IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1211/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 February 2015

Before:

MARCUS SMITH QC
(Chairman)
PROFESSOR GAVIN REID
STEPHEN HARRISON

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC — Appellant

- and -

OFFICE OF COMMUNICATIONS — Respondent

- and -

GAMMA TELECOM HOLDINGS LIMITED
HUTCHISON 3G UK LIMITED
TELEFONICA O2 UK LIMITED
TALKTALK TELECOM GROUP PLC — Interveners

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HEARING DAY ONE

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 Appellant.

Mr. Javan Herberg QC, and Mr. Tristan Jones (instructed by Ofcom) appeared on behalf of the Respondent.

Miss Sarah Love (instructed by Charles Russell LLP) appeared on behalf of the Intervener Gamma.

Mr. Jon Turner QC and Mr. Philip Woolfe (instructed by Constantine Cannon LLP) appeared on behalf of the Intervener Hutchison 3G UK Ltd.

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

Mr. Ben Lask (instructed by TalkTalk Legal) appeared on behalf of the Intervener TalkTalk Telecom Group Plc.

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THE CHAIRMAN: Good morning everyone. Thank you very much for all your written submissions, which we have read, including the recent offering from British Telecommunications, which we have also read. We thought it might assist if we briefly set out how, in the broadest of terms, the Tribunal sees matters. Clearly, all of the parties before us see this as a hearing that is concerned principally with the admissibility of what are either new grounds of challenge to the NCCNs or new evidence relating to existing grounds of challenge, and we agree with that. Obviously we are going to be helped by the parties' analysis of any general propositions as to how any discretion that the Tribunal has should be exercised. We have noted, as we could scarcely fail to, that fairness features extensively in the submissions of a number of the parties. It does seem at the moment to us that the starting point for the Tribunal ought to be whether the ground in question and/or the evidence in question could have been advanced at the time of the original referral, and we would certainly be helped by the parties' submissions on that basic point.

One of the areas where we think the parties may be assisted is actually the provision in relation to new evidence as formulated in the Tribunal's draft Rules which have been circulated for consultation on the Tribunal website, specifically Rule 21(2), which sets out the criteria under the new Rules, and obviously they are in draft, for the admission of new evidence. I think the Référendaire has copies of the relevant provisions here to circulate for the parties, because it may be of assistance if we were addressed on those.

That said, we do think it is important to emphasise that it is our present view that, although general propositions are helpful, our exercise of discretion is likely to be fact based, and submissions that are tied to particular grounds and particular evidence are most likely to assist us.

There is also one specific point in that regard on which we would like assistance, which is this: what exactly is the Tribunal to make of Ofcom's staying of the dispute resolution process in this case up to and including the Court of Appeal's decision and its subsequent lifting of that stay and the making of its decision after permission to appeal to the Supreme Court had been granted, but before the Supreme Court had rendered judgment. At first blush, that does seem to us to be a particular factor that is peculiar to this specific case. I throw that into the ring for what it is worth.

The final area in addition to admission of grounds and evidence on which we would be assisted is what exactly we do with the various grounds that are being advanced now. I, for convenience, use the very helpful summary of Three's grounds for intervention in para.9 of Ofcom's skeleton. I know the grounds can be found all over the place, but I pick that bit.

Looking at the four grounds enumerated in that paragraph, Ground 1 in para.9(a) is that the NCCNs are too uncertain to meet the requirements of the Standard Interconnect Agreement. The question that I have for the parties is, assuming - and I underline "assuming" - we were to admit that ground, what reason is there for the Tribunal not to determine this at this hearing?

The same point, it seems to us, arises in relation to Ground 2. I know that the parties have debated this in their skeletons, and the suggestion has been made that this point be dealt with in the 080 consequential hearing. The only point that I would make there is that the Tribunal constituted for the 080 consequential hearing is not the same as this Tribunal. There is a common Chairman, but that is all.

It may be, like with Ground 1, that if Ground 2 is to be argued, our suggestion would be that we argue it at this hearing so that *de bene esse*, assuming we admit these grounds, they can be determined seamlessly, and it would be quite helpful for a steer from the parties on those two purely legal points.

As regards Grounds 3 and 4, am I right, in relation to Ground 3, that if we do not admit the new evidence, does BT simply win on Ground 1, limb 2? Alternatively, were we to admit the new evidence that the interveners seek to have admitted, is the most practical course to remit, or is there an alternative option?

Finally, on Ground 4, given that Ofcom has not determined the matter in relation to principle 3, what option does the Tribunal have beyond remitting to Ofcom, and is that the case whether or not the new evidence that has been formulated and put before the Tribunal is admitted or not? Again, I know there is a big difference there between BT's position and that of the interveners, but it does seem to me that in each case we would welcome your assistance in what exactly we do on the two alternatives: first, where the evidence or the ground is admitted; and secondly, where the evidence or ground is not admitted.

I am sorry, that was rather a long introduction. The only other points that I would raise are these: we have got nine bundles, which I think have been numbered 1 to 9 by agreement with the parties. So that is the referencing that we propose to use unless something goes terribly wrong.

We have also had a timetable which was not, I am bound to say, as clear as I would have liked it to be in terms of what was the running order and the times allocated. All I will say at the moment is that we are happy to sit late today, if it helps, but equally we do not want any party to feel constrained by shoehorning matters into one day. This case has been

allocated two days and we are more than happy to go into tomorrow in order to deal with the matter properly and comprehensively.

Thank you all very much. I think, on the timetable, it is Three to start, Mr. Turner?

MR. TURNER: Sir, for the recording, should I call the roster?

THE CHAIRMAN: That would be very helpful, Mr. Turner.

MR. TURNER: I appear today with Mr. Woolfe for Three. To my right is Mr. Ward QC and Mr. O'Donoghue, who appear for Telefonica. To the right of them are Mr. Herberg QC and Mr. Jones for Ofcom. To the right of them one has Mr. Beard QC, Miss Lee and Miss Osepciu, for BT. In the second row behind them we have Mr. Lask for TalkTalk, and Miss Love for Gamma.

THE CHAIRMAN: Thank you. Welcome all.

MR. TURNER: Sir, in terms of housekeeping, yes, we have the nine files in the same sequencing as the Tribunal. The ninth file is full of legal authorities that came last night, but it does not appear that those are going to be featuring in the argument to any great extent, not least because of the steer, sir, that you have just given us as to what we should focus on.

You do have the skeleton arguments from all the parties. Ours contains a pre-reading list as well. I do not know whether the Tribunal has had the opportunity to scan any of that material. We sought to identify some of the underlying material that we thought would be helpful.

THE CHAIRMAN: I think we have read, between us, most of the material that was before us.

MR. TURNER: I am obliged. In terms of the timetable for the hearing, we have set out broadly the timings. We will now seek obviously to accommodate, sir, your desires as to what we should cover. We may need more than a day, even if we do sit late. These are interesting and important issues, and they are timely, as you have noted the government is consulting on the draft rules of procedure and a point arises there. There is also quite a lot to cover, as one sees from the size of the skeletons and the annexes. So, if I may, the way that I propose to cover submissions and to try as far as possible to absorb some of the points that you have put to me is in this way.

First, I will deal as quickly as I can with the question of whether you, the Appeal Tribunal, are now in a position to decide that BT's appeal should succeed based on the ground that was introduced by BT into its notice in October, and now that you have sight of the responsive pleadings from everybody and the evidence in support of them.

Second, if you are in a position now to decide this point that you were concerned about at the last CMC, does the statute envisage that you should decide this appeal on the merits

now on the basis of Ofcom having admittedly made a flawed approach to its dispute resolution, and then remit the further matters to Ofcom, but giving Ofcom appropriate directions as to how it resolves the dispute.

The third point is, if you do have a discretion to grapple with the further matters which have been raised by the interveners in our statements or BT, such as its threatened further evidence on the Monte Carlo analysis or its threatened further evidence on practicability issues, which it says it will want to put in as well, how do you approach that task in this case? Do you decide the merits of all those matters for yourself, and does the answer to that depend on whether these are matters which can be understood as being encompassed within the framework of the grounds of appeal.

Sir, I apprehend from the outline of the points that you provisionally had in mind that, certainly in relation to practicability, you may have a doubt about that. It is not something that was decided by Ofcom.

THE CHAIRMAN: No. That does seem to us to be something of a difficulty, and obviously we will hear Mr. Beard about that, but it is striking.

MR. TURNER: Yes. So our position on these points is as follows, very broadly, and then I will deal with them in turn. First, you are in a position now to decide this appeal against the particular instrument, the 2013 Determination of Ofcom. All the parties in the room agree that Ofcom's approach was fundamentally flawed, and so that instrument falls to be set aside. Nobody is in doubt about that.

Second, the statutory scheme is that, where you have a ground of appeal which is well founded, as we have here, the appeal should then be disposed of, and the subject matter resolving the dispute between the commercial parties will then be remitted to Ofcom with directions, and that will happen anyway. In every case, after the Tribunal has disposed of the appeal, there is a remittal to Ofcom to take the final decision on the underlying subject matter, s.195(4), every case. We will turn to that in a moment, but I will outline my points now. That is the way that the process works.

