an intervention here.

THE CHAIRMAN: So you would say, having put down your marker, "Let us wait and see what Mr. Pickford comes up with on his intervention"?

MR. BEARD: Yes.

THE CHAIRMAN: If there is a point that you would say is either one that was not before Ofcom at all, or one which requires new evidence, we will have a hearing to determine that and strike out those parts of the statement of intervention?

MR. BEARD: I think that must be right, yes. I do not think there is any other alternative, because we do not have that before us. All we are dealing with is looking at the submissions that have been put in, the suggestion that there is a whole raft of new evidence that they want to put in. They are very candid about it, the MNOs and Telefonica, they say there is a whole range of new grounds, there is a whole range of new evidence, it is all terribly, terribly complex. Obviously that is put forward in support of their argument that the whole thing should be remitted, as if this is a disposal of the substantive hearing. We say that is just a wholly wrong approach. That is why we engage with it now, because it has been put forward, and we do no want it to be suggested that we think that there is a lot of room for further argument, further evidence, in this case, because we do not.

That is in relation to Ground 1, limb 2, alone. As I say, we are not suggesting that this Tribunal should also deal with Ground 1, limb 1, or Ground 2, albeit that it is worth bearing this in mind, of course, that if you were to start opening these matters up, then you would start undermining the isolation of other grounds because of course Ground 2 pertains to evidence that was actually submitted to Ofcom. That is a matter for another day.

We say deal with Ground 1, limb 2, that is fine. Then we have also got Ground 3, which is also important, to pick up, which is the practicability point, which I was going to move on to, if I may.

THE CHAIRMAN: Yes, please do.

MR. BEARD: Ground 3 that we put forward, which is the practicability ground, which, as I say, is mirrored in what we saw previously, we say, yes, if the MNOs want to come forward and say, "We object to this", they can intervene in support of Ofcom. We do not know quite where Ofcom is on practicability, whether or not they will seek to defend the position in relation to those matters. We say these are matters - I am sorry, am I misrepresenting you?

THE CHAIRMAN: I am sure Mr. Herberg will correct you in due course.

MR. BEARD: I heard the murmur, if I am wrong, I apologise.

THE CHAIRMAN: Is not that anterior to do or do you not want to put evidence in in support of your Ground 3, or are you content to let your notice of appeal stand?

MR. BEARD: Our notice of appeal spells it out, and there are legal points that arise here as well. The first of them is that in assessment of practicability where you are dealing with matters of this sort, this Tribunal has already looked at those issues in relation to 08X. We have the judgment of course in the notice of appeal bundle 2. Is it worth turning that up, it is at tab 14, and the paragraphs that I would refer to are 401 to 408. On "Practicalities", it is dealt with at 401, and we note in particular the assessment that was made in that case, and then through to 408. These are the sorts of arguments that have already been well deployed, and we say that Ofcom was wrong to diverge from this assessment when it came to reach its determination.

A second important legal point that we do highlight is that the approach adopted by the Supreme Court in its decision means that in these circumstances, unless someone can come along and say, "These sorts of arrangements are wholly impracticable and that would cause a real detriment to consumer welfare that would be contrary to the objective in the Directive", then the position should be that innovative pricing should be permitted. That is the tenor of what the Supreme Court was saying. We say that in those circumstances you should allow these things. We say that Ground 3 can, therefore, be determined. We recognise, however, that Ofcom and/or the MNOs might want to say, "No, no, actually there is complete impracticability in relation to these matters". We recognise, of course, that although in its provisional determination Ofcom said, "Actually this is all perfectly practicable, you are sensible, grown up people, you can sort it out", they said in their final determination, "We do not need to decide this because we have dealt with these matters in relation to Principle 2", albeit that they took into account their conclusions in Principle 2 when they reached Principle 3.

That takes us to the third point, which is once you have determined on Principle 2, that does have an impact on whether Principle 3 matters and the extent to which it matters. The

practical upshot of those legal points must be that if Ofcom and the MNOs want to defend these matters, then in relation to these matters they should put forward their case. If they want to seek to apply to put in further evidence then they are free to make that sort of application and we are free to oppose it if we think that these are matters that do not fall within the scope of fresh evidence that should be admitted before this Tribunal.

THE CHAIRMAN: Yes, and that is an area we have traversed already.

MR. BEARD: Absolutely, and I am not going to repeat all of that. If they have put in evidence of that sort, then of course we would wish to be able to put in rebuttal evidence in relation to it.

That will then fit in with, and it takes me on to, future conduct. It seems to us that the sensible course is for this Tribunal to lay down a structure for dealing with Ground 1, limb 2, and Ground 3 by way of an appeal, and setting a timetable for any defence by Ofcom, if it is minded to put in a defence on any of these matters - I anticipate that may be a very brief document - it would be sensible then for the interveners to put in their statements of intervention. It is more sensible for that to be after Ofcom have served any defence, it seems to us, because then they know finally and determinatively where Ofcom are. If, at that stage, they want to seek to put in any further evidence then that is the moment at which they make those applications and we will have to deal with them. Thereafter, BT would put in a reply in relation to those matters, dependent on, in particular, whether or not any further fresh evidence was going to be admitted, and thereafter one could set down a timetable for skeletons and hearing, and so on. That to us seems to be the sensible way to set down a timetable for dealing with this case in a manageable and expeditious way without allowing it to be derailed, remitted, causing further confusion, and to take into account the practical impact that, to be absolutely fair to Ofcom, they have recognised of the Supreme Court judgment in relation to this case.

THE CHAIRMAN: That is helpful. To be clear then, your view is that your notice of appeal is ready to go without the service of further evidence at this stage?

MR. BEARD: At this stage, yes.

THE CHAIRMAN: And you would wait to see what happens in the response and then address matters, if necessary.

MR. BEARD: That is how we see matters at the moment. Because of the issues in relation to the law on how Principle 3 should be dealt with and how Ground 3 should be dealt with, that it is sensible or appropriate for these matters to be dealt with the other way round. If the Tribunal determines that it is necessary for there to be an exchange of evidence, of course

we will deal with those matters. We see it as being a streamlined process dealing with it that way round because, given Ofcom's statements in its two letters, it seems likely that Ofcom's role in this may be relatively small.

We do not know quite where the interveners are intending to be, and therefore the next stage after Ofcom would sensibly be the interveners on both Ground 1, limb 2, and Ground 3. Then we will have a crystallised position where we can either argue about whether or not any of these points or evidence can be taken, if any are put forward, and/or deal with them in a subsequent reply. That seems the most efficient way of dealing with these matters in any event.

THE CHAIRMAN: I understand. The only point I would make is that if BT does not want to put evidence in at this stage then obviously that is entirely a matter for it, and we can structure the timetable on that basis, but it is of course a decision for BT to make on its view of its own case.

MR. BEARD: Absolutely, but in relation to these matters, BT has come forward with its appeal. The principal point is in relation to Ground 1, limb 2. As I say, the effect of the Supreme Court's judgment and the previous judgment in the CAT in relation to 08X which has effectively been restored, of course, because of the Supreme Court's judgment, is that there is a series of legal points in relation to Ground 3 that it is important to grapple with. It seems to us, therefore, that it is more sensible for the Ground 3 process of evidence to be, "If you are, as an intervener, turning up and saying these things are wholly impracticable, notwithstanding the fact that we are multi-billion pound innovative companies that can deal with vast amounts of transactions both here and overseas, we are unable to deal with, for instance, billing arrangements in relation to ladder pricing, then you should turn up and explain that".

THE CHAIRMAN: No, Mr. Beard, I completely understand. All I am saying is, speaking entirely from the Tribunal's point of view, I am not making any decision on whether you are right or wrong. I will await what happens. If you are wrong on your points of law and it turns out that you should have needed evidence on this point then that is a decision you are making, given the fact of the ----

MR. BEARD: We think the sensible way of dealing with this is by way of putting in further evidence from the interveners first. I do not think that that should keep BT out from putting in evidence.

THE CHAIRMAN: From putting in evidence that is properly in reply, of course.

MR. BEARD: Yes, that is quite understood. I will confirm with those behind me, but at the moment that seems to be the most efficient way of dealing with these sorts of matters. If I could have a moment?

THE CHAIRMAN: Yes, please do, Mr. Beard.

MR. BEARD: (After a pause) As I say, the points made in relation to 08X and the reasoning of the Supreme Court applying also in relation to the Principle 3 are our key points in relation to this, and we say it also makes sense in relation to the overall structure of exchange of evidence as well in so far as it is necessary.

There was one other issue, I think, that I have not picked up which is confidentiality. Confidentiality is perhaps not best dealt with in abstract. It is perhaps something that one deals with further down the line depending on what is being put forward. We thought we would leave that for the moment.

Unless I can assist further in relation to the matters on the agenda, I think that probably covers the position of BT in relation to these matters.

THE CHAIRMAN: Thank you very much, Mr. Beard. Mr. Herberg, is it you now?

MR. HERBERG: My Lord, Ofcom keeps trying to follow the invitation of Lord Justice Toulson and not play such an active part in the appeal, but seem to find it even harder to get out than it is to get in. Sir, I hope to be relatively brief. I do want to take you through Ofcom's position in a little detail, not the least because the way that you characterised it at the very outset, you rightly said, sir, that our position was nuanced, but it is perhaps rather more nuanced than you put it. In particular, we do not have a firm position of resisting a remittal on Ground 1, limb 2, for example, as it was suggested we did. I will explain why that is the case.

THE CHAIRMAN: You do not have a firm position?

MR. HERBERG: We do not have a firm position against it. It depends on how the case develops. If, for example, to anticipate the MNOs were permitted to put in substantial fresh evidence on Ground 1, limb 2, some way down the line after an application has been made, then it would be a matter for the Tribunal's consideration whether it was better, in the light of that, for the Decision to be quashed and remitted to Ofcom for Ofcom, as the first line regulator, to consider that matter, as the MNOs, rather than for the Tribunal to remain seised of it.

As we have indicated, we think it is premature to decide that question now, but we do think that what perhaps needs to wait for another day is not only most obviously the Tribunal's decision on any applications to put in fresh evidence or indeed make arguments which are

not currently put, but also the consequences of acceding to any such application. It might be at that point rather than today that the Tribunal wants to substantively consider whether remittal is appropriate. Because, effectively, there is acknowledgement on all sides that there are grounds on which Ofcom has gone along with its Decision in the light of the Supreme Court's decision, there is always that ability, potentially, to quash and remit. Can I, as it were, go back to the beginning, sir, and come back to that?

THE CHAIRMAN: Please do.

MR. HERBERG: Sir, we have very little to say about amendment. It is quite clear that amendment of BT's case should be permitted. To the extent that there is a need, and we understand why it is appropriate to seek to classify which ground it comes under, 11(3)(a) or (c), I would merely say this, sir: it may be that one needs to look more specifically at the different grounds of appeal to see under which head different grounds come. I am sure this is something the MNOs will make perhaps more detailed submissions on, but just by way of example, the amendment to the ground on Monte Carlo analysis, Ground 2, it is very difficult to see how those came out of the Supreme Court decision. It is very difficult to see why. There may be perfectly good reasons why they should be allowed in, and indeed we are not opposing them. We would certainly allow them in in exceptional circumstances. It is very hard to see what new law there is.

If I may characterise that ground of appeal, it is rather like the continuation of the debate that one saw in the 080 cases where effectively points that were already in the case are being further argued with new and better evidence and new and more sophisticated arguments post the Ofcom determination. It is certainly not something which one immediately expect to come out under the 11(3)(a) ground.

Perhaps I should make one other point in relation to the amendment. In relation to Ground 1, limb 2, as it were, the central ground which now focuses so clearly on BT's contractual rights, a ground which, as I recall, it was you, sir, who first raised that many moons ago in the Tribunal, that ground, of course, is a matter which comes out of the Supreme Court decision. It would be most strange if BT were not allowed to argue it on the basis 11(3)(a) or (c). Perhaps it might just be borne in mind, sir, that although that is absolutely clear, that was not actually a ground that was put before Ofcom during the course of this determination. There was no articulated argument on clause 12 of the SIA, or BT's rights at all during this determination process. So all of Mr. Beard's strictures about the MNOs advancing new contractual arguments may also apply to him as well. We do not say that that is a ground from which he should not be allowed to appeal, because it is clearly new

and it has come out of the Supreme Court. The fact is that the timing of it, sir, is that this determination effectively took place, or at least BT's participation in it, took place after the Court of Appeal decision, rejecting roundly the contractual arguments before the Supreme Court decision. BT were not at that stage, by way of appeal, arguing the contractual argument. As it happens it did find its way into the Supreme Court decision for determination and, of course, it is a ground we say they are entitled to take and, on the face of the material at present, it may be determinative of Ground 1, limb 2. But, if one were to look at it strictly in terms of what is a new argument on this appeal, that is actually a new argument on this appeal. BT's invocation of contractual rights is a new argument.

When one looks back at the decision, indeed, you recall how in one paragraph Mr. Beard took you to, it did not articulate that ground and it is not articulated subsequently. Effectively, it was not the way the case was then put.

That does not have an effect, we say, on amendment. It may have an effect in due course on how you look on any application for new evidence, or entitlement to make new argument – it is not so much more new argument rather than new evidence point in relation to the MNOs. We are certainly not taking a stance on that. I make plain we are not taking a stance on whether new evidence should be admitted if applications are made or new grounds of defending or attacking decisions allowed, apart from agreeing that BT ought to be allowed to advance this new argument in this field.

THE CHAIRMAN: Thank you.

MR. HERBERG: Perhaps the most convenient way of taking you through Ofcom's decision is to take you back to the letter of 25th September where we set out our position, which is tab 2 of – I am not sure which bundle it is as my bundles are differently labelled. It is the bundle with all the submissions and orders in it. Tab 2 is a letter from Ofcom dated 25th September.

THE CHAIRMAN: I will just turn it up, Mr. Herberg. Yes, I have it, thank you.

MR. HERBERG: This letter is the first of two that we wrote setting out Ofcom's position. As I go through it I will perhaps add the nuances which appear in the second letter, but it conveniently sets out our position overall.

The first page I do not need to take you to, and I will come back to Lord Justice Toulson's analysis, and the proper interpretation of that in a moment.

If I just take you through Ofcom's position in relation to the proposed grounds of appeal. Ground 1, limb 1 is the ground on which – the only ground perhaps – there is effectively agreement between all the parties, and no one wants to argue it.

I should simply say for the record that Ofcom does not, as I think Mr. Beard suggested, necessarily take the view that it is a point which requires reference. The way we put it in this letter, you will see what we said is that, given the Supreme Court's remarks, it is clear that unless the Tribunal is prepared to reject it outright, there would be need for it to be referred to the Court of Justice, European Union. So we recognise the possibility that it might be disposed of domestically, but I do not think any more needs to be said about that, we are certainly not making submissions on that now. All parties, I think, agree that whatever directions you make, sir, ought to effectively relegate that ground to a position of looming in the background, hanging over everyone with the result that it needs to be looked at.

Ground 1, limb 2, we have said in terms that we do not resist Ground 1, limb 2. It is not taken as a concession of every submission made under the head, but overall we would consent if the other parties take the same position for the appeal to be allowed on this basis. Sir, "if the other parties take the same position" is perhaps an important phrase, because certainly in Mr. Beard's written submissions we think perhaps he was taking our concession on this ground as a stage further than it ought to be taken. Our position is, effectively, that we reached a perfectly proper determination on the material that was put before us as to the consumer welfare test under Principle 2. We effectively decided, as in the 08 case, that it was impossible to know either way if there was a risk of consumer harm, a risk of consumer benefit and we could not decide which was which, so there was the same position of radical uncertainty – known/unknown – I imagine it would be, that obtained in the 08 cases. What the Supreme Court decision does, therefore is to indicate that the conclusion, the legal conclusion which Ofcom drew from that factual position was wrong. We took the view in those circumstances that BT should lose. The Supreme Court has clearly said in those circumstances BT should win.

So, on the material before Ofcom when it took its decision, and on its factual conclusions from that material we concede that the ground of appeal is a good one and would not seek to argue further in relation to it.

If other parties are given permission to intervene, as is not objected to, at least on a limited basis, and if those parties were given permission to adduce new evidence or, indeed, raise new arguments which Ofcom did not raise, which were not before Ofcom at the time of the decision it may well be that there would be alternative grounds for defending the decision Ofcom reached. We do not take any view on that at all. We do not take any view on whether such new evidence should be allowed in, it is not before the Tribunal today.

The point is that we are not making a concession, an overall concession, that the Ground could not be supported on alternative Grounds. If that is how the case developed then Ofcom would have to consider its position at that point. We certainly would not anticipate playing an active role. It would seem to be eminently appropriate as a situation where the parties should be left to battle it out themselves, but we would want to see whether any of the arguments on either side had any significant policy implications, or there was any other reason why Ofcom ought to play any more of an active role. That would be the position. In relation to Lord Justice Toulson's Judgment I do not think that our analysis departs from Mr. Beard's in any significant way. First, we would say that Lord Justice Toulson's analysis, although the jumping off point in those last three paragraphs was Ofcom referring to the predicament of potentially being involved in arguing about the merits of argument, it might have to on a remittal then decide the perils of that. It is quite clear that his remarks went further than that. He effectively indicated that Ofcom did not have to participate or have a discretion as to how far it participated in appeals, that on grounds of costs, expenditure to the public purse, convenience, policy grounds it might wish to limit its role. It clearly went beyond the particular predicament of the danger of it having to act as a decision maker in future. It seems to us that that is clear, and it seems to us that the consequence is that it must allow interveners the ability to participate and to argue the case, even if Ofcom decides it does not want to argue it on policy grounds, and we would say, further, even if Ofcom is persuaded that they got it wrong, it seems to us that it must give them the right to defend the case, at least on the grounds which Ofcom originally decided. So one imagines that during the determination the MNOs persuade Ofcom that they are right, and it finds against BT. Ofcom then sees BT notice of appeal and is persuaded by the notice of appeal that it got it wrong. If the MNOs simply disagree and want to continue to maintain the argument on which they won before Ofcom then it seems to me absolutely right that they should have an ability to do so, and I do not think that Mr. Beard is disagreeing.

MR. BEARD: No, I am not, not at all.

MR. HERBERG: No, I do not think he is. We further, agree, of course, that allowing them in on that basis does not given them an untrammelled right to introduce whatever new arguments or new evidence they want to; they are still constrained by the Tribunal's normal rules and strictures on new evidence and new argument, and if they want to make such argument then they must make application and it must be established.

THE CHAIRMAN: Yes, essentially, as I think Mr. Beard said, it gives them the opportunity to do exactly what Ofcom could do, were it minded to do so, but no further.

MR. HERBERG: Indeed, it gives them that right. It also gives them a foot in the door to make an application to be allowed to do more than that.

THE CHAIRMAN: Indeed, yes, I accept that.

MR. HERBERG: And we, like Mr. Beard, are anxious that the new evidence rules are interpreted in a limited way, and we are not seeking to take a stance on how any such application should be decided; it does not seem profitable. No doubt among matters which will be weighed would be the impact of the Supreme Court case on BT's case, how BT's own appeal had changed by virtue of introducing new arguments or not, and matters such as those.

THE CHAIRMAN: I just do not see any point in speculating as to how each application might be determined. Clearly there is a discretion in the Tribunal, but that is discretion that is really acutely informed by all the circumstances, including in particular the points being taken and the new evidence being adduced.

MR. HERBERG: Indeed. Even on such an application Ofcom might well take no view, not least because one of the consequences of an application, if successful, is that the Tribunal might wish to consider whether to at that point remit the matter to Ofcom rather than decide the whole of the case itself. That issue would still be there and would be a matter for the Tribunal to review at that point, if it allows in a case which is substantially different from the case which Ofcom decided, there will then be a consideration as to whether it is appropriate to remit that to the lead regulator, or first instance regulator, rather than keeping it to itself. Again, that is not a matter which I think can be further canvassed at this point, or I do not need to canvass it further.

Coming back to the letter and the Grounds. That is Ground 1, limb 2. Ground 2 is in a slightly different category. This is a criticism of the Monte Carlo analysis. The reason we do not seek, as it were, to challenge this ground at this stage is simply because we took the view it did not arise. Certainly, at the moment on the material currently in the case, as it were, Ground 1, limb 2 is a good ground of appeal because there is no new evidence or arguments at this stage to, as it were, challenge them.

We would then understand the position to be that Ground 2 effectively does not arise because Ground 2 is BT saying that even if the Supreme Court had decided the other way around, even if the Supreme Court had not given them the powerful weapons giving rise to Ground 1, limb 2, nevertheless we should win because we can actually show that there is no

risk of consumer detriment. So, even on the Court of Appeal type of test, or something of that nature, nevertheless, even then we should have been allowed to make the NCCNs. Since they won in the Supreme Court, as matters stand at the moment, that ground does not seem to go anywhere. Of course, if you were to allow in new evidence on Ground 1, limb 2, and that was contested again, and that ground was back in play then, of course, Ground 2 might be brought back into play because it would then become, as it were, a fall back position; we are going on very much the same matters as the MNOs are now seeking to raise.

Again, we do not accept the criticisms of our treatment of the Monte Carlo analysis made under this head, but we do, at this stage, take the view that it is not appropriate to resist it subject to what happens. Indeed, whether we, ourselves, resist it, or leave it to others to argue it would be a further decision for Ofcom.

Then, on Ground 3, sir, we do say that is in a slightly different position. It is important to recognise, which I think Mr. Beard did in submission, although some of BT's earlier letters blurred the distinction, that Ofcom did not decide in relation to Ground 3 that it was incapable of determination ----

THE CHAIRMAN: It did not determine it.

MR. HERBERG: It did not say it was indeterminate ----

THE CHAIRMAN: No, it simply did not determine it.

MR. HERBERG: Precisely, sir. It did say it was difficult. It said that it did not have much evidence, it did not have evidence on matters it would like to have, but it said given our conclusion on the earlier ground we do not need to determine it. I will not take you back to the passage because you have the point, sir.

In the light of that and, given it is an independent ground, it does seem, as a matter of logic that even if BT succeeds on the ground of appeal, as it were, on Ground 1, limb 2, it would still be necessary for Ground 3 to be considered to see what is in it. Mr. Beard has made various submissions as to why he says his case is very strong and that may or may not be the case. But it seems to me impossible, I do not think it is seriously suggested that the Tribunal can now take the view that there is absolutely nothing in the Ground, any arguments that might want to be put the other way.

So we would recognise that the Ground needs to be determined. That leaves the question of who ought to determine it. Our position on that is also – I think the polite word is "nuanced". We would say that it effectively ought to follow the rest of the case, if there is to be a rest of the case. If the Tribunal were going to be entertaining new evidence or

arguments on Ground 1, limb 2 in support of the decision that was taken, in opposition to BT, and it were to be doing that itself, and to be effectively hearing a substantive case on that, it would be pointless to remit Ground 3 to Ofcom, or to hold it back to be remitted in due course. Everything could be decided together in the Tribunal.

But, if the Tribunal takes the view that either there is to be no new argument on Ground 1, limb 2, because applications to extend it are not agreed, and are not accepted, and it is the only matter left, then it might be that the Tribunal would take the view that the proper course is to remit it to Ofcom. Of course, there is a fair possibility that the Tribunal wants to remit everything to Ofcom after a new application has been made.

THE CHAIRMAN: But, again, your position is 'wait and see' how matters develop before one makes any decision?

MR. HERBERG: I think it has to be. This Ground is unlikely to determine the whole course of remission or not, unless it is the only Ground standing, as it were. But it is a Ground on which there is, on the face of it, an unfinished argument to be had. More submissions and more assessment will be needed. It might be that points of law knock it out. It might be that there are factual matters that are more important, I certainly do not pre-judge that, and that is certainly a matter on which Ofcom is conscious that it may need, as it were, to step out of the roles of litigant and back into the roles of decision maker on at least one contingency as to how the matter develops.

For all those reasons that is our position in relation to the grounds of appeal, and what conclusions one can draw from them.

In relation to the interventions at this stage we say there is absolutely no basis to object to any of the interventions, including Gamma's, that is not prejudging the role that any of the interveners will play in due course.

Sir, unless I can assist you further, that is Ofcom's position.

THE CHAIRMAN: I am very grateful, thank you, Mr. Herberg. Is it Mr. Pickford or Mr. Ward next? Mr. Pickford.

MR. PICKFORD: Sir, I am going to begin. If I may, I am going to address very briefly the issue of intervention. I do not think that is going to take more than about five seconds. Then, the amendments, and I do not think that will take more than about 15 seconds. Then, obviously, I will go to the meat of the issues today, which are: what are the implications of BT's Ground 1, limb 2? Which body should be dealing with the further issues in the case, and should we be restricted in general terms as to what we should be permitted to say in relation to it.

On interventions, we set out our basis for intervention, no one has objected, we do not object to anyone else, so I think on that basis I think I can say there is nothing further that needs to be said on them.

On BT's proposed amendments, I do not think there is anything between any of the parties now either. Mr. Beard explained very clearly that his position is that it is 11(3)(a), but if it is not 11(3)(a) it is 11(3)(c). We said we thought it was probably 11(3)(c), but we are happy if it is 11(3)(a). There is nothing between any of the parties on that, it does not determine or influence any of the other issues, so again I do not think we need to particularly worry ourselves about that.

The key issues then are those that arise from the second item in the Tribunal's agenda on the position and future role of the respondent. If I may, I would like to address those in the following order. First, very briefly to deal with Ofcom's position on the BT appeal and the immediate implications arising from it.

Secondly, just to give the Tribunal a very broad overview of the points that we would propose to make, just to put in context the discussion that then follows.

Thirdly, the question of where the matter should proceed, whether in the Tribunal or before Ofcom; and fourthly, to make some comments in response to what Mr. Beard has said about the restricted nature of the case that we should be able to advance.

THE CHAIRMAN: Mr. Beard's marker, in other words.

MR. PICKFORD: Mr. Beard's marker, yes. He obviously develops that marker at some length, and I think it is appropriate for us, at least, to put down our marker in response, as it were.

THE CHAIRMAN: Indeed. Can I just float this? It does seem to me that Mr. Beard having made his marker you can, of course, expand upon your points today and I positively invite you to do so, but, at the end of the day it is going to matter how you put things in your statement of intervention, and what stance with regard to that holding statement Mr. Beard takes. Of course, one could define the scope of your intervention now, or one could say simply permission to intervene, bearing in mind the marker Mr. Beard has put down, and have a strike-out hearing later on if BT is minded to make one having seen the colour of your money.

MR. PICKFORD: It is clearly right that the right procedural course is that any debate about precisely what we should be permitted to adduce is on the material that we want to adduce, and we are not there yet. So, I am not trying to make a premature application in relation to that issue. The reason why we say it is nonetheless important for the Tribunal to at least hear some of the other side is because these issues may influence the Tribunal's view on

where it is likely to be appropriate for this matter to continue. If the Tribunal is reaching a view that it would be particularly limited, what we were able to say in the Tribunal but it might be different if it went back to Ofcom, I think it would be helpful to give the Tribunal a flavour of what we say is actually the right test in this situation because it is in some ways relevant to the prior question of where should this case continue? It is at least capable of influencing it, so for that reason I would like to deal with these points at least briefly.