Third, you, the Tribunal, do have the power nonetheless to decide the merits of further matters beyond the fundamental for yourself if, and here is the point, if the issues can be fitted within the framework of BT's grounds of appeal. So, if, for example, our points go to areas which have been opened up by BT's grounds of appeal, take consumer detriment, they can be adjudicated on. It may well be appropriate for the Tribunal not to take too myopic a view or strict a view as to what is put in issue by BT's grounds of appeal if you approach it in that way. But there are cases, even where that is the situation, where institutionally the

industry regulator, Ofcom, is the right body to form a primary judgment on certain further matters we have highlighted in our skeleton. Aspects of detriment to consumers and users of telecoms, one would have thought, is pre-eminently something for the industry regulator, and similarly the nitty-gritty of practicability. In such a case, even if the Tribunal can technically say this is within the grounds of the appeal, is remittal with the directions that the Tribunal can give, which can have teeth, not nonetheless the better course to adopt? Moreover, even if the issues that we, the interveners, have raised, if you decide that they are not within the strict framework of BT's grounds of appeal, that is not to say that those cannot be raised before Ofcom in the context of a remittal. Take practicability again. If it is not properly part of the appeal against that Determination, it still may be a live point that should be grappled with by Ofcom in a remittal. The essential question, as we have urged on you, is whether it is fair and appropriate for Ofcom to address those matters before it reaches a final conclusion on the dispute resolution decision after the inevitable remittal. That is a question on which you, the Tribunal, do have the power to reach a view under s.195(4) of the Act, and I will turn to it in just a moment. You are charged with the function of giving appropriate directions to Ofcom in every case.

So I turn to my fourth point by way of saying how we will answer this. The further issues which have been now raised in our statement of intervention by Three may be viewed as being encompassed by BT's amended grounds of appeal. They do raise as issues in the appeal, this is BT's notice, consumer detriment, practicability and the rights and obligations under BT's interconnection contract. But, in any case, those further issues, we say, can be seen to fall into the category of things that it is fair and appropriate to allow to be considered by somebody before a final decision is taken on whether to uphold and apply these notices, the Network Charge Notices (NCCNs) or to reject them. The question of whether you should allow these points to be taken forward, we have said, depends on these two considerations; fairness, which means to the disputing parties, looking at the adjudicatory function of Ofcom in a dispute resolution, and secondly, the wider public interest, which Ofcom is, after all, set up to safeguard. Take the question, is there is a serious point that these NCCNs could be detrimental to consumers if they are implemented? That is a point that the public authority should be able to consider. That is why we say fairness and appropriateness both count.

So that is a broad sketch of where I will go, and I will turn to the specifics, as, sir, you have asked to look at the individual points as I go. So let me deal with that first point quite briskly. Question 1, are you in a position now to decide the appeal before you against

Ofcom's 2013 instrument? We say you are. You can do that promptly. You can do that today. To be satisfied, I do ask the Tribunal to look at the parameters of this Determination, BT's notice of appeal, and briefly of the responsive case of Ofcom and the interveners. If you pick up please the Determination, it is in the third bundle, tab 11? I have submissions of Gamma Telecom. That is tab … The third bundle.

THE CHAIRMAN: What is the bundle entitled?

MR. TURNER: It is entitled BT Notice of Appeal, BT Notice of Appeal Bundle, Volume 1.

THE CHAIRMAN: Right. So BT1 and tab 11. Yes, it is BT1 and it is also Volume 1, but we will manage.

MR. TURNER: We will work through this. Anyway, in that bundle, at tab 11 you have the Instrument which is now under appeal to you.

THE CHAIRMAN: Yes.

MR. TURNER: You see from the cover page, it is a Determination to resolve disputes concerning these tiered termination charges in the three NCCNs. If you turn to p.4, under the summary, go to para. 1.4 towards the bottom. "In the disputes the MNOs" – that is looking at them as a group – "contend that BT's termination charges are unfair and unreasonable" – pausing there, that is the test from the old *TRD* case. The MNOs claim that they will have a negative impact on consumers or that at a minimum BT has failed to demonstrate that the charges will benefit consumers. So you have the two alternative approaches to the test that should be applied on consumer detriment.

1.5 is BT's contrary approach. 1.6 what the MNOs were asking Ofcom to do. 1.7 Ofcom then accepted the disputes for resolution. Pausing there, you may wish to note for the timetable, in case it should be important, that apart from 1046 the time when it accepted the disputes on the other NCCNs was April 2012, as you can see from the last sentence of para. 2.39 on p. 15 just for your note, that is when they were formally accepted for resolution by Ofcom.

1.8 sets out the three principles by which Ofcom then grappled with the matters in dispute. The three principles, the second of those is stated in the terms that were subsequently said not to be right by the Supreme Court: to satisfy the second principle, the termination charges should be beneficial to consumers, they said BT did not have to show that. To satisfy the third principle the charges should be practical to implement.

THE CHAIRMAN: Of course, Mr. Turner, there is quite a formal process set out in sections 185 and 186 of the 2003 Act regarding the process of referring a dispute to Ofcom and Ofcom accepting that dispute from the dispute resolution process. It occurs to me that in the course

of that process there will be an articulation by the person raising the dispute of what exactly is in dispute, and what dispute Ofcom was accepting to resolve. In other words, the story begins not with BT's notice of appeal, it begins actually with the referral to Ofcom.

MR. TURNER: Sir, you are right, subject to one qualification. That is absolutely the starting point for the dispute resolution process. That is not to say that by the time the dispute is accepted, and certainly by the time it is decided on by Ofcom, the issues that are placed before Ofcom have not changed or grown, or even been slimmed down. But that certainly is the starting point.

In fact, if you go to p.17 you see two-thirds of the way down, although it is not set out as a chronology, under the heading: "Information relied on in resolving the dispute" Ofcom records, beginning at 2.48, and also 2.49 how the information it received from the other parties was gathered by information notices and submissions, and what information it took into account. You see at 2.49, the third bullet refers to the judgments by the Tribunal and the Court of Appeal in respect of the 08X cases. You see the final bullet in 2.48 is the responses to the provisional conclusions that came out on 4th December 2012, and those are the previous tab.

You will see just looking at that, that much of the information gathering, at the top of p.18 is from around May 2012. In the chronology the Court of Appeal judgment comes on 25th July 2012. Then a key point when the parties had the chance to make submissions on the fully reasoned document from Ofcom is December 2012, that is the last bullet of 2.48. A slightly compressed timetable, they are given until 4th January 2013 on any side to put in their submissions on that. Then we have the determination finally coming out, as you see from the cover page on 4th April that year.

Now, that is broadly the sequence and the timing which puts in context what we are about to say. The determination outlines the analytical framework that Ofcom used – we see that if you go to p.22. There is a heading "Analytical Framework" at the top, and para. 3.1. They say: "We have used an analytical framework which is substantially the same as that which we used in the 08X case."

We know that there was a flawed approach to this issue of consumer detriment. Is it enough really to show that it is uncertain what the outcome is going to be? Do those opposing this notice need to show that there would be a detriment? You see the flawed approach if you go on to p.3.102 on p.46. This is at the end of the discussion of the consumer detriment issue, right at the top of p.46, just above Principle 3, Practicality". "Where there is an uncertainty as to the possibility of overall harm, etc. we consider it appropriate to place

greater weight on the potential risk of harm to consumers." So that is the approach which is the wrong turn.

If you go forward to p.155 you have Ofcom's conclusions after its consumer welfare analysis, and having received points made by the parties after its provisional determination in December 2012. You will see that they decide on that basis of uncertainty to reject these BT tiered charges. You see that if you look in particular at 7.228 and 7.229. They say that there are plausible scenarios where there could be harm and there could be benefit, but what they are going to do is place greater weight on the material risk of detriment, so there is the crystallisation of the wrong turn. That is the key issue – the pivotal issue – in this determination and, sir, as you apprehended, Ofcom does not decide the issue of practicality. It says there are various matters that it would need to look at further before it could make any decision on it.

If you go forward in the practicality section to p.160, the heading there – this is just a frame –is "Our views: Implementation Costs and Time". Then they run through some of the issues of practicality in turn. If you turn over the page, one that we highlighted in our skeleton under the heading "Pricing Complexity", half way down the page is 7.265, if we can just dwell on that:

> "EE suggests that the large number of average prices that it believes it will need to calculate each month means that it is impractical to implement the Disputed NCCNs. It is difficult at this stage to reach a firm view as to whether there is merit in EE's concerns as we are unclear on a number of issues which may affect any conclusion we reach on this matter such as the frequency of the calculation of average prices and how the calculations would be carried out. That said, a requirement to calculate around 200 average prices each month does appear to be burdensome. The question whether administering this amount of average prices is so burdensome that we should conclude that the charges are not practical to implement is something we do not have sufficient information on at this stage."

Pausing there, where do you get the 200 figure from, as a matter of detail? If you go to p.179, although it is in several places in the document - 179 is part of a technical annex - half way down you have something entitled "MNO's pricing policy", para.A3.11, and it refers to something called the "Dobbs 3 model", which you will have seen that the parties respectively are still talking about now. That was developed by BT, and:

"… it was initially designed to analyse a single stepped wholesale tariff schedule. NCCN 1046 contains only one wholesale tariff schedule as there is only one BT price point for calls to all 080 numbers (i.e. free to caller)."