THE CHAIRMAN: I understand and, as I say, I am not wanting in any way to close you out from that. The only other point I would make is that I did hear loud and clear what Mr. Herberg said that Ofcom's position is that remission may or may not be appropriate, but not yet. It is a question that needs to be considered depending on how the points evolve, and it does seem to me that whilst Mr. Beard's stance is clear, which is no remission, and your stance may be remission, are you suggesting that we make an order remitting matters today, or that matters are in fact considered after, as I say, the colour of your money is pleaded out?

MR. PICKFORD: I am saying in the first instance the Tribunal is capable of making an order today on the issue of remittal, but I hear what Mr. Herberg says and if the Tribunal would prefer to do it, having considered what particular points the interveners are going to advance then obviously that is an alternative that is available to it, but I seek to persuade the Tribunal that on the basis of principle you are, sir, in a position to be able to make that order today.

THE CHAIRMAN: Right. But are you going to be seeking to persuade me not only that I can make the order but that I should make the order today? Or, are you going to pull short from that and instead take the approach that Ofcom is taking, which is that this is, to coin a phrase, a 'nuanced' question which requires consideration in the light of all the parties, not just Mr. Beard, having set out their stall?

MR. PICKFORD: Our primary position is that you should make it today.

THE CHAIRMAN: Right.

MR. PICKFORD: But, obviously, in the alternative we will be inviting you to make it later.

THE CHAIRMAN: In that case do proceed, Mr. Pickford. I am clear where you are coming from.

MR. PICKFORD: On Ofcom's position on BT's new Ground 1, limb 2, there is obviously considerable common ground here between all of the parties. It is clear that Ofcom misdirected itself as to the approach it took on the determination of the disputes between BT and the MNOs. It follows that on account of that misdirection, Ofcom's decision needs to be set aside – so far so good.

We say that you cannot then leap, as BT seeks to do, from that error to the conclusion that it is then a downhill ski to BT being entitled to relief, because we say there are a number of other issues that will need to be determined, to decide whether, in fact, the NCCNs in question should be upheld.

Without wishing to develop the points in any detail it may just be helpful if I outline the points that we currently intend to make.

The first of those points are the contractual issues, and they stem from the Judgment of the Supreme Court that validated the position adopted by the Tribunal, but then overturned by the Court of Appeal, but the terms of BT's Standard Interconnect Agreement are of particular importance for determining any dispute. We propose to make two contractual arguments in that respect. First, we will say that the NCCNs under consideration were not actually in accordance with clause 12.1, because they did not specify charges which were capable of taking effect on the effective date. Although they had a very detailed set of charges, they were not sufficiently clear as to how they related to the MNOs retail charges to actually enable them to take effect, and that is the point that obviously I will develop in due course if we are permitted to do it. That is the outline of the issue.

THE CHAIRMAN: Just to be clear, Mr. Pickford, that is a point that is a new argument, it was not one that was advanced in opposition to the NCCNs when the dispute was put before Ofcom?

MR. PICKFORD: That is correct, it is a new argument, just as BT's argument is a new argument that was not put forward ----

THE CHAIRMAN: I can see we might have an argument about that as well, but let us leave that for the moment.

MR. PICKFORD: The second point that we wish to make in relation to contract concerns only NCCN 1046, and that is the NCCN that concerned the 080 numbers, and we say that was invalid for a further reason and that was because Ofcom had already in its determination of February 2010 set down what the relevant terms should be for charging for the relevant number range, and effectively the new NCCN 1046 was seeking to cut across that, and that was contrary to the requirements of clauses 12.5 and 12.6 of the SIA. Again, I do not wish to develop that any further now, just to articulate what the point is going to be.

THE CHAIRMAN: I am very grateful for that, Mr. Pickford.

MR. PICKFORD: That is the first category of points we want to make. Secondly, we will argue that the NCCNs do not satisfy Principle 2 properly applied in the light of the Supreme Court's Judgment, and we say that this will require significant factual and economic

evidence on the direct effect and the mobile tariff package effect of the particular matters in question.

We are working with economists at the moment to develop evidence in relation to that. We have not finished that process but we have certainly begun it, and we are likely to wish to rely on more detailed evidence than was available to Ofcom at the time of the original determination to analyse Principle 2 both in relation to two core volumes, and the prices charged for non-geographic calls, information which has become available since Ofcom's determination.

Now, also in relation to Principle 2 we may need to address the Tribunal on BT's case on Ground 2, on the criticisms of Ofcom's critique on the Monte Carlo analysis. I will come on to that when I deal with directions. We are a little unclear, really, as to where BT sits in relation to its Ground 2 currently. As I understand it, it is currently saying that it does not want to put any evidence in in support of it. We will say that that is an election it is entitled to make, but it cannot then come back months down the line in this procedure and suddenly decide that, actually, it would have preferred it if it had had evidence because that is going to derail the procedure and it is not an appropriate approach. It needs to decide now whether it wants to pursue that with evidence or not.

THE CHAIRMAN: Yes, it is the point I made in relation to Ground 3, that obviously reply evidence is one thing but if one is adducing primary evidence in support of the Ground now, now is when it is produced.

MR. PICKFORD: Absolutely, sir. We entirely endorse that.

The third point that we will wish to advance is that we say that the NCCNs do not satisfy Principle 3. I think I can probably do this fairly briefly. BT has suggested that there is no real issue here. First, it says, that Ofcom's conclusion on Principle 3 was one of uncertainty and by analogy to the Supreme Court Judgment on Principle 2 therefore it should win. As Mr. Herberg has made clear and you, sir, have well on board, that was not Ofcom's conclusion. Ofcom's conclusion was that it was difficult, but it did not need to determine it. So the premise for that argument simply is wrong.

BT has also said today that the issue of practicability has already been determined in the 08X case, and the points we make in response to that are as follows. These are separate proceedings, dealing with separate ladders, and we are entitled to contest this issue on the basis of the specific details of these ladders and what we now know. We will say that there is significant factual evidence that has come to light in the light of experience of dealing

with the original 08X ladders, that demonstrates that practicality is a real problematic issue in this case.

BT says that the evidence does the contrary. There is only so much I can say in relation to that because I do not want to develop my case too far, and also there are confidential issues here. There is going to be a major issue on the facts in relation to that.

THE CHAIRMAN: Again, this is evidence which was before Ofcom. It is just that Ofcom, quite properly, took the view that given its decision on Principle 2 it did not need to reach a conclusion or cause a difficult issue on Principle 3.

MR. PICKFORD: There were two aspects to it. Yes, sir, that is correct, there was evidence before Ofcom, and it certainly did not need to reach a conclusion and we say actually it should have reached a conclusion on the basis of that evidence. We would say, moreover, in the light of everything that we know now, today, standing here, in relation to experience of trying to deal with these kinds of matters, there is further relevant and pertinent evidence that we should be allowed to adduce in relation to that issue.

THE CHAIRMAN: And that will be a Rule 22 application.

MR. PICKFORD: Exactly. The final point in relation to Principle 3 that I would like to make – if we could just pick up BT's submissions at tab 10 of the main bundle, and turn to para. 26.

THE CHAIRMAN: These are the further submissions?

MR. PICKFORD: That is correct, so these are BT's further submissions. At para.26 BT makes an argument where it quotes para.3.115 of the determination, about four lines down on p.9. It says:

> "Indeed, in 3.115 of the Determination, Ofcom stated that it would regard the issues raised by Principle 3 as being of lesser importance if it regarded Principle 2 as being met."

It quotes from the determination:

> "'*In relation to the unintended, unforeseen or wider implications raised by the MNOs in the 08X cases, and any potential distortion in choice of transit provider, we remain of the view that* ***the weight we attach to these potential practicality concerns depends on our findings in relation to Principle 2****'.*"

That figure BT emphasises.

> "'*Specifically, whilst we recognise there are potential practical consequences resulting from the NCCNs, we would place less weight on these consequences if we thought the NCCNs would lead to overall consumer benefit'.*"

There are two points to draw from that. Firstly, BT has misunderstood the key point being made here by Ofcom which is that it would only afford less weight to Principle 3 if it thought the NCCNs would lead to overall consumer benefit. They never made that finding at all. So the fact that its decision in relation to Ground 1, limb 2 needs to be set aside does not lead to the conclusion that BT suggests, that now suddenly Principle 3 is relegated.

The second point, however, to make is that the link that Ofcom identifies there, and which BT highlights between Principle 2 and Principle 3, is important because Ofcom needs to apply the Article 8 objectives in the round by reference to conclusions on Principle 2 and Principle 3 together, so they are considered in the light of one another. We say that is another reason why, if Principle 3 is to be remitted, it should be remitted at large, together with Principle 2.

Could I just illustrate one concrete example of what we say is the inter-relationship. Let us assume that the practicality concerns mean that the NCCNs would be implemented in a particular way by MNOs - for instance, perhaps in relation to some number ranges it would not be practicable for them to actually change their prices. If that is the case in relation to practicality, that conclusion needs to feed through into the assumptions that are used in the consumer welfare test under Principle 2. So we say you cannot divorce Principle 2 and Principle 3 from one another in the clean way that BT suggests that you can.

That is the third category of points that we will be wishing to advance.

The final point is in relation to BT's Ground 1, limb 1. There is probably not a lot I need to say about this. We, like Ofcom, oppose it. The Supreme Court was unconvinced by it, but we agree with the other parties that nothing needs to be determined in relation to it at the moment. It depends somewhat on the outcome in relation to the other issues in the case.

That then takes me to the question of remittal, who should determine the remaining issues? Our position is that Ofcom, having fundamentally misdirected itself on the appropriate approach in its original determinations, the proper course now is for the question of NCCNs, and whether they should be given effect, to be remitted to Ofcom for re-determination applying the correct test as laid down by the Supreme Court and in the light of all current relevant circumstances.

We make three points in support of that. The first point is that although this Tribunal has a merits jurisdiction, it is an appellate body. We quoted the often quoted comments of Lord Justice Jacob in the *T-Mobile* case, that the Tribunal is not a duplicate regulatory body, it is an appeal body, a body which can look into whether the regulator got something materially wrong. We say that it follows from that that if the correct institutional balance between

Ofcom and the Tribunal is to be maintained, that requires Ofcom to have the primary decision making role.

THE CHAIRMAN: Just pause there, Mr. Pickford. Pursuant to which provision am I going to make this remission?

MR. PICKFORD: It would be pursuant to s.195(4). If the Tribunal will bear with me. I think s.195 did not make it into the authorities bundle. We say that the proper course is that BT have established that Ofcom's original decision was incorrect and should be set aside, because Ofcom approached matters on a fundamentally incorrect legal basis. We say, therefore, that what the Tribunal should do is then remit the decision under appeal to the decision maker with such directions, if any, as the Tribunal considers appropriate for giving effect to its decision. In this case it should be remittal to reconsider the question of whether the NCCNs should be given effect in the light of the Supreme Court judgment.

THE CHAIRMAN: I see that, but really remission only follows after the Tribunal has disposed of the appeal pursuant to s.195(1), and that disposition is on the basis of s.195(2). I quite appreciate that deciding the appeal on the merits might be done very shortly, but on the merits and by reference to the grounds of the appeal, it does seem to me that one is putting the cart before the horse to say, right, simply on the basis of BT's notice of appeal and oral submissions without these being articulated in any form of pleadings, you can make a remission having decided the appeal on the merits. It does seem to me a little premature.

MR. PICKFORD: Sir, we say in the light of Supreme Court judgment that has fundamentally changed the relevant legal landscape here. In these circumstances, which are somewhat exceptional, the Tribunal can move swiftly to that particular conclusion because there clearly has been identified a serious problem with the approach that Ofcom took. Because it goes to, we say, the heart of the way in which we would have - I will come on to develop this in a moment - developed our case had we been applying the correct legal approach, because we were under the misapprehension that the right approach was that set down by the Court of Appeal, the case would have developed very differently in front of Ofcom. In the light of that fundamental shift that has been brought about by the Supreme Court judgment, that is the appropriate course now, to remit. One does not have to go through all of BT's grounds to get to that conclusion. One of its grounds is sufficient to have the decision set aside.

THE CHAIRMAN: I do not think it is in dispute by anyone that the Supreme Court decision is a fundamental and important decision. What I do think is in dispute is exactly the consequences of this, because, of course, what Mr. Beard draws from this is polar opposite

to what you are drawing. He is saying that the effect of the Supreme Court decision is an easy win on his appeal. You are saying quite the opposite, you are saying, "No, fundamentally, we need to revisit, or Ofcom needs to revisit the entire basis of its decision". Surely there is a stage before that, which is to determine exactly what the evidential basis of any merits decision by this body is before it makes a remission, and that, in turn, depends on the evidence that you actually can put before this Tribunal.

MR. PICKFORD: Sir, we would disagree with that. In fact, we are not so far apart necessarily from Mr. Beard in this sense only: we say there is an easy win in the narrow sense that Ofcom's decision should be set aside. What one cannot do is jump from that to the conclusion that it was necessarily right for BT to be able to impose the particular NCCNs in question. For a proper analysis of that question of whether the NCCNs were appropriate or not, there needs to be a new appraisal of Principle 2 in the light of the Supreme Court judgment. Our position is that that is appropriately done by Ofcom as the original decision maker, rather than the Tribunal for reasons that I can come on to develop.

THE CHAIRMAN: No need, but Mr. Herberg's point was simply that on the basis of the evidence that was before Ofcom, if one looks at Ground 1, limb 2, the facts are as Ofcom found them, namely that the effect and consequence of the charges was indeterminate. Applying the law to those facts Ofcom reached the perfectly proper conclusion that it could reach, given the Court of Appeal's decision which was the prevailing decision at the time. The Supreme Court takes a different approach, not on the facts, but simply on the legal consequences to be attributed to that, and on that basis, as I understood Mr. Herberg's point, the decision that Ofcom made needs to be overturned. That does not mean to say that factual material needs to be revisited. All it means is that the legal conclusion that Ofcom drew for completely understandable reasons proved not to be right.

MR. PICKFORD: We would say it does need to be revisited, and for this reason: irrespective of Ofcom's position in relation to the conclusions it drew from the particular material that was before it, the material that was before it was conditioned by the MNOs' understanding of the legal test that was applicable. To make that good, it might be helpful if we turned to the Determination briefly. That is at BT1, tab 11, I believe.

THE CHAIRMAN: Yes, I have that. The publication date is relevant, it is 4th April 2013, so it is about nine months after the judgment of the Court of Appeal in July 2012. If one goes to, for example, section 7, we see a summary of the submissions and provisional conclusions and Ofcom's response to them, and just above 7.13, we see the first relevant issue, "Onus

on party proposing change to justify it". We see the views of the parties, BT disagreeing, H3G noting that the onus was on Tribunal. Then:

> "Our views
>
> Ofcom considers that the CoA Judgment was clear as regards the onus of showing that a change is fair and reasonable."

It cites the TRD case and the Court of Appeal, and it goes on to conclude:

> "Given the similarities between the Disputes and those considered in the 08X cases, we believe that it is appropriate to follow the approach articulated in the CoA Judgment, namely that '*there is no good reason to reverse the burden and to relieve the proponent of the change … of the need to show that he change is fair and reasonable, in the sense explained in the TRD case'*."

So that was the position that Ofcom was adopting, and it was also the position that the MNOs were adopting.

Then, in the light of that approach, if one then goes to ----

THE CHAIRMAN: Are you saying, Mr. Pickford, that the MNOs put in no evidence at all about fairness and reasonableness, and simply said that the onus was on BT to justify and you failed to do so?

MR. PICKFORD: No, sir. What I am saying is that naturally the approach that the MNOs would have taken would have been conditioned by what it was that they thought they had to establish. Mr. Beard says, "No, no, no, everyone knows that you have got to make points in the alternative", but the reason why his clients had to make submissions in the alternative is because the law was against them. Their primary position was, "You have got the legal test wrong, it should not actually be upon us to demonstrate this, but, in the alternative, if it is, i.e. according to the law as it currently stands, or at least as articulated by the Court of Appeal, then we say we have done enough anyway".

For us the situation was different because we had at that point the law on our side. It would have been disproportionate and strange for us, I would suggest, to have not merely said here is the evidence that is sufficient to demonstrate that we meet the legal relevant legal test, but moreover, even if the legal test was something entirely different, here is a lot more far more detailed evidence that may be entirely irrelevant given the nature of the legal test that would establish a different stand on the question of Principle 2.

THE CHAIRMAN: I see that, Mr. Pickford, but are we not straying into precisely what the purpose of Rule 22 is, namely you, for whatever reason, chose before Ofcom not to put in this material. One might say, and I stress that I am not making any kind of statement as to

how a Rule 22 decision might be determined, Mr. Beard might say he knew the case was going to the Supreme Court because permission had been granted in February, and, what is more, you could have gone on the aggressive in the argument that, even if there was no appeal to the Supreme Court, to say, yes, not only are these charges not proven to be fair and reasonable, they are not fair and reasonable, and here is the evidence to show it.

The weight of those points is not a matter for today, does it not go to reinforce the point that Mr. Herberg made just a few moments ago, namely that precisely the correctness of Ofcom's decision and the ease with which one resolves it depends upon what evidence is admitted here, which is an indication for remitting later rather than now.

MR. PICKFORD: Sir, we would say there are two different issues, albeit they are related. The point that I have articulated about the approach that we would have taken, sir, you are entirely right, it does, amongst other things, go to the question of fairness as to whether we should be permitted to adduce that now if the Tribunal decides that the matter should continue in the Tribunal.

However, we say, additionally and separately, it is also relevant in explaining why one cannot assume that merely because Mr. Beard's clients have succeeded in demonstrating on a narrow basis that the decision of Ofcom should be set aside, that means that had everyone been applying the right test, Ofcom's decision would have been the same. We say that had we been applying the right test we would have adduced different evidence and therefore Ofcom's decision could have been different. Because Ofcom's decision could have been different, obviously we cannot pre-judge what Ofcom's decision would have been, it might have rejected our case, but we say necessarily we would not have approached it in the same manner. If that is right then it follows that it is for the primary decision maker to consider these matters again, namely Ofcom, and to address Principle 2 in the light of the clarification given by the Supreme Court as to the correct approach.

That is the interrelationship, and the arguments I have been making go to both. We say they are still nonetheless separate questions. You do not have to adopt the approach that Mr. Herberg says.

We understand the Tribunal might wish to go down that route, but I am seeking to persuade you that it is not actually compelled to do so, and you can separate the two out in the way that I have suggested.

To come back to the issue that we were previously discussing about the institutional balance between the Tribunal and the regulator, we set out in our submissions the test from *Freeserve* that was citing the *Bettercare* judgment. We made a mistake in our submissions.

We said that the *Freeserve* case was under s.192 of the Communications Act. It is not, it was a Competition Act case, and it might just be helpful if we briefly go to *Freeserve*, which is in the authorities bundle, tab 7. If one picks it up at para.103, one will see there that the Tribunal set out the jurisdictional provisions that applied to the Tribunal in relation to a Competition Act case. There were in para.3(2) of Schedule 8, and those provisions allow the Tribunal to:

> "(a) remit the matter to the Director,
>
> (b) impose or revoke or vary the amount of a penalty.
>
> (c) grant or cancel [exemptions] …
>
> (d) give such directions, or take any other steps, as the Director could himself have given or taken, or
>
> (e) make any other decision which the Director could himself have made."

The Tribunal in that case has a jurisdiction which coincides with that of the original decision maker. It is entitled to make any decision that the original decision maker could have made itself.

Even in that context it went on to cite withhold approval the approach in *Bettercare*. That is at para.111:

> "Nonetheless, in our view this Tribunal is essentially an appellate tribunal, not a tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did. If it turns out, in the course of the appeal, that the Director was insufficiently informed, in our view the appropriate course will usually be for the Tribunal to remit, rather than to attempt to investigate the merits for the first time."

We say that that approach applies, *a fortiori*, in the present case because, of course, here, as, sir, you saw, under s.195 the Tribunal is required to remit decisions to Ofcom. It does not have any primary decision making power of its own. All its decisions have to go through the vehicle of remission.

We say that that approach is also consistent with general public law, that the proper course for a public body which has misdirected itself by applying the wrong legal test is that it should take its decision again, directing itself appropriately by reference to the correct legal test. We cited at footnote 9 of our written submissions *R on the Application of C v The*

Chief Constable of Greater Manchester for that proposition and I do not think I need to take you to it. I think that is well established.

We say that it is the orthodox approach in cases such as this that there would be remittal. Moreover, we say that it is also procedurally efficient and an appropriate use of resources of the different institutions involved. The Tribunal's procedures are necessarily more formal and costly than those of Ofcom, just in the nature of legal proceedings such as these. We say, therefore, rather than fight out all issues now in the Tribunal, it would be far preferable, now that we have identified the serious error, for Ofcom to take a first instance decision, and if there is to be any appeal at all the Tribunal can then focus on the sub-set of issues that there is still a dispute about following Ofcom's initial assessment.

We would also suggest that there are practical considerations here for the Tribunal. It is obviously an expert body and it would ordinarily have the benefit of an economist, but it is nonetheless an appeal body. It does not have the same kind of resources as Ofcom has, for example, in terms of the ability to analyse and pick through data at first instance, which a first instance decision maker would need to do.

Again, we say that those reasons support what we say is the right approach here, that the matter should go back to Ofcom.

Those are my submissions on that issue. If I could then turn briefly to the issue of the legitimate scope of what we should be able to say. Some of this we have actually canvassed already so there may not be too much further that I need to go on it.

The analysis, we say, is as follows: if the Tribunal determines that the matter should go back to Ofcom, then in those circumstances it is very simple. Ofcom as a decision maker under the general principles of English law, acting in the public interests, needs to take account of all relevant material now available to it. That is articulated in the *Chief Constable of Manchester* case, that we have quoted. It is an obvious and trite principle, that if Ofcom is asked to look at the matter again it cannot close its eyes to relevant considerations that would influence a correct view on the merits of the matter.

THE CHAIRMAN: Is that right, Mr. Pickford, when you look at s.195(4), because what that says is that the Tribunal shall then, having made a decision on the merits, remit the decision under appeal with such directions, if any, that the Tribunal considers appropriate for giving effect to its decisions. So, surely one can, after a hearing on the merits of a s.192 dispute resolution decision, actually remit to Ofcom an extremely narrow point if that is the effect of the Tribunal's decision on the merits. Of course, it depends what the decision on the merits is, but is that not the point?

MR. PICKFORD: It depends on the context, but we say here where the issue is of such a fundamental nature that both the MNOs themselves and Ofcom were simply directing themselves at the wrong test, then inevitably that does require reconsideration of that issue again taking account of all relevant information that is now available. It does not necessarily require reconsideration of Principle 1, because nothing has changed in relation to Principle 1, so you are correct that there may be some narrowing, but the decision maker cannot shut its eyes to relevant information that is put before it that would influence its decision, which is ultimately in the public interest pursuing Article 8 objectives. That, we would say, would clearly be wrong.

There is a coincidence between the approach that is taken by the Tribunal, and the ordinary approach in public law which is where the decision maker looks again at the decision in the light of the available information then available to it. That is the position, we say, if there is remittal.

If there is not remittal then we have to get into the question of the appropriate test under Rule 22 and, as I have said, we are not making application yet so I can be relatively brief in relation to that.

What has been suggested by BT is that we had the chance to advance all these points before. It was our dispute and therefore we should not be allowed to advance anything new now. We say that is wrong and any process that restricted us in the way that BT suggests would be extremely unfair. One has to remind oneself of the relevant context here. BT is asking that the Tribunal now decide all relevant matters that need to be determined in order for it to be afforded relief. We are now applying the new test formulated by the Supreme Court and, in the light of that, BT ask that it is allowed to pursue a new point never previously pursued, based on the Judgment of the Supreme Court, based on its contractual rights under clause 12. So BT gets to alter its approach in the light of the Supreme Court Judgment. BT further asks that it be permitted to hold in reserve as Ground 2, as I understand their current position on it, a substantive case on the merits of the assessment under Principle 2. They say that Ofcom was wrong to find there was any material risk of consumer detriment arising from the NCCNs considered in 2013 determination, and they are currently attempting to reserve the right to adduce evidence on that.

We say, in those circumstances, we should be entitled to respond with equality of arms. We, too, like BT, should be able to pursue new points following the substantial change in the correct legal test, occasioned by the Judgment in the Supreme Court. We, too, like BT, should, if necessary, be entitled to rely on economic evidence. Of course, we are in a

similar position to BT, we have a prior legal point which may mean that we do not have to consider any of our economic evidence. But, if we are wrong on our legal point, we say that we should be entitled to deal with those economic issues just as BT wants to do in relation to its Ground 2.

I have already explained why we say that would be fair, and that we can hardly be criticised for approaching the matter in the way we did, because we were acting in accordance with the view of the law as set down by the Court of Appeal.

Just very briefly, if we might just go back to the Judgment of Lord Justice Toulson, the *BT v Ofcom* case that was obviously part of the 08X appeals, that is authorities bundle, tab 12. Mr. Beard took you through some of this, and I would just like to make a couple of points myself in relation to it. If one could start at para. 13, please?

THE CHAIRMAN: Yes.

MR. PICKFORD: We see there Lord Justice Toulson referring to the Common Regulatory Framework, in particular Article 4, the right to effective mechanisms for appeal. At the end:

> "Member States shall ensure that the merits of the case are duly taken into account".

We say that ensuring the merits of the case are taken into account must mean the merits on both sides. It cannot mean only according to BT. Moreover, that the mechanisms for an appeal referred to at the beginning of Article 4.1 would not be effective if one party to the underlying dispute was gagged in the way that BT attempts to do in relation to us.

Then one goes to the relevant factual background to this case at paras 36 and 37, and Mr. Beard has touched on this. The issue that arose in that case was that Ofcom had originally said it only wanted to look at NCCNs in general and then, effectively, it changed its mind and said: "Actually, we are going to look at one NCCN in particular", and BT wanted to react to that. The description of the evidence that it wanted to put in is summarised at para. 48:

> "Mr Read helpfully accepted that Ofcom summarised it fairly in its supplementary skeleton argument.
>
> > 'Whereas BT had previously said only that NCCN 956 *might* create incentives to reduce retail prices, the (new) evidence is designed to show that it *did* create those incentives. This argument is supported by complex economic and algebraic analysis. If the evidence is admitted, it will need to be evaluated for the first time by the Tribunal itself'."

We say that is analogous to the present context. Previously, it was good enough to show that there might be adverse effects. Now, in the light of the new test we wish to show that there will be adverse effects.

Then, in considering the right approach, Lord Justice Toulson went on at paras. 59 and 60, and in particular at 60, to say as follows:

> "The task of the appeal body referred to in art 4 of the Framework Directive is to consider whether the decision of the national regulatory authority is right 'on the merits of the case'. In order to be able to make that decision the Framework Directive requires that the appeal body 'shall have the appropriate expertise available to it'. There is nothing in art 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal."