Pausing there, that is actually true for all of the NCCNs that were in issue in the earlier case, sir, where you were the Chairman, the 080 case. We were talking about one schedule for each of these NCCNs. Then:

"As noted in paragraphs 4.5 and 5.6 above, NCCN 101 contains 39 different termination schedules and NCCN 1107 contains 159 termination schedules. These termination schedules correspond to BT's retail charge bands for the number ranges affected by these NCCNs, with variants based on the time of day for each charge band."

That explains why this case is different on practicability grounds, or may be different - Ofcom thought it could be - from the earlier case where you are talking only about one schedule for each of the NCCNs. It is a significant point. Ofcom raises it in 7.265 and says that it would want to think about that further.

If you then go back to p.162 there is a title "Final conclusion", and then if you look at 7.272, it says:

"We have given consideration to the points [the MNOs] have made …"

pushing back on the idea that it was practical to implement these notices.

"Whilst as explained above, we still believe that the fact that agreements were able to be reached following the CAT Order is relevant to our assessment of whether similar charges are practical to implement, we recognise there is some merit in the points raised by the MNOs. On balance, therefore, we consider we should place less weight than we did in our Provisional Conclusions on the CAT's view in the 08x cases that it should be practical to implement tiered rates.

We have had considerable difficulty in trying to assess whether it would be practical to implement the charges set out in the Disputed NCCNs as we have been provided with little information as to how it is envisaged that the tiered rates would actually be implemented. The Disputed NCCNs only contain details of the pricing schedule that would apply, without proposing details of how they will apply. For example, it is unclear how often average charges would need to be calculated or on what basis they would be calculated (e.g. would they be calculated at the end of the month using actual data for that month or at the start of the month using some form of historical data). We also believe, however, that there may be differences

between how practical the charges are to implement in the specific NCCNs in dispute."

Then they say there may be more issues about the ones where there are lots of the termination schedules rather than 1046.

Pausing there, on that paragraph two points may be drawn from it. The first is that some of this information that Ofcom is referring to, the lack of information about how it was going to apply, is information which you would expect to come primarily from BT. They do not have that. That is why there is something of an overlap, at least on the factual issues that you will want to decide, with our contractual point, because our contractual point is that these notices are insufficiently specified. Just as Ofcom is saying here, we do not know how to implement these notices. Our contract point built on that says, you, the Tribunal, or Ofcom on a remittal, should take that factual point and what Ofcom, for example, says here about it, and then look across at the Interconnection contract, the SIA, and you will see that it says that for these network notices to be valid, you should be able to specify these things so that they can take effect on the effective date, we are a month ahead. Here you have a serious point being made that you cannot do that. You have notices that are setting out the general charging system that should apply, but how these are to apply you cannot tell based on that document. That is our contract point.

Turning from that then, let us go to the final conclusions in the overall document on p.164. At 8.5 under "Principle 2", which is consumer detriment, you have the crystallisation of the flawed approach:

"To satisfy Principle 2, the charges in each NCCN should provide an overall benefit to consumers."

They thought BT had to satisfy that hurdle.

At 8.8, under Principle 3, the point, sir, that you remarked on at the outset:

"We consider that there is some uncertainty as to whether it is practical to implement tiered termination rates. In the light of our conclusions in relation to Principle 2, we do not consider that it is necessary for us to reach a definitive conclusion in relation to whether NCCNs 1101, 1107 and 1046 satisfy Principle 3 .and therefore [we] do not do so."

At 8.9, "Overall conclusion", it is headed, right at the bottom of that page:

"Taking into consideration our assessment across the Principles, and in particular the fact that we find that none of the NCCNs satisfy Principle 2, we conclude that it is not fair and reasonable for BT to apply the termination charges …"

in any of these notices.

So what one sees there if one stands back is undoubtedly the pivotal importance of the wrong approach that was taken to Principle 2, and how that formed the foundation stone of Ofcom's 2013 Determination.

If one then puts that away, and I am going to say this with some trepidation, but if you take up bundle 2, in my bundle 2, you should have the amended notice of appeal by BT, which is at tab 41 - is yours bundle 3, tab 41. It is useful because that shows you how they changed the case by amendment in October from the original notice of appeal against that Determination. .

THE CHAIRMAN: Bundle 3, tab 41.

MR. TURNER: Does everybody have the right bundle?

THE CHAIRMAN: Yes.

MR. TURNER: So it is the bundle at tab 41. If one turns in it to para.8? Perhaps one could pause and just look at the struck out point at para.5, halfway down. They said there:

> "BT's principal argument in its notice of appeal to the Supreme Court is that the 08 Determination demonstrated overly intrusive regulation of BT's prices by Ofcom contrary to the principle of minimum regulation enshrined in the Common Regulatory Framework for Communications".

That was the principal argument that was advanced, as opposed to referring to the terms of the contract. It was a regulatory point.

Going to para.8 in the amended version on p.5, after referring to what the Supreme Court decided, they say:

> "In other words, the Supreme Court found that the basis on which Ofcom had proceeded in the 08 Determinations was fundamentally wrong. As explained further below, the 2013 Determination adopts essentially the same approach to dispute resolution and the same analytical framework anti-anti-suit that adopted by Ofcom in the 08 Determinations".

Then, if you go to para.10 over the page? Pausing there, one sees also from the struck out text at the bottom of para.8 that they said, just at the bottom:

> "For example, should BT succeed in the Supreme Court, Ofcom may well wish to revisit its 2013 Determination rather than defend BT's appeal".

So they were envisaging interestingly there that Ofcom may itself then undertake a further consideration. If one goes then to para.10, they said:

> "It is, at present, unclear whether Ofcom in fact challenges the analysis of the impact of the Supreme Court judgment outlined above and referred to below. If not, the proper course would be for the 2013 Determination promptly to be quashed and the pricing in question permitted".

We agree with that, apart from the word "permitted", where we say "remitted". But they are at one with us as to what should happen. You see it again, over the page, at para.11, their last sentence:

> "Ground 1, Limb II [which is how they have renamed it in their amended Notice of Appeal] is in essence the basis on which the Supreme Court found in favour of BT and therefore is the basis on which this matter can be disposed of without the need for further more extensive consideration".

So everybody is taking that approach. Their Grounds need to be looked at it in terms of what this Tribunal can now do, and the question of considering what we are raising too. So, if you go to p.20, you have the heading "IV Grounds of Appeal" about two-thirds of the way down. Sir, as you have mentioned, there are four of these.

You see, at Ground 1, it is defined as "Ofcom erred in law and its reliance upon Principle 2". That is the error of approach. But, if you go forward to para.69 on p.26, what you see there under (ii) about two thirds of the way down:

> "In any event, there is no basis for imposing any obligation where there is uncertainty as to the possibility of consumer detriment".

If you look at para.69.7, they amend to introduce the contractual point;

> "BT had a contractual discretion, under Clause 12 of the SIA, to alter its prices for BT services provided that the revised prices did not conflict with the regulatory objectives".

So that is the contractual point. Again, at 69.9, the last paragraph on that page:

> "In the 2013 Determination, Ofcom failed to take proper account of either (a) BT's contractual rights under the SIA or (ii) BT's lack of significant market power on the relevant market".

So, as a result, Ofcom got it wrong. So what you see is the introduction of the contractual point, the reliance on the SIA, which was not in the earlier notice, the un-amended notice. At para.70, p.27, at the bottom, last sentence: "The 2013 Determination falls to be quashed on this basis alone". Subject to the word "permitted", rather than "remitted", frankly we agree with them.

If you turn to Ground 2, that is on p.29, it is described in the heading as:

"Ofcom erred in fact in finding that the [Notices] give rise to a material risk of consumer detriment".

Interestingly, this Ground is written on the basis that, if we are wrong on the first Ground, you see 71 begins: "In the further alternative, even if Ofcom was right to include Principle 2 in its analytical framework" etc., it is a contingent point. They say, "Even on that basis, you can exclude there having been a material risk of consumer detriment. The Monte Carlo analysis was not properly considered by Ofcom in its Determination and, if this matter goes further, then we would want to put in more evidence on it". They say that on p.31, para.77:

"In the event that this appeal proceeds beyond the exchange of pleadings (which, in the light of the Supreme Court Judgment, would not be necessary or appropriate), BT will provide further expert evidence supporting the Monte Carlo analysis".

THE CHAIRMAN: Yes, and, of course, this Ground has been stayed.

MR. TURNER: That Ground has been stayed. So their approach there was "We have got this in reserve". Then Ground 3, the last point, p.32, at the top of the page is the practicability point in the amended Notice of Appeal. You will see at para.81, again, that they say, if this case goes forward beyond the exchange of pleadings (which it should not), then we are going to bring forward our troops on the practicability point too.

I needed to do that to show the Tribunal precisely the Determination and Grounds of Appeal. Pausing there for a moment to take stock, the appeal point in Ground 1, the basic error of approach, it is compelling and everybody agrees it justifies you setting aside the Ofcom Determination now, because it was a wrong approach.

Secondly, the error that was made by Ofcom means that the issue of consumer detriment, an important public policy question, was not properly examined in the Ofcom procedure. It is not only Ofcom, but all the parties, at least after the Court of Appeal judgment in 2012.

Take the legal test to be the existence of uncertainty. That is the basis on which Ofcom then proceeds to issue its provisional Determination and make its final Determination. The response to the provisional Determination, December 2012, was an important occasion for making detailed submissions. From our point of view, and now I am turning to the fairness side, there was not a need for the MNOs to put in significant work, given both the Court of Appeal judgment and, more particularly, what then lands as the provisional conclusions of Ofcom.