That is addressing Mr. Beard's point that we should be restricted to information at the moment.

> "The expression 'merits of the case' is not synonymous with the merits of the decision of the national regulatory authority. The omission from art 4 of words limiting material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of the case it is not typically limited to considering the material which was available at the moment when the decision was made. There may be powerful reasons why an appeal body should decline to admit fresh evidence which was available at the time of the original decision to the party seeking to rely on it at the appeal stage, but that is a different matter."

Again, we say our approach is fully consistent with that, and it is fully consistent, moreover, with the postscript which you have been directed to, sir. Again, we say our approach is fully consistent with that, and it is fully consistent, moreover, with the postscript which you have been directed to, sir. Our submission in relation to that issue is really as follows. BT cannot have it both ways if the spotlight is on the original decision maker, and its decision, then the correct course is remittal to the decision maker for a further decision.

If, however, the right approach is that the decision maker steps back and we are to battle it out before the Tribunal, then we should be permitted to do so without our hands tied behind our backs, and should have the freedom to respond to the Supreme Court Judgment just as BT has done. We say anything else would be inconsistent with the right to an effective

appeal mechanism pursuant to which the merits of the case – I emphasise – are duly taken into account.

We have had the late addition of the *Tesco* authority. We say that that is not pertinent in this particular instance. *Tesco* was dealing with a challenge to a regulatory decision, but it was one under the Competition Act. It was not a dispute under s.190, it was an entirely different context and what the Tribunal was emphasising there is that in accordance with the general principles afforded for fair rights of defence, the decision maker should not be able to move the goalposts in relation to the basis on which it has made a very serious finding of infringement against the original party. That is entirely different from the function that Ofcom was carrying out here where it is adjudicating on a dispute between two separate parties. As emphasised in the *Tesco* case, it says the Tribunal must be vigilant to ensure the fairness of the appeal process. We say that is absolutely correct, and ensuring the fairness of the appeal process in the present case means allowing each party to the underlying dispute to advance its case on that. Certainly, if BT is allowed to advance the case that we have not objected to we should be able to respond accordingly.

I think that is all I need to say because I simply wanted to meet Mr. Beard's case.

THE CHAIRMAN: You are meeting Mr. Beard's marker half way.

MR. PICKFORD: Yes.

THE CHAIRMAN: I am fully apprised of that. I understand.

MR. PICKFORD: On directions I had understood that BT's case was that we could potentially agree those. I am not sure if Mr. Beard is sticking to that position or whether he is saying the Tribunal should actually make directions now. Certainly, it is very important for the Tribunal to direct its mind to the prior issues of remittal or not before we can sensibly go on to consider that.

THE CHAIRMAN: I understand, and on that basis for the moment we will park the question of directions as Mr. Beard has suggested, but we hope we may get to them later on today.

MR. PICKFORD: May I have just a moment?

THE CHAIRMAN: Please do.

MR. PICKFORD: (After a pause) Sir, unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: I am sorry, Mr. Pickford, there was one point I had for you. Obviously, we are still thinking about the question of remission, but assuming that we do not remit, but the matter remains, at least *pro tem* before the Tribunal, I am thinking about how the nature of the permission to intervene could be crafted for the MNOs. It struck me that wording along

the following lines might be appropriate just to ensure that the MNOs were not unduly restricted in the points they could take. The wording I was thinking was this:

> "Without prejudice to any application made under Rule 22 of the Tribunal's Rules, the interveners be permitted to defend the appeal on any grounds that Ofcom could have advanced had it been so advised."

MR. PICKFORD: Sir, we would not suggest that we should be restricted in that way, and the reason is because there are differences between what Ofcom, as an original decision maker, should potentially be permitted to do, and what we, as the parties to the underlying dispute, should be permitted to say ourselves, and it goes back to the point in relation to *Tesco*. There are reasons that you should constrain a decision maker to stick by its decision, which do not apply if the Tribunal, rather than remit the matter to the decision maker, is to decide all matters remaining between the parties itself. The issue is this: the decision maker may be fixed to some extent with the approach that it took in its decision, but that is not necessarily the end of the matter, because if its decision is set aside it can potentially reconsider according to the correct approach and, therefore, there is a reason, because of the institutional balance between the Tribunal and the regulator, it may be appropriate – indeed, we say it is appropriate – to be relatively strict in relation to what the decision maker can advance in the Tribunal. That does not necessarily mean that the decision maker is foreclosed from dealing with those issues at all in the future. As an example, in the *Mastercard* litigation before this Tribunal, what happened was that the OFT took a particular decision. It then advanced a somewhat different case in its defence to the case that it had previously advanced in the Decision. What the Tribunal and the other parties said was: "You cannot do that. You need to stick by your original Decision" and so therefore the matter was set aside. Then it went back to the original decision maker to start again. It was not necessarily precluded, because it got it wrong the first time, from going back and thinking about those issues again and potentially doing something further. That is why there is a difference between the position of the decision maker, the regulator, and the position the Tribunal should take in relation to what it is allowed to say and ourselves, as counterparties to the original dispute, where Ofcom was effectively acting as an arbitrator between the two of us.

THE CHAIRMAN: I anticipate that is going to be quite contentious with Mr. Beard's clients and, indeed, there is going to be quite a debate, I suspect, about how much weight one can place on what was said by the Court of Appeal in its postscript.

MR. PICKFORD: I am so sorry ----

THE CHAIRMAN: I was flagging the fact that I anticipate that what you have just said is going to be pretty contentious with BT, given the submissions Mr. Beard has made – I see him nodding – and, indeed, we are likely to be moving into a debate about exactly what the Court of Appeal meant when it suggested that Ofcom could properly take a back seat and leave it to the interested parties to battle it out.

MR. PICKFORD: Yes, and we would say it is bound up really with the application of Rule 22, that it is a matter that you should decide in that context rather than, we would say, prematurely seeking to constrain ----

THE CHAIRMAN: No, I understand, but that is why I phrased my draft as being 'without prejudice' to any application to be made under Rule 22, the point being that I would expect the MNOs to formulate in full their statement of intervention, but to make it clear which points they do not need a Rule 22 argument in relation to and which points they do.

MR. PICKFORD: I beg your pardon, I potentially misunderstood. Certainly, our position is that at this stage the Tribunal should not be seeking now to rule that we cannot advance points that Ofcom would not be permitted to do. As long as the approach that the Tribunal is adopting that we can make those applications and the Tribunal will consider them.

THE CHAIRMAN: I am very keen not to pre-empt matters, given the fact that all the parties have yet to see your statement of intervention, given that it is yet to be drafted. What I am equally keen to ensure is that we do not have a messy argument later on about precisely which grounds in your statement of intervention you say Ofcom could itself have advanced, were it minded to do so, and which grounds you say you actually need some form of consent by the Tribunal under Rule 22 to make because you are relying on additional evidence, without in any way pre-empting the Tribunal's decision under Rule 22.

MR. PICKFORD: Sir, the only comment I would make in relation to that, and the formulation that has currently been advanced is, it is not purely without prejudice to the application of Rule 22, because Rule 22 deals with evidence but it does not deal with the grounds that we are necessarily permitted to advance. So it would need to be without prejudice more generally to the question of the grounds that we are permitted to advance. It is not merely a question of Rule 22. It may be that there is a means of formulating that appropriately, but we would suggest that actually it might be easier not to seek to make that constraint at the current time, and to have the whole debate, if necessary, in the context of the particular grounds we then want to advance.

THE CHAIRMAN: As I said, I am very keen not to resolve substantively what points you can and cannot make in the future. On the other hand, I am keen to have clear those points

where you can make the argument, or make the point of 'as of right' and those points where Mr. Beard is going to be standing up and saying: "I object to these points, I would like them to be clearly delineated because of hearings in the future."

MR. PICKFORD: Sir, we hear that and that is very helpful because obviously in any statement of intervention that we produce, if that is the route we are going to go down.

THE CHAIRMAN: Yes, indeed.

MR. PICKFORD: Then in the light of, sir, your very helpful point on that we will endeavour to articulate precisely which set our points fall into, whether it is the former or the latter. We say that is all we need to do in relation to that. We hear you loud and clear, and we do not need a potentially rather problematic ruling to reflect that, we can simply make sure that we do that.

THE CHAIRMAN: I will think about that, Mr. Pickford, thank you very much.

MR. PICKFORD: Thank you.

THE CHAIRMAN: Yes, Mr. Ward?

MR. WARD: Sir, I can be very brief because Mr. Pickford has really covered much of the same territory.

Starting with the question of BT's amendment, it is not opposed. Turning to the question of interventions, they are not opposed and our own application to intervene appears not to be opposed.

Can I just quickly respectfully adopt what Mr. Pickford said about the form of order you were proposing, sir? We are very keen that there should be no inadvertent pre-judgment within that order, as you clearly intend, sir. But, as Mr. Pickford suggests, we could separately identify which parts, in any statement of intervention we say do arise, as of right, and which do require some form of permission from the Tribunal and, of course, you could make an additional direction to that effect in addition to what we submit would be appropriate, namely, general permission to intervene without qualification.

Sir, can I then turn to the real issue of substance, namely, Ofcom's participation in the future conduct of the appeal. Here I can be very brief, and Mr. Pickford has said much of what we would have wanted to say.

It is, of course, a matter for Ofcom the extent to which it chooses to participate in the appeal, but then the fundamental question is how to dispose of the appeal fairly. In our submission that means that all parties – not just BT but all parties – should have the opportunity to advance the case they wish to advance on the merits. In Telefónica's case, as you have seen, sir, it wants to argue that, even though Ofcom made an error of law –

indubitably now in light of the Supreme Court's Judgment – it was nevertheless correct to resolve the dispute in Telefónica's favour. We rely, to that end, both on economic analysis, of the kind that Mr. Pickford has outlined, also, one contractual point on one of the NCCNs, and also Ground 3, the question of practicability.

But, of course, sir, when you read the submissions for today, you no doubt were struck, as we were, that the combined effect of BT and Ofcom's submissions was to leave Telefónica with no way to contest the appeal to all practical purposes, because Ofcom did not want to contest Ground 1, limb 2, or have it remitted to it, and BT said that Telefónica could not contest anything that Ofcom was not contesting.

THE CHAIRMAN: Yes, I am not sure that that is BT's position, at least not any more.

MR. WARD: No, it has softened its position and its position now is that if Telefónica wants to run some suicidal points arguing with the Supreme Court's Judgment it is welcome to do that, but it cannot run any real points.

THE CHAIRMAN: No, I think Mr. Beard's point was a little more nuanced than that, and I think he is agreeing with Mr. Herberg that you should be allowed to run any point – good, bad, or indifferent – that Ofcom could have run but, for whatever reason, is choosing not to, and that might be because Ofcom, as a regulator, decided not to do so, or because Ofcom has taken a view that the point is simply a bad one and you disagree.

MR. WARD: And, sir, where it really takes us to is that the point of principle that has been raised by BT's submissions is whether the interveners, the MNOs, can raise any kind of new arguments or new evidence beyond what Ofcom has decided. This point was advanced as a point of principle, albeit as a marker. I do not think one can ever go through a case management conference in the Tribunal without someone laying down a marker, but that was the first marker of the day. I am reluctantly obliged to lay a countervailing marker.

In our submission, the point of principle is a bad one. It was a new one and a bad one. The position here is very simple. Telefonica was a party to a dispute between private parties. That result was resolved by Ofcom in its favour. BT then brought an appeal exercising its right under Article 4 of the Framework Directive to an appeal in which the merits are duly taken into account and under which it has enjoyed a right to an effective appeal mechanism. As Mr. Pickford showed you, sir, just ten minutes ago, Lord Justice Toulson confirmed in the now well traversed judgment that such an appeal is not confined to the merits as they appeared at the time. In our submission, what this means is that the private parties involved, not only BT, but the other private parties are free to adduce further evidence

subject of course to the discretion of the Tribunal, and what Mr. Beard says is that they cannot defend the decision on a basis different to the regulator.

In our respectful submission, there is just no good reason for the constraint at all as a matter of principle. Of course, Telefonica is not the regulator. Telefonica did not promulgate the decision. Inevitably, even in an ordinary case where the law has not changed fundamentally, it is possible that even the victor might be less than entirely satisfied with the ruling.

The *Dairy* case that Mr. Beard showed you, sir, is, of course, concerned with a different situation. A regulator imposes a penalty under the Competition Act. That penalty is a criminal charge in conventional terms. It triggers rights of defence on the part of the suspect, to use that word. They receive a statement of objections, they receive access to the file. Then they appeal if they wish to. What the Tribunal says in *Dairy* and the other cases is that the OFT, as it then was, could not then move the goalposts and say, "Actually, we had a statement of objections, even though we gave you access to the file, we now have a whole load of new reasons why we think you contravened the Competition Act." There are obvious powerful public policy reasons for that, but they have absolutely nothing to do with the position of a private party to a private dispute which has had a determination by a regulator. In our respectful submission, the position must be that not only BT but the other side must also be allowed to advance fresh material, subject of course to the discretion of the Tribunal, because otherwise one would come to a quite absurd position where the successful party in a dispute would have a strong incentive to file a protective appeal. It would sit and say, "We won, but we had better appeal just in case because otherwise we will not be allowed to ever adduce any further considerations that expand upon what he regulator has decided". Sir, that would be a recipe for enormous procedural diseconomy and we respectfully submit it cannot be right.

Anyway, in this case, of course, we are dealing with a specific set of circumstances, namely a fundamental change in the law that occurred between the time when Ofcom considered the dispute and the position we find ourselves in now. It is very, very important from the point of view of the approach taken by the MNOs to the dispute. Where we were was that we knew that, under the judgment of the Court of Appeal, Ofcom was exercising a value judgment about how to weigh the various risks and the various costs and benefits. Now, of course, we have a firm standard of proof that must be discharged.

That change in the law has triggered BT's amendment, which we have consented to, but of course it has affected our position as well, and what we want to do is address that from the perspective of the other party to the Decision.

Sir, very briefly, Mr. Pickford has urged remittal upon you. You have made clear, sir, that you are not minded to take that course today. We do respectfully agree with Mr. Pickford that the appropriate course would be remittal, as indeed that would be the usual course where a public authority has clearly proceeded on a wrong basis, and here, of course, Ofcom has, itself, said that it is willing in principle to consider Principle 3, where of course it reached no determination. So, it would be, in our submission, sensible and convenient for everything to go back at the same time.

Also, we submit, it does rather cut through this debate about fresh grounds and fresh evidence, again for the reasons Mr. Pickford gave, namely that a decision maker, exercising public authorities, has a duty to consider all relevant considerations when it is acting in the public interest. Of course it is right, sir, as you put to Mr. Pickford, that the Tribunal could give a very narrow direction that somehow cut through or cut down that obligation, but, in our respectful submission, it is very hard to see why that would be an appropriate or fair way to dispose of the appeal.

Sir, what I have about Ground 1, limb 2, also applies to Ground 3, the question of practicality, so I do not propose to expand on that further.

On timetable I heard you say, sir, that we can address those matters at a later stage once you have decided on at least the first stage of how these appeals will go forward.

Sir, would you give me a moment. (After a pause) Mr. Pickford points out to me, sir, which I will just put to you for your consideration: dealing with the question of what direction the Tribunal might make regarding reconsideration by Ofcom, s.195(5) of the Act says that the Tribunal must not direct the decision-maker to take any action that he would not otherwise have power to take in relation to the decision under appeal. Of course, he would not otherwise have the power to fail to have regard to material considerations.

Sir, it is an argument for another day, but what we do say is that remittal does offer a way through these now probably overly protracted debates about how the case can proceed.

We do not make an application under Rule 22, but we accept it is inevitable that we will have to if the case proceeds in the Tribunal.

Unless I can assist further, sir, those are our submissions.

THE CHAIRMAN: I am grateful, Mr. Ward. Mr. Beard?

MR. BEARD: I am conscious of the time, but I will not be particularly long in reply. Is it sensible for me to just briefly deal with things?

THE CHAIRMAN: I was minded to see if we could wrap up before the short adjournment, so do proceed, Mr. Beard.

MR. BEARD: I am grateful. On this occasion I do not think I have much to say about Mr. Herberg's submissions, except one point. He keeps saying that the points raised in the Supreme Court were new and that Ofcom did not know about that. Apart from Ofcom fighting terribly hard to be a party in the Supreme Court proceedings, it is simply not right that at the time of the determination the arguments that had been raised by BT were not matters that BT was relying upon before. You can see that in the determination, tab 11, para.7.6.

THE CHAIRMAN: Remind me which bundle I find that in?

MR. BEARD: It is the notice of application bundle, tab 11, 7.6. Ofcom put in terms of "regulatory absence", which was that funny term that the Court of Appeal used in relation to these matters. The essence of the point is set out there in 7.6 and 7.7. More particularly, it made very clear that the points that we are raising are the ones being raised in our appeal to the Supreme Court. We say that it was those points about what we say are Ground 1, limb 1, in other words, it was only end to end connectivity on which you could interfere, or, effectively, the burden was put the wrong way round, which was Ground 1, limb 2, that were raised. For the MNOs to say these are new points that were not raised by BT and therefore by some sort of comity of reasoning they should be able to put in new issues is simply not right.

It is confirmed in 7.12:

> "Therefore, while we note that BT disagrees with the CoA's position on how the absence of regulation should be treated (and has appealed the CoA's decision to the Supreme Court), we consider the CoA's position represents the law as it currently stands and that it is appropriate for us to follow that approach …"

You go through to the end of 7.13 and you see:

> "BT believes that in a market which is not regulated, the burden is on the party resisting the change (the MNOs in these Disputes), to demonstrate that the change is contrary to the objectives set out in the EU Telecommunications Directives."

That is Ground 1, limb 2.

I will not go further on that, but I will pick up another legal, this time not Mr. Herberg's. This is Mr. Pickford's submissions on s.195. There are various terms that could be used to typify what Mr. Pickford had said, but if we just go to s.195(3) and (4) itself, what we see is, after 195(1), you should dispose of an appeal brought to you under 192(2):

> "(2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

So that is a final determination that you can take.

> "(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision maker to take in relation to the subject matter of the decision under appeal."

"If any", so it is not envisaging that it always has to be the case.

> "(4) The Tribunal shall then remit the decision under appeal to the decision maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision."

If Mr. Pickford is saying that 195(4) requires the Tribunal to remit any decision to the regulator, Ofcom, where an appellant is successful that is plainly wrong. That is not what 195(4) is saying at all.

MR. PICKFORD: I can assist, Mr. Beard, that is not my position.

MR. BEARD: The position is that the Tribunal, as it can in merits appeals in other jurisdictions, can determine these matters and should determine these matters.

Indeed, it is just worth noting in passing, of course, that we do have parallel proceedings behind which these were stayed, the 08X proceedings. It has not been suggested by anyone that the outturn of the Supreme Court ruling is that there should be a remittal to Ofcom. Indeed, it becomes transparent that Mr. Pickford is simply trying to reopen everything on the basis of new argument and post-decision evidence, and we do not accept that post-evidence is admissible, and we do not accept that Lord Justice Toulson's judgment remotely suggests that post-decision evidence is admissible, even in relation to merits appeals, but that may be a debate to be had if they try to press the point of submitting such evidence in due course.

In relation to the point about what sort of new analysis is needed, Mr. Pickford has not explained why, on the basis of the Supreme Court findings, Supreme Court findings that have not warranted any sort of remission in relation to those ladders, there needs to be new analysis of matters under Ground 1, limb 2, nothing at all in relation to that.

On law, just in passing, of course we do have the situation where Lord Justice Toulson has very clearly said in para.63 that the approach to evidence adopted in relation to Competition Act appeals by the Tribunal is instructive in relation to these matters.

Briefly then on the points that Mr. Pickford raised, obviously these may be debates for another day. On the contract points, those are entirely new, points he plainly could have put in earlier. This is more than merely a marker. There is no basis on which those could be pursued before this Tribunal. He then says that there is a whole heap of new evidence and there is hive of economists buzzing away preparing these matters because they could not possibly have been putting in evidence in relation to these matters about consumer welfare, and so on, at the time.

I would simply refer the Tribunal to 7.62 onwards in the decision where, in particular, Everything Everywhere sets out very detailed empirical evidence with the assistance of teams of economists in relation to those matters that were put before Ofcom. It is a badly made point in those circumstances.

His third point relates to the Monte Carlo analysis. We have made clear that in relation to Ground 2 which relates to the Monte Carlo analysis, we see no need for that to be pursued at this stage before the Tribunal because Ground 1, limb 2 will dispose of these matters.

THE CHAIRMAN: Can I just interrupt there? Assume for the moment no remission, it is simply case management. How do you propose that we case manage the fact that there are some issues which, in terms of determination rank behind others. So Ground 2, for example, is one which you say does not need to be determined, provided Ground 1, limb 2, is determined a certain way. The problem we have is that there are going to be, it is quite clear, applications under Rule 22, which I do not wish to anticipate today, because it would be unfair on all of you to do so. Given that is the case and, given therefore, there is at least the possibility that those applications may be successful, and if successful may result in a different outcome on, let us say, Ground 1, limb 2, what do we do about Ground 2. Do we park it for the distant future, or do we say let us have BT's evidence now, to which – if so advised – the interveners can respond, so that all the issues at least are there ----

MR. BEARD: We say 'park it' because it is not just Ground 2, it is obviously Ground 1, limb 1.

THE CHAIRMAN: Limb 1, I agree.

MR. BEARD: So we are concerned to try and deal with this matter as expeditiously as possible, entirely consistently with the proper obligations that the Tribunal has in making case management decisions. We say you could open up Ground 1, limb 1, and have a long discussion about the applications, the Directives, and logically, if we are right on Ground 1,

limb 1 everything goes away. We say that plainly is not sensible in circumstances where those matters were argued before the Supreme Court but it was not determined, but they determined Ground 1, limb 2, and in those circumstances much the most practical way of dealing with this is to park Ground 1, limb 1, park Ground 2 and deal only with Ground 1, limb 2, and Ground 3. That seems to us to be sensible. We are not conceding on either of those points but it would be wholly disproportionate to start a process that involved the putting in of submissions and potentially further evidence in relation to Ground 2 at a time when that may be wholly unnecessary, and in circumstances where the suggestion that there is going to be a raft of new evidence that is admissible and is appropriate is, at best, shall we say 'speculative'.

THE CHAIRMAN: It is speculative, Mr. Beard, that is true, but I suppose what I am getting at is obviously you are entirely happy to park these additional grounds if you succeed and get what your clients want, under Ground 1, limb 2. What I am considering is the alternative scenario which is a Rule 22 application is successful and that application is again changed. At that point are you going to be popping up saying: "Actually, we would like to start progressing our other Grounds as well, because we may win on those".

MR. BEARD: We are not conceding those other Grounds, they are being parked and, therefore, to some extent whatever happens in relation to the Rule 22 application does not suddenly undermine the existence of those other Grounds.

THE CHAIRMAN: No, it does not undermine them, what it does though is it slows down their determination, should it become relevant to determine them. If you are happy to put them ----

MR. BEARD: Yes, but this is the more efficient course, that is why we have put it forward. That is why, I think, Ofcom agree that dealing with Ground 1, limb 2 and Ground 3 is a sensible course. We recognise that if, for whatever reason notwithstanding the Supreme Court, we lose on Ground 1, limb 2 on an appeal, then in those circumstances we would end up with a situation where you had effectively split the trial issues.

THE CHAIRMAN: So what you are seeking effectively is a stay in respect ----

MR. BEARD: Yes.

THE CHAIRMAN: -- of all Grounds except 1, limb 2, and 3?

MR. BEARD: Yes, that seems to us to be the most sensible way of dealing with it.

THE CHAIRMAN: I am not saying it is a bad idea, I simply want to be absolutely clear.

MR. BEARD: That is the reason we are focusing on those because we say that is the way that this case can be most sensibly and expeditiously case managed in the light of the Supreme Court

determination because if, as we say, the Supreme Court disposes of Ground 1, limb 2 and there is nothing really in Ground 3, then in those circumstances, that is really the end of this case, and you do not need to get into anything more, which is why we have put it forward as we have done.

Obviously, if the unforeseeable occurs and there is some reason to revisit these things we will have to look at it, but at the moment that seems by far the most sensible and efficient way of doing it and that is why we have done this, because what we are effectively doing is taking account of the fact that there was a stay pending the Supreme Court, the Supreme Court comes out in our favour, how do we feed that in most effectively and efficiently in this case? That is the way to deal with it.

Those were the first three points – contract points, new evidence points, Monte Carlo on Ground 2. Then, Ground 3, again Mr. Pickford is positing putting in post-Decision evidence. Again, we put down more than a marker, we do not see on what basis that can possibly be right in these circumstances. His comments on the interpretation of para. 3.115 I think are perhaps for another date, but we should say it is wrong.

As for Mr. Pickford's protestations that it would be disproportionate and strange if a legal approach here precluded them putting in new or post-Decision evidence, because it was all terribly difficult and they did not know what the legal test was going to be, this Tribunal has given some clues as to what the alternative approach on the law might be, if the Supreme Court appeal was successful. They knew that. They knew that when this dispute was being dealt with. It is wholly disingenuous for the MNOs to come forward and say they did not know about the possibility of different legal test outcome here. They knew it, they took the risk of not dealing with matters in the alternative. They put in vast amounts of material and Mr. Pickford's attempt to say by analogy with the 08X case that somehow there was real doubt here and one did not know what was going on, that is wrong. In that case the concern was that Ofcom had left the situation where the scope of the dispute was mis-appreciated, so no one knew what sort of material you might be able to put in and was relevant. Here, there was no doubt as to the scope – it covered legal issues and the relevant factual expert issues, and for the MNOs to say we did not know whether or not we might need to put in material relating to particular legal issues in the circumstances, it is just not a credible position to take.

As I say, in relation to the consideration of what should be put in now, the reference to *Tesco*, although Mr. Ward and Mr. Pickford have both sought to distinguish it, we recognise that there are differences between Competition Act and Communications Act cases, but

what is instructive is how Lord Justice Toulson said that those principles that applied in relation to evidence pertaining to Competition Act appeal cases were relevant to the consideration of these dispute cases.

Finally, just picking up one or two points from Mr. Ward, he stresses that he should be able to put in anything because really this is just a commercial dispute between BT and the MNOs, and if it is a commercial dispute you can jolly well put in what you like because parties are free to decide the scope of it. The rhetorical question is: what on earth is the point of an Ofcom Decision on his basis? It just does not make any sense. Actually, what you have is a regulatory structure through European law and domestic law that does put Ofcom into the process as a regulatory decision maker. In this case it carried out a very wide ranging consideration but it got its legal categorisation wrong. That is a simple and narrow point that this Tribunal can and should deal with. There is absolutely no ground for remission, indeed, it is wholly premature in the context of a case management hearing.

Unless I can assist further, those are the submissions of BT.