Had the test at that time been the Supreme Court test, imagine the Supreme Court has given judgment by that point, and here, if I may, I am picking up your Lordship's indication that you would to consider that sequence in your opening remarks, let us assume that the

Supreme Court has given judgment before this point. Let us assume that Ofcom responds to that, and the provisional Determination it comes out with is in line with the Supreme Court and is in line, sir, with the Tribunal's earlier judgment as well, and it says "You need to show detriment here". It is surely obvious that the MNOs, the mobile companies, would have given different more detailed input.

The wrong path that was taken by Ofcom and the prevailing state of the law cannot be ignored in terms of fairness. In terms of appropriateness it does mean that on an important public interest question, whether there is harm to consumers it has not been properly addressed.

THE CHAIRMAN: Do you say, Mr. Turner, that taking your hypothesis of a provisional determination by Ofcom based on the Supreme Court's decision as it eventually came out, what Ofcom would have allowed the MNOs to do is put in further evidence on consumer detriment between the provisional Determination and the final Determination?

MR. TURNER: Yes, because the provisional Determination is circulated so that the parties can respond to it. If, at that point, the parties do say before you reach your final determination 'we now see the change in the law, we do have this further evidence' then Ofcom surely would, as a public body take that into account before making a final decision. That was not something that the mobile companies were in a position to do. That is a fairness point as well as a public policy point, because, sir, as you are well aware the European Directive which governs the exercise of Ofcom's functions, the Framework Directive, says that in the exercise of these functions – Article 23 of the Directive as, sir, you know - Ofcom shall seek to promote those objectives. So when it came to reach its final determination, yes, if there was such evidence brought forward then because the right legal test was being applied by everybody it must have had regard to it. So as a procedural matter there has been a problem.

If one then turns to the third issue, practicability -put consumer detriment to one side for the moment.

THE CHAIRMAN: Just pausing there, Mr. Turner, one other point, obviously I see the difference between the Court of Appeal's decision and the Supreme Court's decision is on one level very significant, but on another level you could say all it affected was the burden of proof, in other words, was it incumbent on BT to show consumer detriment, or was there a need to show that there was consumer detriment before the pricing changes were allowed?

Now, viewed through that prism the need for evidence going to consumer detriment was always apparent in a sense the MNOs could, right from the beginning put in evidence

showing that not merely had BT failed to discharge the burden of proof, but actually it could not discharge that burden because these NCCNs were detrimental to the consumers, and here was the evidence, and all that happened then was that the MNOs would have won big at an early stage.

MR. TURNER: The answer to that is surely that if the test is uncertainty, showing uncertainty is a different matter from being able to prove a likely consumer harm. Secondly, and more specifically, if what the parties are faced with is a reasoned provisional conclusion with an analysis by Ofcom saying "We have uncertainty here" then the response of parties which want to show detriment is necessarily going to be different and more limited. It is understandable that if Ofcom says: "We have analysed this. We have come to the conclusion that it is uncertain, and that is the conclusion that the mobile companies agree with", to then commission further work and put in further material designed to go further and show detriment at that stage is not something that is as likely to be done.

THE CHAIRMAN: Is that not a little bit unreal, Mr. Turner, in the sense the greater includes the lesser and I agree that on the Court of Appeal's and Ofcom's test uncertainty is all that is required in order for the MNOs to win. But, surely, if the MNOs have the ability to commission evidence which shows no, it is not uncertain, actually it is a very bad thing, would it not, even on the Ofcom/Court of Appeal test, be sensible to adduce that evidence very early on and to say: "This is an easy question. We appreciate the test is uncertainty, but in fact this is worse than uncertain, this is bad".

MR. TURNER: Yes, they would certainly put their best foot forward early on. As I was saying a little bit earlier, as is undoubtedly the case in reality with the Ofcom process, it develops, and therefore a submission that you put in at the beginning is different from a legal submission or a pleading in defining your case, crystallising it; it is what you put in at the start which can be refined and amplified.

Later on, when Ofcom, which is in the driving seat has produced its analysis and found that there is uncertainty, at that stage as opposed to at the beginning of the process, the MNOs have a chance to put in further material, and my point is at that stage, which is an important stage, you then have a situation where, because of what has happened, because of the prevailing state of the law, because of Ofcom's analysis, in reality they do not go to the effort that they would have done. They would not, perhaps, have put in all of the analysis that you find in the Hunt Report, which we are now seeking to introduce at this stage - I will mention two features of that briefly – but not least because the first, which is that Mr. Hunt writes with the benefit of a recent academic piece of literature from 2013, which was not

available at that stage. So, one of the questions for the Tribunal is going to be: in a public policy setting, if there is supervening new material academic literature, which could not have been brought forward at that earlier stage, would it be right for that to be looked at too? We say "yes".

Also, another feature of what Mr. Hunt does is that he looks at the range of prices in the Dobbs 3 Framework from each of the MNOs, whereas what Ofcom has done in its provisional determination is simply to take the EE prices and apply the framework to that. It is perfectly conceivable, and I say entirely realistic to assume that had the MNOs been told in December 2012: "This is the approach that should be taken: one needs to establish detriment, the Supreme Court has recently given judgment; we are minded to decide this principle in favour of BT." Certainly, they may well have said we will do a wider piece of work, a more active piece of work, and we will look at factors such as the prices of each of the MNOs, and put that in at that stage. So, yes, I do say that it is wrong to focus on the beginning point in the process and say that determines the point when you shoot your bolt, because it is an evolving process over time, the Ofcom procedure, and at a later stage in it Ofcom gives the opportunity to the parties to respond to its original determination. Had the legal test at the time been different, it cannot be assumed that the MNOs would not have sought to put in further evidence in that changed situation.

THE CHAIRMAN: But as we all know, Mr. Turner, even under the Ofcom dispute resolution procedure, at some point in time the new evidence adduction process has got to stop, as Mr. Herberg himself knows very well. Early on in the 080 proceedings, we had the debate about whether various Dobbs models should be admitted by Ofcom or not, and Ofcom decided at that time, no, it was too late. They set a timeframe, and the Dobbs material came too late. So even the Ofcom process cannot be protracted indefinitely, particularly given the four month period within which these determinations are to be met.

MR. TURNER: Of course not, and I do not demur from that at all. What I would say is, to return to the specific question, if the provisional determination issued on 4th December 2012 for the parties to comment on had at that stage taken a different approach, perhaps informed by a recent decision of the Supreme Court reversing the Court of Appeal, that is not an attempt by a party to put in something late when the decision-maker could say, or would certainly have said, “No, it is too late and we will not entertain that at this stage”.

On the contrary, if one imagines that the Supreme Court had given judgment significantly earlier, it is certainly plausible to imagine that they would have put in something, and it would have been fitted within the Ofcom process without it being said you are doing so in a

disorderly way and throwing in material late. It would have been part of the process, and one that Ofcom would fairly have considered.

I am reminded that after the Court of Appeal judgment came out in July 2012, you remember from 2.49 that I took you to earlier in the Determination, Ofcom refers to how it took into account the Court of Appeal judgment in its further work. What they did was they wrote to the parties after that judgment came out and asked for the parties' views on impact of the judgment at that stage. To adopt my thought experiment, if that had been the Supreme Court, or if the Court of Appeal had ruled as the Supreme Court did at that point, July 2012, yes, there again one can see that within the Ofcom process and in an orderly way, the parties would have wanted to, and could have, without it being said to be too disruptive to be allowed, put in further submissions.

THE CHAIRMAN: That is interesting, Mr. Turner. Just as a matter of interest, was a similar process gone through when permission to appeal to the Supreme Court was granted in February 2013, which I recognise is shortly before Ofcom's Final Decision in this case in April 2013?

MR. TURNER: No. Sir, I move then from that to the third Ground, practicability: sir, you have got the point, it was not decided as part of this instrument, it was not decided by Ofcom. BT says in its amended notice of appeal, para.79, four lines down, that Ofcom should only rely on that ground to reject NCCNs in exceptional circumstances, and that if this appeal continues before you beyond this pleading stage, para.81, then they will submit further evidence.

What that does is to open up a new area of investigation before you for you to reach a decision that the decision-maker never made. That, I say, is something that, on its face, does seem to arise outside the framework of the appeal against the 2013 Determination and what Ofcom did decide.

To follow up a point that has been made by Ofcom on more than one occasion, if you are considering how best to deal with further matters and whether you should deal with some and Ofcom may have to deal with others, one of the points to consider is efficiency as well. If Ofcom is going to be dealing with that matter rather than split things or delay things by having two stages, there may well be good sense in saying that for certain further matters, beyond the point that disposes of this appeal, with you, the Tribunal, giving directions to Ofcom to make sure it is done tightly and appropriately, that is the way to do it.

That is the amended notice of appeal. Ofcom's defence: I do not know whether I need to show the Tribunal again, not least because I am not sure of the bundle, but it is my bundle 1. It is called the CMC bundle.

THE CHAIRMAN: Our bundle 8.

MR. HERBERG: (without microphone) I think a composite index was provided, sir.

MR. TURNER: We have been working off the Ofcom index. It is really to remind you that they are, as it were, the principal respondent. It is their Determination. They put in a very short defence with no evidence. It is five pages. I am looking at tab 7, if all members of the Tribunal have got it.