THE CHAIRMAN: Mr. Ward?

MR. WARD: If I can just make one point on what Mr. Beard said. I am slightly concerned about the approach being take to Ground 2, the Monte Carlo simulation. It might be just convenient to turn up under tab 41 of the CMC bundle, the marked up notice of appeal. Can you turn to p.29 of the notice of appeal, which is where Ground 2 gets going. I am not going to detain you, sir, with the details of it. If one reads para. 71:

> "In the further alternative, even if Ofcom was right to include Principle 2 in its analytical framework and was entitled to reject the NCCNs solely on the basis of a material risk … of resulting consumer detriment, it was wrong to find that there was any material risk …"

And it was wrong because of the Monte Carlo simulation which they go on and say in essence demonstrated that there was not such a material risk.

Plainly, that Ground of appeal is targeted to, if you like, the old legal test, the question of whether there is a material risk, but the reason why we are just a bit concerned at the idea that this Ground can be left in abeyance is that if we find ourselves in a position that the Tribunal is allowing the MNOs to advance arguments of substance about the welfare test under Principle 2, this argument of BT's is an argument of substance as to what the welfare test should reveal and is, of course, in a sense at polar opposite to the position the MNOs maintain. The MNOs maintain the Supreme Court's test is satisfied. BT will presumably want to argue on the basis of the Monte Carlo Analysis for the opposite proposition.

Again, it may not be an issue for today, but it is hard to imagine the Tribunal having two trials on what would amount to essentially the same issues. In other words, where does the welfare test come out?

That is really all I wanted to say today.

MR. PICKFORD: Sir, I have 30 seconds, if I may? Mr. Beard chastised me for not addressing a point which I did not actually understand him to have made. He said that I offered no explanation for why this case is different from what happened in the Supreme Court, where the court decided that that was the end of the road and that no further matters need to be decided. There are two differences. The first is that in the Supreme Court case the MNOs were not labouring under a misapprehension as to what the correct legal test was at the time of the original decision by Ofcom, because there was no Court of Appeal Judgment in that case. The second one is that in the Supreme Court case the Tribunal had made findings of fact. We are not at that stage yet, we are arguing about whether, in fact, it should be for Ofcom to make those findings of fact or for the Tribunal.

MR. HERBERG: Sir, Mr. Ward has my point; I was rising to make the same point. I would merely invite you, sir, not to decide on questions of what should be parked and not parked at this stage. It clearly makes sense to park Ground 1, limb 1, but there are potential problems in parking Ground 2, because it can be seen, as it were, the other side of the same coin as the expanded MNO Grounds on the hypothesis that they might be allowed to argue them.

THE CHAIRMAN: What we are talking about is parking the evidence, and my question, I suppose, for Mr. Beard or, indeed, yourself, is whether one should park it until we are hearing and determining whatever Rule 22 applications are made. It may be that the Rule 22 applications are unsuccessful, the stay should be extended. On the other hand, it may be if they are successful, depending on how they are successful, Mr. Beard's position may change, I do not know.

MR. HERBERG: Sir, I see that, yes. I was only addressing the latter point.

MR. BEARD: I was going to rise and say the same thing. Mr. Ward's point is made on a working assumption that he is going to be able to put in lots of new evidence, dealing with matters which we are not happy about, I think ----

THE CHAIRMAN: No, to put it mildly, I think. That is the problem we have.

MR. BEARD: Yes, I understand that but for the moment one should proceed on that basis and what they are then putting in evidence in relation to, they are seeking to, is Ground 1, limb 2, and Ground 3, and then we will see them later.

THE CHAIRMAN: Right. Thank you all very much. What I am minded to do is rise now until quarter past two. At that point, I hope to give you a ruling, though perhaps not with any reasons, on the question of remission and what I suggest you do, in addition to having a well earned lunch, is give some thought to directions going forward on the basis that I elect not to remit the matter, but I stress that it may be the work is wasted, of course, if I decide to remit, but I think that will be time well spent, and if we resume at a quarter past two, hopefully we can get some directions ordered.

(Adjourned for a short time)

THE CHAIRMAN: Good afternoon, everyone. Before we turn to the question of directions, briefly on the question of remission of any matters to Ofcom under s.195, I have given this considerable thought, and I have some doubt about the ability to remit under s.195 in the present circumstances in any event, but irrespective of these doubts, even if there were jurisdiction, it does seem to me that it would not be right to exercise that jurisdiction at this stage – I stress that.

I was very impressed by the submissions of Mr. Herberg on behalf of Ofcom that a 'wait and see' approach should be adopted, and my conclusion is that that is exactly what we should do in this case, wait and see until the pleadings are fully evolved and take a decision at a later stage. So, that deals with the question of remission. Then it is really a question of identifying what directions need to be made for the future conduct of this matter. Yes, Mr. Beard?

MR. BEARD: We have endeavoured to have discussions over the short adjournment. I do not think there is complete agreement in relation to them. I think obviously the first direction that is going to be required in these circumstances is permission of BT's amendment pursuant to Rule 11.

THE CHAIRMAN: Yes, well shall I go through and we can all see whether we agree, or disagree with what I have got.

MR. BEARD: If, sir, you have a list, then sorry.

THE CHAIRMAN: I have a list. The first one was forum, under Rule 18, the proceedings be treated as proceedings in England and Wales, and I assume that is not controversial.

Permission to amend, it seemed to me that we should say something like permission to amend pursuant to Rule 11(3)(a) and 11(3)(c) BT be granted permission to amend its protective notice of appeal in the terms of its draft amended notice of appeal. It seemed to me that we should deem service of that, today, Mr. Beard?

MR. BEARD: Happily, yes.

THE CHAIRMAN: Next, the stay that we mooted, and it seems to me we simply say there that BT's Ground 1, limb 1 and Ground 2 of its draft amended notice of appeal be stayed until further direction by the Tribunal, and we will make clear that there should be no prejudice to BT in not serving any evidence at that is time by reason of that stay.

Then, on the question of intervention, that Gamma be permitted to intervene in support of BT, and that – if I can compendiously describe them as such – the MNO interveners be granted permission to intervene but on this basis, and I will read this quite carefully and, if necessary, hear submissions on the point:

> "Without prejudice to any application that may be made:
>
> (i) under Rule 22 of the Tribunal's Rules and/or
>
> (ii) to introduce into the appeal a new ground justifying the decision not advanced by the interveners before Ofcom. The MNO interveners be permitted to defend the appeal on any grounds that Ofcom could have advanced had it been so advised."

Then, supplementarily:

> "The statements of intervention of the MNO interveners shall plead, but identify separately and distinctly any point which, in order to be made requires one of the two sorts of application described in the previous paragraph."

To be clear, the point is I want all cards on the table by the time we are next assembled. It seems to me that there are two points of controversy that are going to arise on that occasion. One will be new evidence under Rule 22, and the other is precisely what points can and cannot be advanced by the MNO interveners when they are acting effectively as the private respondents to a decision made by effectively a third party arbitrator like Ofcom. It does seem to me that those are both points on which no position should be taken at this stage, but we do need to be clear that those points may emerge so that we can have a proper debate in due course.

Mr. Pickford, Mr. Ward, do you have any points in relation to that?

MR. PICKFORD: Sir, I will just take instructions on the latter point. There is one point, however, in relation to the stay, which was canvassed earlier, but we would say that it is relevant in the directions context and so we should consider it now, which is that if Ground 2 is to be stayed, that causes some difficulties in relation to the consequential directions because in order to plead our statement of intervention ----

THE CHAIRMAN: You would need to address Ground 2?

MR. PICKFORD: We need to address Ground 2. We need to know the scope of what we are going to meet because that will shape our intervention, and then the Tribunal will not

properly be able to assess our intervention and the two questions that it wanted to determine about (i) the legitimacy of the points; and (ii) the legitimacy of the evidence without knowing what it is that we are responding to because obviously if we are responding to something that BT has pleaded it would be very hard for BT to argue that we should not be allowed to do that. So we really do need to have the full scope of the evidence that we are going to have to meet set out prior to us putting in our statement of intervention. That does not apply in relation to Ground 1, limb 1 because that is a purely legal matter which can be held over, but we say it does arise in relation to Ground 2.

THE CHAIRMAN: Mr. Beard, what do you say to that?

MR. BEARD: I am not sure I fully understand, because Mr. Pickford says I can deal with Ground 1, limb 2, which is the one that is live. He can deal with Ground 3 on practicability, we can see that. In circumstances where Ground 2 is stayed he does not need to deal with it. In those circumstances it is very unclear as to why it is there needs to be any sort of non-stay, further disclosure of material in relation to it. This is precisely the sort of creeping expansion of the case that we are most concerned about. It is the sort of thing that we do need to keep under fairly tight control. There clearly is no need for it.

MR. PICKFORD: We do say that it cannot be held in abeyance because Ground 2 goes to Principle 2, and therefore overlaps with all of the issues that we have articulated that we want to address. Therefore, it simply does not make any sense to deal with it in the way BT suggests. It is BT's appeal, and the rules are very clear. Obviously, there was an exception pursuant to the Tribunal's order of 8th August in relation to the evidence that BT had to advance, but in any ordinary case, BT is expected to advance its grounds and all supporting evidence that go with those grounds, and we say there is no sensible reason for diverting from that normal process here, precisely because if you do we are going to end up in all sorts of complications in terms of how we then go on to deal with the issues and the Principle 2, because they are going to be partitioned, and what will happen is that if we are able to make certain points we are then going to see that BT has to bring Ground 2 back in to play and that is going to be procedurally inefficient because at that point we will have to respond to Ground 2. We may want to have new evidence in relation to that that will overlap arguably with the evidence that we wish to adduce ourselves in any event on Principle 2, and there is no good reason for that other than the fact that BT wants to hold it back now, that is not ordinarily the case. It would be far easier to just allow ----

MR. BEARD: It really is not. The whole purpose of seeking the stay in relation to Ground 1, limb 1, and Ground 2 is to keep this streamlined. We understand the MNOs want to make a

"Dirk Gently's Detective Agency" submission that there is a great interconnectedness of all things and therefore once you start pulling at Ground 1, limb 2, because that is dealing with Principle 2, you will have to look at the evidence in relation to Ground 2, and once you are looking at the evidence in relation to Ground 2, BT might want to be able to put in some more, and then we might be able to respond to that. Then they may want to put in rebuttal evidence, and before you know it is 2016 for the hearing.

This is in relation to a dispute resolution process that was supposed to take four months. We are trying to put forward proposals that apply some sort of discipline and prevent precisely what Mr. Pickford is inviting this Tribunal to do, which is to pull at a thread and let the whole jumper unravel.

THE CHAIRMAN: As a matter of interest, Mr. Beard, can you help me on this, if you were to put in evidence on Ground 2, how quickly could you do it?

MR. BEARD: I just do not know the answer to that. The difficulty would be as to what it is we are dealing with in relation to Ground 2, because we all agree that Ground 2 does not need to be dealt with if Ground 1, limb 2 determines these matters, because, of course, that is not the issue at stake. The appeal we brought was on the basis that we had failed in the Supreme Court then we would need to rely on Ground 2. Our appeal succeeded in the Supreme Court therefore Ground 2 does not need to be pursued at this stage.

THE CHAIRMAN: I appreciate that, Mr. Beard, but one always has contingent grounds. I do not think that is necessarily a good reason for staying Ground 2. That said, for the other reason articulated it does seem to me that we will have *pro tem* a stay because it is going to be a question really of what happens after the next CMC in this matter, where we debate the question of the width of the MNO interveners' cases. I appreciate that it is unusual. Normally, one has all cards on the table first but this is, I am sorry to say, an unusual case, and for that reason I am minded to stick with the formulation of the stay of Ground 1, limb 2 and Ground 2, until further direction, but to be clear I am expecting that that matter will be resolved as far as Ground 2 is concerned at the next CMC. Mr. Beard, you should be under no illusions that if it proves to be the case that you must deploy and move on Ground 2 your clients will have to move quite quickly.

MR. BEARD: I am sure those behind me hear you.

THE CHAIRMAN: Mr. Ward?

MR. WARD: Sir, I wanted to address you on a different point arising out of your initial Ruling, namely the scope of intervention permitted to the MNOs. I suppose I fear it is yet another marker, but if I may? You gave Gamma an unrestricted right to intervene, whereas in our

case you have asked us to identify certain potential applications that may be made. You appreciate from the submissions made before that we would not accept, respectfully, that our position is different from Gamma, but obviously that is not an argument to pursue further today, so that, I think is a pure marker.

The second point, which may be in the same category, is that you have asked us to go beyond what Ofcom would be permitted to adduce, and in that respect we do again reserve our position entirely. We have not had full argument today about what Ofcom itself could or could not do. Our concern, primarily, of course, is what we are permitted to do as interveners. I am not seeking to resist the direction that you have made, but merely observe the issues that it creates for us.

THE CHAIRMAN: I do understand that. The fact is that Gamma's position is that of an ordinary intervener, and what Gamma will be doing is assisting but in a very short and limited time frame on points that it is supporting BT on and we anticipate that the room for manoeuvre that Gamma will have will be the extremely limited room that is accorded interveners ordinarily. You, the MNOs, are in a rather different position, and actually the order that I have made is envisaged to be protective rather than restrictive.

MR. WARD: Sir, I appreciate that.

THE CHAIRMAN: It is simply identifying the fact that it is clear we are going to have major argument both on Rule 22, and on what the Court of Appeal said in the 080 evidential Ruling, and I do not want to have a debate today because I do not think it would be fair to anyone to do so.

MR. WARD: I am not seeking to pursue it any further. No doubt Gamma will bear in mind the remarks that you have just made.