THE CHAIRMAN: Yes.

MR. TURNER: It is very short, and you will see in relation to practicability, if you go to paras.10 and 11, on the last page:

> "Ofcom denies 'practicality issues' can invariably be resolved through co-operation between operators …"

You cannot just sweep it away and say everything can be done co-operatively, because you have to look at it. Then they say at para.11:

> "… on the basis of its position in response to Ground 1 above, the question of whether the NCCNs comply with Principle 3 does now require to be resolved."

They are neutral as to the way in which you, the Tribunal, choose to do it. That is all that they say. Otherwise, they, in line with everybody else, say that you, the Tribunal, can now decide the appeal.

If I may, in view of what, sir, you asked me to do at the outset, I will briefly run through our statement of intervention so that you have the points firmly in your mind as I make submissions on them. I would just say, before doing that, that Gamma's statement of intervention, which should be in the same bundle that you have open in front of you - they come in favour of BT - they are at tab 10 of my copy of that bundle. What they do p.2, para.6, is, in very stark terms, say that they just agree that this Ground 1, limb 2 of BT's appeal must succeed, para.6, and the last sentence:

> "The 2013 Determination accordingly falls to be quashed on this basis alone."

Would you then turn to our statement of intervention, bundle 5, VEH1, reflecting its origins when it was Vodafone, Everything Everywhere and Three, tab A, p.3. In the summary of the case at paras.3 and 4, which I need not read, we also agree that the flaw in Ofcom's approach is fundamental. So 3 and 4, we are saying the same thing.

Then we raise four further matters in these proposed grounds, which we do wish to raise before the ultimate underlying question of the validity of these ladder charges is decided by somebody.

It is convenient in the light of, sir, your comments that I touch on those briefly now before making points. I begin on p.32 with Ground 3, in fact, taking them in a slightly different order from the way that they are presented. If you have p.32, our Ground 3 is the consumer detriment point. This is the contention that the charges in one of these NCCNs, number 1101, would be positively detrimental to consumer welfare. It addresses a question which is different from that which Ofcom posed for itself in its 2013 Determination, but it is obviously related, and it relies on Mr. Hunt's report. On p.36, para.83, you have the summary of this. I shall not take much time over it, because I have already adumbrated some of the points, but he is using the framework for assessing beneficial /detrimental effects that was accepted by all parties, common ground. At para.84, he is taking an approach to assessing likely retail price falls, or perhaps rises because of these new charges, based on BT's witness, Professor Dobbs. If you go over the page to 87.1, there is the point I mentioned a little bit earlier, that he takes the Dobbs 3 approach. What he is doing is he is applying it to the retail prices for all of the MNOs, not just for EE, which is all that Ofcom had done. Do you see that, at 87.1, the top of the page:

> "The results of the model may be made more robust if a wider range of retail prices is considered than was used by Ofcom in its analysis. Mr. Hunt extends the analysis to consider MNOs' incentives to alter prices".

So he look as that. Then, having done that, he considers whether these levels of price rises for other products and services prompted by the effects of higher termination charges, what was called the Mobile Tariff Package Effect, is likely to outweigh any direct price falls that happen on calls to numbers covered by this one notice, Notice 1101. If you go to para.96, you see him pointing out that that Notice will cause consumer detriment for even very low levels of the Mobile Tariff Package Effect.

Over the page, at p.42, under the heading, "It is more likely than not that the MTPE is sufficiently high for 1101 to lead to overall consumer detriment", he then reaches the conclusion, which is summarised here, that it is very likely to cause harm, because the rise in prices is going to outweigh any price falls which take place within the range.

You will see there that he relies, at 98.2, on:

"The evidence of the two academic studies by Genakos and Valletti [about] the waterbed effect for mobile termination rates [termination rates prices received by the mobile companies applied analogy] suggests that there is likely to be a significant MTPE in the present case".

THE CHAIRMAN: May I raise a point about the Valletti study? Just to remind everybody, could you date that study in relation to the Hunt study and the Dobbs earlier study?

MR. TURNER: So the Genakos and Valletti point, I remember it. It is dated 2013, the recent one. The Dobbs work is earlier work that had been done by everybody and accepted by everybody in the Ofcom process itself, so that is earlier.

MR. BEARD: Sorry. I am sure the Tribunal Chairman has this well in mind. It was a point I was going to make. The Dobbs 3 material was, of course, material that was submitted during the course of the 08x proceedings, well before this dispute took place at all. Of course, at that time, the MNOs had a slightly different view about the Dobbs 3 material and its reliability, but I will come back to that.

PROFESOR REID: So I think we have got the dating clear on this. So could I ask then, under the Genakos and Valletti document itself, which is a research paper, it is not about the UK, as I understand it?

MR. TURNER: It includes the United Kingdom, I believe. Sir, are you probing the merits of this, or asking yourself whether, at this stage, it is possible to conclude that it is irrelevant?

PROFESSOR REID: Yes, I'm questioning its relevance, in fact. As I understand it, it is a cross-country cross-section analysis, whereas what we are really looking for is a highly targeted UK type analysis, and I wonder just how relevant it is.

MR. TURNER: Yes. That may be something that ought to be raised in consideration with Mr. Hunt as a point. He has clearly taken that as a relevant factor in forming his view about the Mobile Tariff Package Effect in this case. At this stage, I should say it is not appropriate for the Tribunal to take the view that that it is simply irrelevant without a substantive consideration of it, which we have not come prepared to deal with at this point.

PROFESSOR REID: That is fine. We will get to it.

MR. TURNER: At some point, either the Tribunal will or, if it is Ofcom that is looking at it first, Ofcom might reach a view on that very question itself. A decision-maker should reach a view on it, if it is allowed.

PROFESSOR REID: Thank you.

MR. TURNER: Mr. Woolfe reminds me, if you have bundle 6, MH1, that is Mr. Hunt's report. Quite helpfully, in the index, you see the dates of the various things, sir, that you were

asking about. If you look, for example, at entry 14, Professor Ian Dobbs' Third Export Report, you see there 2nd April 2010. I am sorry. Sir, it is really the opening page. It is two pages, 16 entries, and there you have the chronology in terms of the various bits and pieces. At entry 13, you see the Dobbs report, the third report, 2nd April 2010. As Mr. Beard says, that was introduced at a very early stage. Our point, however, is not to say that that is not something that could have been referred to earlier. Clearly, the Dobbs analysis would have. It is the additional work that went into it with the addition of the other MNO's prices that was prompted by the Supreme Court Judgment and by the Appeal.

You will see that the Genakos and Valletti paper is referred to as Entry 5 of 2013.

THE CHAIRMAN: And there is one at Entry 6 of 2011.

MR. TURNER: Yes, there is an earlier one too. The recent academic literature to which he refers, I believe, is the 2013 one. If you go in that same bundle to p.60, for example, para.6.1.2, it is section 6. It is called "Evidence on the size of the MTPE", at the top of the page, p.60 of the numbering in tab 1. In there, you will see, at 6.1.2 at (d), he says:

> "In section 6.5, I consider new empirical evidence from Professor Valletti that builds on the academic work considered in the [earlier] case and I explain why this further academic work supports finding an even higher [effect] that considered previously".

Then, if you go forward to p.64 to section 6.5, towards the end of that page, the heading is "New empirical evidence on the waterbed effect", and that is where he discusses the article and the framework used to explain the results.

Sir, as I say, at this stage, it is not something that perhaps can be sensibly the basis of an informed discussion as to whether he is wrong in his expert view that this particular point is relevant or not.

What I would say though is to remind the Tribunal that the new empirical evidence is one factor in the Hunt report. It is not, of course, the same as the Hunt report overall.

Therefore, even if one was to take a view that he was completely wrong to rely on this because it is an irrelevant study, still one has the point that he has collected together an analysis which stands, regardless of that recent empirical evidence which is one supporting factor for what he says about the Mobile Tariff Package Effect.

THE CHAIRMAN: I am not for a moment inviting you to take us to it, but is the 2013 Genakos and Valletti appended to Mr. Hunt's report?

MR. TURNER: It is in the index, it should be there at tab 5.

THE CHAIRMAN: Yes, there it is, thank you.

MR. TURNER: Perhaps if I just take the Tribunal to a few of the equations on p.18. (After a pause) I shall not do that now!

THE CHAIRMAN: I think you have disappointed my colleague on my left greatly. (Laughter)

MR. TURNER: Perhaps Mr. Lask will help you with that in due course, but not now. That is how we raise the ground and what we rely on. The second matter we rely on, I will take our Ground 4 impracticability, because we have seen these before, p.44. If you have open our statement of intervention, that is the document we were just looking at before, it is our primary case, showing what we want to raise. Page 44 at the top is the heading: "Ground 4. The ladder charges imposed by the NCCNs were not practical to implement".

THE CHAIRMAN: It is 43 I think, your heading "Ground 4".

MR. TURNER: I am using the internal numbering of my document. "Ground 4: The ladder charges imposed by the NCCNs were not practical to implement"?

THE CHAIRMAN: Yes, we have the heading but it happens to have skipped a page, we are on p.44.

MR. TURNER: I will press on anyway. This Ground addresses the unresolved question that Ofcom did not decide because Ofcom thought it did not have to do so. There are two aspects, as you see from para. 100, just under the heading, and the first is you have large numbers of important issues that have not been specified or agreed, and you will recall that is echoing the point made by Ofcom that we looked at in the determination itself.

Then it goes on at 100.2 to say that even if you try to work out exactly how things are to be done, and all of those matters are nailed down, still you are faced with, for example, four lines up from the bottom, "The manual calculation by each MNO of around 200 different averages and a variety of other matters."

Our case is, therefore, echoing the points that were raised but not decided by Ofcom, for these reasons, you are looking at something that is impractical and burdensome, and you are looking at something which picks up on the points that Ofcom had said it had not been able to decide and had not reached a view on.

The third matter we raise is the contract point objecting to the NCCNs, Ground 1, p.22 of my copy. The NCCNs are not validly issued, and this neatly follows on from the point that we were just looking at. The point is that the interconnection contract with BT unsurprisingly requires that prices payable should be specified, para. 12.1 of the SIA, such that they can take effect on the effective date. That is paras. 61 and 62 of what we set out there.

For all of the reasons I have now outlined, as you have seen from what was in Ofcom's Determination it is a short legal point but it builds on that factual foundation as to whether or not there is insufficient specification by the notices, because you cannot tell from them exactly how you are meant to do things, or what the prices should be. For that you have to have another, or a series of other conversations between the parties.

THE CHAIRMAN: Mr. Turner, is it not a short legal point that has existed from the moment the NCCNs were issued?

MR. TURNER: It is a short legal point that has always been there, and I will address in just a moment, if I may, rather than take that one out of turn, why it is certainly fair that that should be raised now. What I mean to say is that if the point is something which can be argued now, without additional effort, because it is a short legal point, and if the other point is a fair one to be taken anyway, although it will be considered by Ofcom, we say – or should be considered by Ofcom - then that is the occasion to allow it, and that is why it should be allowed. Let me deal with that in just a moment.

The fourth, and final, point of our four, is p.30, and it is another contractual objection, this time to one of the NCCNs alone, 1046. It is p.30 and begins at para. 69, does the Tribunal have that?

THE CHAIRMAN: Yes, I would stick to paragraph numbers if I were you because we are on p.29 not 30.

MR. TURNER: I am interested to know what the missing page is, but it in my copy it is p.30, para. 69 and following.

This is different, this is a contractual point that the Interconnection Agreement does not allow BT to ride two horses at one time. It is continuing with an appeal against the rejection of one set of its charges for 080 numbers, and as we say in para. 71.2 the contract requires BT to abide by Ofcom's determination of those prices until the conclusion of the legal proceedings. BT presses ahead with those legal proceedings in an appeal but then it just issues a new NCCN with inconsistent charges. It says that this one should be complied with too.

Our contract point is simply the contract does not allow that to be done. This is a point that was live in the Ofcom process. It was raised by Telefónica in terms, although Ofcom did not deal with it in that final Determination document. You see it if you have the CMC bundle at tab 13, your bundle 8.

THE CHAIRMAN: Tab 13?

MR. TURNER: Yes. This was a letter written to Ofcom, because there are not formal pleadings or submissions before Ofcom, as the Tribunal knows, and you will see from the introductory sentence it was a response to an invitation for comments in relation to the dispute on NCCN 1007, which was the predecessor to 1046. There is no difference between them.

It then sets out under the heading, "The validity of NCCN 1007" the point, and at 1(c) and (d), the point is made about the particular operation of that paragraph in the BT contract and why, under the contract, you are not allowed to behave in this way.

Paragraph 2 makes the point that if BT was able to behave in this way there is going to be frustration of the intention behind the contract overall. It can evade Ofcom's control as well, because every time that Ofcom decides against it, it then simply issues a new NCCN and says obey this one, and then that one is applied until it is rejected and then it issues a further one, and so on forever. It cannot have been the parties' intention for the SIA to be interpreted in this way.

At all events, that is the contract point. It was before Ofcom, raised and developed in terms, and the second letter in the file in the following tab was October 2011, a letter from Telefonica's solicitors, SJ Berwin. It attached the earlier letter in case it had not been sent to the other parties. You will see who it is copied to on the second page. It was part of the Ofcom process. It was not, however, dealt with because at the time Ofcom makes its decision in April 2013, in Ofcom's view, in the parties' view, the contract point has rather been lost, but it was there.

With that I move on - I am conscious of the time, but I am grateful, sir, for your indication, because I think I did need to cover this ground. It is an essential ground for everybody in the room to have in mind as we make our points about it.

If we put that away, I will leave Mr. Ward, if so advised, to look at his statement of intervention for Telefonica and I will simply move on to make some points. Following my own sequence, but adapting it as needed to deal with your observations, sir, the first question is, should the Tribunal decide the appeal, should it now decide the appeal on the basis of the error of approach ground? Not just, are you in a position to, you are, but should you do that, and then remit further matters to Ofcom to consider, giving Ofcom appropriate directions.

It may be helpful, because this is going to require a general comment, to turn up Ofcom's skeleton, which is in your bundle 8 at tab 6. In the respondent's skeleton argument, p.5, there is a short section headed "A note on sequencing". Ofcom's perspective, para.13, is

that you have considerable discretion to decide further substantive matters for yourself, even if the appeal can be disposed of on a single point. In para.14 Ofcom says that the first question is whether the further matters are in issue or not.

Finally, para.15, it says that this question is to be decided by the Tribunal asking whether it would, if it was hearing the matter, permit the parties to rely on the grounds and evidence that they seek to rely on.

For completeness, over the page, in deciding what you, the Tribunal, can do, if you go to para.18 of their skeleton argument, they say that an intervening party can respond to a notice of appeal by making its own points. They say at the end of that:

> "The correct approach, it is submitted, is that appeals must be decided by reference to the grounds in the Notice of Appeal, but not exclusively so: the Tribunal may also consider any ground which an intervener has been given permission to rely on."

That is their framework.

We respectfully part company with Ofcom on some of that analysis, but we do end up in the same place.

Can I now, sir, ask you to do what I think you were doing at the outset, turn up the statute? I have the statute in my final bundle, tab 2. Section 195, which is a crucial section for present purposes, is six pages or so in. This is the machinery explaining how you, the Tribunal, are to deal with your task. Section 195(2), on which in particular Gamma have laid emphasis in their short skeleton argument:

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

Gamma says that is exclusive and that is what you should do. 195(3):

> "The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker. …"

Note the words "the decision-maker", not "the Tribunal" -

> "… to take in relation to the subject matter of the decision under appeal."

So when you decide this, even if you decide it, as all the parties agree you can, on the error of approach ground, still your decision, your judgment, should include a part about what action Ofcom should take about the matter going forward.

The 195(4):

> "The Tribunal shall then remit the decision under appeal to the decision-maker …"

which is why I say this is in every case -

"… with such directions, if any, as the Tribunal considers appropriate for giving effect to its decision …"

Its decision there will include the part we have just talked about in 195(3), the decision about the appropriate actions for Ofcom to take.

So you do see that the scheme of the legislation is that the Tribunal does have a rule, even if you do decide some of this material should be sent back to Ofcom to consider, to give them directions about how they are to deal with it fairly and appropriately.

Your jurisdiction is different from Ofcom's. Ofcom is required at large to make a determination for resolving a dispute between operators, which is accepted. That is s.188(2), which I will not take you to for present purposes. That is all that the statute says. You are required to decide the appeal. Your jurisdiction is based on considering the specific grounds set out in the notice, not wider issues in dispute which the industry regulator assesses. You can decide for yourself further issues if and when they can be said to be encompassed by the framework of BT's grounds of appeal.

So your area of responsibility is different from Ofcom's, but that is not to say, and I emphasise, that you have no role in considering the further issues, because of 195(3) and (4). You can consider these matters and give appropriate directions to the decision-maker. You do not ask yourself whether those further matters form part of BT's Grounds of Appeal. This should not be your approach, which is what BT are saying to you now. What you should not do is say "I am going to ask myself whether these matters that the interveners raise do come within BT's Grounds of Appeal", or else, no one can consider them, not even Ofcom. Practicability, nothing can be considered, because they are not with in the Grounds of BT's Appeal. Instead, you should ask yourself whether it is fair for the matters we are raising, the four matters, to be considered, and whether it is appropriate for those to be considered, bearing in mind the public interest dimension.

The reason why fairness counts is obvious. Sir, you alluded to that right at the outset. Above all, if we cannot be criticised for having failed to raise a particular matter in the same way earlier in the dispute process before Ofcom, it would be wrong, in my submission, to prevent us from raising it on a remittal to Ofcom. That could be, for example, because new evidence has become available, Genakos or Valletti perhaps, or perhaps, and this may be equally important, because a point which was there has come into clearer focus following Ofcom's original determination or because the parties and Ofcom were each proceeding beforehand on some understandable, but erroneous, basis about what the legal test was, which has only subsequently been clarified.

All of those matters go to fairness, and I will pray them in aid. Appropriateness counts too, because the EU framework lays down that Ofcom's decision should aim to achieve the policy objectives. Users should, because of the decision Ofcom finally reaches at the end of this, derive maximum benefit from the charging system. So, if Three has got evidence, good evidence which shows that BT's charges are harmful if they are applied, it would be wrong to prevent that from being considered too, unless, to pick up on, sir, your point earlier, everything has to have an order to it, and you say "It is now too late for you to start raising that now". We say we are not in that situation. It is not too disorderly, and it is an important point which should be looked at.