THE CHAIRMAN: I am sure they will. They are not here today, I know.

MR. WARD: They will be anxiously reading the transcript.

THE CHAIRMAN: I am sure they will be reading the transcript, and if they do not they will be reminded the next time they are here.

MR. PICKFORD: Sir, you asked for our comments also in relation to that Ruling.

THE CHAIRMAN: Yes, I did.

MR. PICKFORD: The one point we would make, and it may just fall into the category of marker, rather than anything substantively that needs to be decided. As I understand it, if I have it down correctly, the Ruling envisages that we will make an application to introduce new points.

Now, strictly speaking, we would say that under the Tribunal's Rules there is no such application that is required, but obviously the Tribunal can direct us to do so.

THE CHAIRMAN: Sorry, you are talking about an application to introduce a new Ground?

MR. PICKFORD: New Ground, yes. What would ordinarily happen is we put in our statement of intervention and then BT, if it wanted to, would object to it. I do not think anything comes of that because obviously the Tribunal is entitled to direct us to follow a particular procedure, but just so we are not being taken as having conceded it.

THE CHAIRMAN: Mr. Herberg will remember this debate from long, long ago when the question was: who makes the application to admit new evidence? Is it the person who wants to admit it, or the person who wants to exclude it, and I am afraid the chicken and egg debate that that gives rise to is one that I really do not think we want to have. It seems to me that we may well have an argument about whether, in fact, a point is a new point or not a new point, and that will have to be dealt with, but I am asking the interveners, since they are drafting this document, to be clear so that all parties know, and the Tribunal knows, what exactly they are requiring new evidence for.

It may be that Mr. Beard will stand up and say that, actually, there are a whole series of points which you say you have the right to advance without any form of permission which BT disputes - we will have to have that argument in due course.

MR. PICKFORD: Yes.

THE CHAIRMAN: Thank you, Mr. Pickford. That brings me to the date on which the respondent should file and serve its defence and any supporting evidence. Mr. Herberg, I do not know if you have any views as to when that can be done?

MR. HERBERG: Sir, subject to two points it can be done very quickly. The first point is that ordinarily we would have Gamma's intervention, I suppose, before we filed a defence, since they are supporting BT. It may be, given the nature of our defence in relation to BT, that Gamma is not going to make a big difference, and we do not need to be held up for that to accelerate the procedure. What we are contemplating in terms of our defence, lest there be any doubt about it, is effectively to follow the position that we have outlined in our letters to the court and on which this hearing has taken place, namely, literally a one or two page job, because at this stage there is no new evidence and therefore our simple position, which we have outlined, obtains. Even on Ground 3 we will make a recognition that the thing falls to be either remitted back to us or determined by the Tribunal, but we are not proposing to advance a substantive defence.

On the basis that that is acceptable I would ask to have 14 days, which might seem a lot in the circumstances but we can do it in that time - we have some absences to deal with, but certainly we could do a defence on the basis which we propose to within 14 days. I do not think that there is any need for us to wait for Gamma interposition first, as long as obviously if there are new points in the Gamma intervention we might have to amend to deal with them, or something of the sort.

THE CHAIRMAN: No, but you do make a good point in relation to Gamma. Unfortunately, of course, there is no one from Gamma here to assist us. I do not know, Mr. Beard, whether you can assist.

MR. BEARD: I am sorry, I cannot. We have the material from Gamma here, I cannot make any commitment on their behalf, I am sorry.

THE CHAIRMAN: I think we need to make an order but, given the position Mr. Herberg adopted, he would, slightly controversially, select the same date, 14 days from the date hereof for Gamma to serve its statement, it being understood, Mr. Herberg, that you would obviously be able to address any additional points.

MR. HERBERG: I am grateful. I say that on the basis that, having seen what they have said so far I am not anticipating Gamma to be running entirely new points that BT are not going to run.

MR. BEARD: That is what we certainly take from their submissions to date.

THE CHAIRMAN: That then leaves the interveners to file and serve their statements of intervention, the MNO interveners I mean, and their supporting evidence. I do not know, Mr. Pickford, if you have a date in mind?

MR. PICKFORD: Sir, just before we get into that, I do not think we have addressed when BT is going to provide its evidence on Ground 3, because Ground 3 has not been ----

THE CHAIRMAN: As I understood it, Mr. Beard was standing on election and not ----

MR. BEARD: There is material that has been put before Ofcom. We are not putting in fresh evidence in relation to Ground 3.

THE CHAIRMAN: Mr. Pickford, he stands or falls on that.

MR. BEARD: It is the material that has already gone in.

THE CHAIRMAN: So, we have the notice of appeal deemed served today and there is no evidence given the other orders we have made.

MR. PICKFORD: To be clear in relation to Gamma, it is my understanding it that it is 14 days from ----

THE CHAIRMAN: From date hereof.

MR. PICKFORD: From date hereof - coincidental - right.

THE CHAIRMAN: That is slightly rough justice but they are not here to object.

MR. PICKFORD: We would say that prior to service of our statement of intervention there do actually need to be a few further directions that the Tribunal can make now that will assist us with that. The first is that we will need to have a confidentiality ring, set up.

THE CHAIRMAN: Of course, you are quite right.

MR. PICKFORD: Secondly, we will need Ofcom to make disclosure into that confidentiality ring of the following:

(i) the confidential version of its Decision.

(ii) the confidential model that it used for its Decision; and

(iii) the full and confidential versions of all of the submissions and evidence that it relied upon in coming to its Decision.

THE CHAIRMAN: Mr. Herberg, are there any problems with that?

MR. HERBERG: There are no problems with that in principle. I just need to take instructions, however, on timing. Some of those documents are readily available, such as the confidential version of the Decision. (After a pause) Sir, we will obviously try and do it as quickly as we can. Can I have 14 days for it? If there proves to be an unexpected difficulty that those instructing me are not aware of we may need to then make an application by letter or something, but at the moment we see no reason why it should not be a relatively quick process. Obviously, the confidential version of the Decision we can do immediately.

THE CHAIRMAN: Mr. Herberg, what I suggest we do is that we have these dates as provisional dates and we circulate a draft order including the points that Mr. Pickford has very helpfully made. If, in the next 48 hours or so, it proves to be the case that the dates that we have provisionally ordered are ones that cannot be met and they need to be extended, then we can deal with that, perhaps, by amending the draft order rather than anything else. So that will deal with the point on confidentiality rings and material to disclose in there and, indeed, if there is a point on Gamma.

MR. HERBERG: Sir, I am grateful.

THE CHAIRMAN: So, Mr. Pickford, assuming Mr. Herberg's clients can make the 14 days, what would be your timetable and, indeed, Mr. Ward's timetable on statements of intervention?

MR. PICKFORD: Sir, our position in relation to that is ordinarily, but for two points that I am going to come to, if we were stepping into effectively Ofcom's shoes, and making the case that we would have appointed Ofcom to make, we would have asked for six weeks in order to do that. However, I am going to ask for eight weeks, and there are two reasons for that.

One, is that six weeks takes us, I think, right into the middle of the Christmas holiday period - that is six weeks from the date at which we receive the ----

THE CHAIRMAN: From the date on which this is introduced into the confidentiality ring?

MR. PICKFORD: Indeed.

THE CHAIRMAN: Six weeks is what you are seeking.

MR. BEARD: Just to put down a marker - there are many markers - this sort of timetable where Mr. Pickford is suggesting that he sets his hive to work on a vast amount of disclosure he thinks he is going to be getting from Ofcom and starts reconstituting a decision is not appropriate in the context of this sort of appeal. Again, I go back to the point, four months is dispute resolution process. We quite accept, as a matter of law, that Mr. Pickford can step into Ofcom's shoes if it is not defending, but the idea that then this whole process is extended out well beyond Christmas, when we are looking at situations concerning us then opposing any matters, pertaining to their evidence or issues raised in the SOI which could not then be done until after Christmas, a hearing that is then pushed back until February - we are well beyond the time for the whole dispute resolution process from now. That is simply not reasonable in these circumstances.

It seems to us that it is important that the Tribunal imposes a very significant discipline on the interveners in relation to these matters. They clearly have in mind, and Mr. Pickford made submissions that his hive is buzzing away already in relation to these matters, that he was well able to put forward his material in relation to these points already. It should not depend on the further disclosure and we say that he should be able to do this within 28 days from now.

MR. PICKFORD: Sir, it is very helpful for Mr. Beard to elucidate his position, obviously, I had not, in fact, explained the reasons why we say that we should be entitled to the amount of time that we have requested.

BT fails to articulate any particular urgency as to why this has to happen in four weeks rather than eight weeks. There is no particular prejudice it will suffer depending on that particular timetable. The reason why we do need the amount of time that we have asked for is as follows. Ordinarily, in a case such as this Ofcom would often be afforded quite a considerable period itself, if it were putting in a defence. Its defence is often extended very substantially beyond the six week starting point and we do have a lot of work to do if we are going to be responding in the way that we would wish to.

If we are subjected to a very strict timetable now that will effectively prejudge the issue which this Tribunal then has to consider as to the scope of what it is legitimate for us to say,

because Mr. Beard's submissions depend on his submission that he wants to make in a couple of months' time that we should not be allowed to do any of that. As the Tribunal has rightly pointed out, you are not approaching that issue and deciding it now; that needs to be determined later.

There are considerable difficulties in terms of acting very swiftly in relation to this. For reasons of economy, which will assist BT, all MNOs are joining forces in relation to the experts that we are instructing. So Telefónica and three MNOs are all going to instruct the same experts.

However, because there are then four parties, each with confidential information, and their own interests and views to articulate and I can tell you that is quite a complex procedure to deal with and it adds to the amount of time that we need to be able to present our case effectively.

As I said, eight weeks is only an additional two weeks allowing for the Christmas holidays, on top of the six weeks that is the very minimum that Ofcom would be afforded. In all the circumstances we would suggest it is entirely reasonable, and there is no good basis that has been advanced by BT as to why we should not be allowed a sensible period of time in which to respond to BT's case on what may be quite substantial issues.

THE CHAIRMAN: Mr. Beard, do you wish to respond?

MR. BEARD: Yes. My understanding is that these NCCNs actually expire in June next year. It is in relation to a dispute raised by the MNOs in 2012. Of course, there was a stay pending the Supreme Court. That was on the basis that the Supreme Court would be effectively determinative of these matters.

The MNOs now come forward and say that actually the Supreme Court is not determinative, we have all sorts of things we want to say. Now, they say they will need another eight weeks before they can work out what it is they are going to say that makes it clear that, in fact, the Supreme Court does not determine these matters. These issues are precisely the sorts of issues that if they thought they had any merit should have been the subject of work and preparation already. They should not depend on the disclosure that Mr. Pickford is now seeking. They are matters where statements of intervention should be made very shortly and, in relation to evidence that is being put forward there is no good reason why you should have eight weeks to deal with it.

As I say, what this envisages is effectively a process where objections to these matters will not be dealt with until February of next year. In those circumstances, with a reply and then a listing for a hearing, we are looking at a hearing in relation to these NCCNs at the time at

which they are expiring, and that is why it is quite wrong for the MNOs to be afforded this sort of time to deal with these matters.

The Tribunal is well aware that in circumstances where sharp deadlines and tight timetables are imposed the capability of individuals to deal with these matters is remarkable. Mr. Pickford's talents will, no doubt, be wonderfully deployed if intensively.

THE CHAIRMAN: Mr. Pickford, I am going to accede to your request. It looks like, therefore, it is going to be a date around 15th January 2015 that your statements of intervention and evidence will be served. I hear exactly what Mr. Beard says, this is supposed to be a fast process, but I am very concerned that if I were to impose great acceleration I would be at risk of pre-judging effectively the arguments that you would be making on the Rule 22 and other applications and so for that reason I will accede to your request, but I want to be fairly clear that there will not be any further extensions to that timetable unless there are really very clear cut circumstances justifying it. It would be our hope to have a case management conference dealing with the questions that I inevitably expect will arise out of your statements of intervention in January 2015, at the end of that month. One of the things that the Tribunal will do is canvas availability in the New Year with that sort of date in mind. It does seem to me we need to be fairly generous in terms of allocating time - I was thinking of a hearing of two or so days.

MR. BEARD: With respect, the idea that if this is received first on 15th January that we can sensibly have a two day hearing by the end of January in respect of matters where both sides are going to have to put in skeleton arguments to deal with these matters, it is simply not going to be feasible in that timetable. That is the reason why the eight weeks does need to be curtailed, or we are going to have to move that hearing out and, as I say, that would be most unfortunate, but more time has to be given between the submission of the SOI and the product of the hive and this CMC otherwise there is a real danger that it is not going to be properly prepared for, just the logistics of it.

THE CHAIRMAN: Well, Mr. Beard, that may be right, in which case we will have to push out that hearing. I am afraid I am not prepared to curtail the time. As you know, I have had more than my fair share of these hearings and I am conscious that there is a lot of work that needs to be done in order to get the application up and running, particularly when one is stepping into Ofcom's shoes rather than simply intervening where Ofcom is playing a full part. So, I am sorry, I understand exactly where you are coming from, but that is my Ruling on the service of statements of intervention. We will think about a date for hearing - I hear

what you say about the end of January, but two days seems to be generally accepted as, perhaps, a very reasonable estimate of what it may take.

I would not be minded to make any further directions because we can, of course, make further directions at that next hearing.

Costs will be reserved. There will be general liberty to apply. Is there anything I have forgotten?

MR. PICKFORD: Not from us.

THE CHAIRMAN: That is what I like to hear - apart from the confidentiality ring. Thank you all very much. I will adjourn.

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