So, to summarise, where you do have an overriding point which seems to dispose of the appeal, you, the Tribunal, should decide further matters for yourself, only if two conditions are satisfied. The first is that those matters do fit within the framework of BT's appeal, and secondly, that they are matters which may rescue the 2013 Determination, because, if they do not, then why are you proceeding to consider them? We know that the practicability certainly is something that stands outside it.

Otherwise, secondly, you should not decide these further matters for yourself, but you can and should consider whether these matters which we put forward are fair and appropriate to be considered by the industry regulator when the matter is returned to it, as it will be. So that is my second area.

The third is, if you do have a discretion to consider remaining substantive tasks, how do you approach that task? Now I talk about the nitty-gritty and I will deal with it as briskly as I can. I will start with our Ground 3, which I have shown you, the detriment to consumer welfare, arising from one of these notices, 1101. We say it is clearly fair an appropriate to allow our point to be raised now, and Mr. Hunt's evidence to support it.

The first point is it is an important matter of public interest in this field, which Ofcom's function is to safeguard. The matter is being remitted to Ofcom and, if we are right, BT's charges will harm consumers. That is something that should be looked at anxiously and thought about anxiously by the Tribunal and by Ofcom, at least as a factor. If we are right, it is an important public interest point.

Second, it concerns an issue that was live before Ofcom when the prevailing state of the law was at a material time different. I have said that the dispute over this NCCN was accepted in April 2012. The Court of Appeal judgment comes in July. From that time forward, until the Determination in April the following year, the relevant test is whether the effects of these ladder charges is uncertain and not whether they could be distinctly shown to be

detrimental. I have made my point that we were given the chance to comment on the provisional Determination in December 2012, which takes the position in favour of the mobile companies on the Court of Appeal's legal test. I have said that, if you imagine the legal test had been different, had the provisional Determination been different, the MNO's response would have been different.

The third point is that the Hunt report is not, and I actually take this as a positive point in our favour, some entirely novel approach being thrown in late. That is a point in our favour about adducing this. It uses BT's own experts' framework of analysis. It is well trodden ground to measure direct price effects. But, in view of the significance of the need to show likely overall detriment, it is now clarified by the Supreme Court that it uses information from all of the MNO's, not just EE alone like Ofcom did, and it takes into account this recent academic literature to support its conclusions.

It would be harsh, and we say it would be wrong to say that this evidence, which is targeted, precise and manageable and, in my submission, persuasive should not be allowed to be seen at this point after the change of the law. It should be viewed again, either by this Tribunal or, we say, by Ofcom on remittal after you have had an opportunity to consider whether appropriate directions to Ofcom about how it should deal with this have been thought about.

BT's opposition to this in its first skeleton is misplaced. They say first "There has not been any change in the pre-existing law". That was their para.60 in their skeleton. "The law was simply described by the Supreme Court". We spend no time on that. It is hardly realistic. "The Supreme Court reversed the Court of Appeal, on whose judgment Ofcom explicitly based its reasoning". Then they say that a misdirection by Ofcom in the 2013 Determination cannot be relevant to Three, because Three could have raised all these arguments beforehand. That misunderstands the process, a point that we have now canvassed. The prevailing legal test was different at key points in the Ofcom process, which was an iterative and developing process, including when it culminated in 2013.

Finally, BT says at paras.67 and 68 of its skeleton:

> "What Three should have done is this [which is the point that it makes about our Ground 2] it should have filed an appeal against the 2013 Determination to protect its position".

It is a point they vehemently urge on the Tribunal it will be interesting to see if it is orally developed in the same way. It is also misconceived. It is not right for a party to launch an appeal to challenge a decision in its favour, let alone where the reasoning in that decision is fully accepted as well. Certainly, that should not be some sort of expectation.

As Mr. Ward and Mr. O'Donoghue have pointed out, and I will be careful not to steal their thunder, the Statute provides itself, at para.192(6), that a Notice of Appeal has to identify whether it is contended that the decision appealed against is based on an error of fact or was wrong in law, or both. So, in a case like this one, how could Three have done that? I will say no more about it. That is the point. That is the Consumer Detriment Ground, and why we say it is fair and appropriate for someone to consider it, and we say it should be Ofcom.

Secondly, Three's Ground 4, practicability. This ground relates to something that was before Ofcom originally. Ofcom did not consider it necessary to decide it. It was no part of the decision under the appeal. Now Ofcom says it is necessary to address this to resolve the dispute. Ofcom did not finish its investigative work on the point. You have seen that. It said it wanted more information before it could reach a conclusion. I have given you the references. It is, therefore, entirely appropriate that Ofcom should now be able to do this. There is no good reason why BT should be able to stifle the practicability issue from being looked at sensibly at this time. So what does BT say? First, they argue that Three did not put forward detailed evidence on practicability to Ofcom below. This party did not. Other parties did. That was Everything Everywhere and Vodafone. So you, the Tribunal, should, therefore, not take that into account. That is a bad point. Dispute resolution before Ofcom is not a piece of litigation in that way. Ofcom address the issue of practicability of each of these Notices as a single question; is this NCCN valid or is it not? It treated the points of the MNOs about the issues, and that one in particular, collectively. I shall not ask you to open it up again, but you will see the way it is argued is "The MNOs say this, the MNOs say the other".

BT then supplies an annex to its skeleton, and it says many of these points made in our factual witness statement that we have now put forward from Kushal Sareen of Three, they are new. Sir, you asked me to address that. They are not new. I do not know if you have our skeleton argument. It will not be possible or appropriate or fair for me to go through this in detail. But, if you take the annex to our skeleton, we responded to BT's annex.

THE CHAIRMAN: That will be the CMC bundle, will it not?

MR. TURNER: Yes, the CMC bundle, tucked at the back of our skeleton

THE CHAIRMAN: Yes, I think it is tab 4, bundle 8.

MR. TURNER: Yes, just at the back of our skeleton

THE CHAIRMAN: Is "Comments on annex to BT's skeleton".

MR. TURNER: Yes, so we have added an extra column. Their point is, or was, in broad terms "you never raised this point before". You will see in our responses, I am not going to go

through each and every one, but you have some of the documents, I think, separately provided for you. What we do is we go through and say, no, in almost all cases these are points which were raised before. If you go to the second page, paras.45 to 47 of Sareen it is talking about. What is said is that this was not evidence placed by Three before Ofcom. Those are points that Ofcom says in the final determination we will want to consider if we take this forward, and so it is responding to Ofcom, which says it will need to see more on this point.

So, for either of those two reasons what we are putting forward is entirely appropriate for Ofcom to consider.

In answer to the question that you raised at the outset, therefore, about what is new and what is not, this is something where almost everything was before Ofcom, even if it was not this particular MNO that put it forward, and in other cases where Ofcom has said in the final Determination to reach a view we are going to need X, Y and Z, it gives X, Y and Z.

That takes me to our Ground 2, which is the contract objection, you will recall, to the validity of 1046, that is the 'riding two horses' point. I have shown you that that was an issue squarely before Ofcom in the dispute resolution. I have shown you the letter, and it is a serious and well arguable point of law that BT should not be allowed to ride two horses at once. We know that Ofcom did not deal with that point in its determination, it is not there, but it would be self-evidently fair for the point to be addressed by someone now. It was there, it has not been addressed.

BT does not oppose, interestingly, the point being addressed now. What it says is that this point should be dealt with in a different set of proceedings, the one where, although we have the common Chairman, it is a different Tribunal, namely the remittal from the Supreme Court, that is para. 100 in their skeleton. Our answer to that is a very short one. In that other case the Tribunal, of which, sir, you are the Chairman, has already declared that the validity of this NCCN, 1046, is a matter that does not fall within the scope of those proceedings, and the Tribunal said that the parties would have to raise it before Ofcom in a separate dispute, and that was done. I will briefly show you that, that was your ruling on relief, and I am told by Mr. Woolfe it will be in your bundle 2 at tab 15.

THE CHAIRMAN: No, what is the title of the bundle?

MR. TURNER: BT Notice of Appeal bundle vol.2. If you go in that to p.4, para. 8. There is a reference here to 1007, 1007 is the father of 1046. You say at 8(1):

"The question of the fairness and reasonableness of NCCN956 was before the Tribunal. The question of the fairness and reasonableness of NCCN 1007[/1046] was not. Neither was any question regarding the inter-relationship . . ."

Then (2):

"The Tribunal can only determine issues that are properly before it. The Tribunal has determined that NCCN 956 is fair and reasonable, and that BT had the right to introduce it. Although it must be right that there are aspects of the Judgment that will be relevant to questions regarding (i) the validity of NCCN 1007[/1046] . . . the fact is that the first of these questions is before Ofcom and not before the Tribunal, and the second of these questions is a matter for the parties, presently before neither Ofcom nor the Tribunal (in other words the parties to raise [something])"

This was August 2011, the letter that you saw which raised the point in the dispute before Ofcom, was October 2011, but it is a matter that arises in these proceedings and it does not arise in the remittal proceedings and it should be dealt with here. It cannot be the case that the separately constituted Tribunal has jurisdiction in the 08 proceedings which it did not previously have because the matter went up to the Supreme Court and came down.

In view of the time I will conclude by turning finally to my last Ground of the four, Ground 1. If you have our statement of intervention, which is my bundle 5, tab A, p.22, paras. 60 to 68. I had forgotten the pagination is different, it is under heading D, para. 60. This is 4.4 and following, sir, your request to me about how to look at this, I say as follows: this contract objection, which I have now outlined to you, was not raised originally in the Ofcom dispute process, but it is fair to allow Three to raise it now for these reasons. The first point, under the Court of Appeal's approach to the law, which you know built on a previous ruling of this Tribunal in the T-Mobile or TRD case, Ofcom's task of dispute resolution was viewed as purely regulatory. It was concerned with the legislative objectives, the contract in question was not a matter that was considered important to the way that Ofcom should exercise its function.

Lord Sumption in the Supreme Court pointed out that that is what Lord Justice Lloyd in the Court of Appeal had done, and it was an issue that the Supreme Court fundamentally disagreed with the Court of Appeal about. Can I take you to the Supreme Court judgment. It is my bundle 4, which is the BT notice of appeal bundle. What the Supreme Court says is at tab 20, and if you go Lord Sumption's opinion at p.18, he has a heading, "The function of Ofcom in resolving disputes". The Tribunal may be well familiar with this and so I shall be

quick, but at para.30 you will see that Lord Sumption refers to what Lord Justice Lloyd did, attaching considerable importance to the nature of the function. The second sentence:

> "He considered that 'dispute resolution is a form of regulation in its own right, to be applied in accordance with its own terms'. In his view, the terms of the Interconnection Agreement were of little, if any, relevance because their effect was that any new charges introduced by BT were liable to be overridden by Ofcom in the exercise of its regulatory powers …"

and so on.

He points out the approach that was taken by the Court of Appeal. At 31 he says, first sentence:

> "The dispute resolution functions of Ofcom have often been described as regulatory …"

notably in that earlier case, which is sometimes called TRD. Then at 32, first sentence, he makes the point that:

> "As a national regulatory authority charged with the resolution of disputes, Ofcom has got both regulatory and adjudicatory powers."

Then if you go to para.46, the second sentence, p.23:

> "In the first place, as I have explained, in resolving this particular dispute, Ofcom was not exercising a regulatory function, but resolving a dispute under the unchallenged terms of an existing agreement."

It is very trenchant, very clear and a very strong reversal of the Court of Appeal.

THE CHAIRMAN: Yes, it is, Mr. Turner, but actually is not the way Lord Justice Lloyd was seeing it actually slightly asymmetric. What he was saying was that he attached relatively little weight to BT's right to introduce new charges because he saw the regulatory overlay as trumping private rights.

MR. TURNER: Yes.

THE CHAIRMAN: But I question whether he would have had the same approach if the MNOs' argument had been these NCCNs are contractually invalid and cannot be introduced. I anticipate his answer might have been rather different then and he might well have said that the contract does not allow you to do this and so you cannot.

MR. TURNER: I accept that the point may have been raised at that point, the contract point, entirely. I absolutely accept that. Nonetheless, the point is that the argument proceeded on the basis of the regulatory approach that should be adopted, and the Court of Appeal judgment saying do not focus on the terms of the contract as being decisive was in place

during critical parts of the Ofcom process, including the response to the provisional determination.

THE CHAIRMAN: That is absolutely right, but the way the argument was deployed was on the basis of BT saying, we have this right, we can do this, whereas the contrary argument of saying, you do not have this right, you cannot do this, look at the terms of the SIA, that was never raised.

MR. TURNER: I take, sir, your point, and let me deal with it in this way, because that is a very fair question. Imagine it along the following lines: had this Supreme Court judgment, with this very trenchant wording been delivered in July 2012 or some time after that, before the provisional determination, one asks oneself: would there have been a different provisional determination? At that point the matter is still live before Ofcom, it is still trundling along. At that point, might the parties, the MNOs, have seen what this is saying and then raised the contract point? The answer is yes. I fully take on board, sir, what you are saying to me about the ability of the MNOs to raise this point at the outset. Yes, it is a contract point, it is clear; and yes, it could have been taken at an early stage. However, if you ask yourself whether it is fair to shut this point out now, you need to address also the further question of whether, because of the canvas in place at the time of the dispute resolution process which takes place over an extended period, things would have been different had the prevailing state of the law been different. It is because, unlike in litigation again, the MNOs do not have a one-shot go at putting forward a case at the outset. You are able to refine and add points into a dispute as you go before the final determination is made. That is why, while I understand the point that you are making, it should not be decisive.

THE CHAIRMAN: I see what you are saying, Mr. Turner, but I am slightly troubled by s.195(2) of the 2003 Act. If one goes back to the way this process begins, one has the referral of a dispute to Ofcom, which says, we have an argument on the following grounds, and Ofcom then, in accordance with the statutory responsibilities, accepts that dispute and decides the dispute accordingly. The problem I have is that if a contractual argument for saying the NCCNs are invalid is not taken before Ofcom, obviously Ofcom cannot be blamed for not deciding it. Let us proceed on that assumption. I know you have a point for saying that one of your contractual arguments at least was live before Ofcom. Let us say it is an argument that could have been taken but was not. So Ofcom quite properly decides the dispute by reference to the points that are live in front of it.

Do you say that on an appeal before this Tribunal the new point can be introduced, given that the Tribunal's jurisdiction is to decide the appeal on the merits and by reference to any

grounds of appeal set out in the notice of appeal? The contractual point cannot form part of the grounds of appeal set out in the notice of appeal, any appeal, because Ofcom will not have addressed it at all.

MR. TURNER: Yes. Let me deal with that in two ways. The first is to say that if this is not something that fits within the framework of the grounds of appeal, I accept, and it is in line with my own reasoning, that the Tribunal should not, therefore, address it, but that is not to say that it is not fair and appropriate for the matter to be raised and considered by Ofcom.

THE CHAIRMAN: How do we do it? What is the mechanism for doing that? As I read s.195, we make a decision under s.195(2), and then, following on from that decision, we decide what action is appropriate for the decision-maker, Ofcom, to take. It does seem to me, but do correct me, that the matter needs to be live on the grounds of appeal in order then for s.195(3) and following to engage.

MR. TURNER: Do not read it that way because there may be issues, and this is perhaps an important point to pick up, that are raised which are not within the grounds of appeal strictly, but which are raised before you, and of course the Tribunal asked us to put forward the points that we would wish to argue, assuming it was all going to be dealt with here, this being one of them. There are points which, although they are not part of the grounds of appeal, are nonetheless important for the resolution of the dispute by Ofcom. Section 195(3) says that, as part of your job, you consider whether the decision that you make must include a decision as to the appropriate action that Ofcom should take in relation to the underlying subject matter. Then, 195(4), you do give directions, if any, to Ofcom as to how it is to proceed.

My contention is that that enables you to consider matters even if you find that they are not within the framework of BT's grounds of appeal and give directions to Ofcom as to how those are to be considered or dealt with. So you are able also to take a view on this. Even if you were not, nonetheless the matter could be raised before Ofcom, if it is fair and appropriate to do so. You may choose simply to give no direction on that point.

If I may conclude, there are two further points that I would like to make about this. I will merely add that, although this is a contract point which was not distinctly made before Ofcom before, the fact on which it is based, the lack of proper specification and the confusion from the 200 separate charges and how it was to be applied, all of that factual question is something that should still be decided and will be going to Ofcom to consider. So it would be fair and appropriate for Ofcom also to consider, if it is doing that, how that fits with BT's Interconnection Contract as the legal point on top.

If I may, I will then add the final points that I want to make about this, because there is more to say. First, BT's reliance itself in the Notice of Appeal, the amended Notice of Appeal, on the terms of the Interconnection Contract to support its appeal is entirely new. It is a point Ofcom has made to you before, and I am making it again. I showed you when we went through their Notice of Appeal that originally it did not rely on the contract terms, the SIA, at all.

BT was given permission by you in October last year for the first time to rely on the terms of the Interconnection Contract following the Supreme Court, and its new case is in para.69 of the amended notice.

So BT, by an amendment granted by this Tribunal because of the Supreme Court judgment, now says "We want to raise a contract point that we did not raise before Ofcom, that we did not raise even before the Supreme Court", but BT wants to stop the counterparties from relying on the contract terms following the Supreme Court against it. Viewed in that way, this is not fair. BT gets permission to amend to bring in its contract point in the Supreme Court, and we must not be allowed to.

My final point, which I think I have now completely covered, is that allowing Three to raise this will not open up a new factual area in any way. If this matter is to be considered, therefore, and we say it should, then it is fair and appropriate to do so.

So, to conclude, sir, I am conscious that there are a number of us to get through, and that the ambition of completing today's hearing in one day is unlikely to be achieved. However, I hope that this has been of some assistance to the Tribunal. Our ultimate conclusion is this. You are in a position to decide this appeal on the basis of the fundamental flaw that everybody agrees on. Indeed, my opposing parties say with us that you should now decide the appeal on that basis.

Secondly, if you do that, there are certain further matters which arise to be considered. They have now been flushed out in the Statements of Intervention; practicability, the consumer detriment point, the contract point that was there but was not considered, and this one. These are matters which it does make sense, with firm directions from the Tribunal, to be dealt with by Ofcom. It is both fair, is efficient, and it is the appropriate way to do it, rather than splitting these points up. Although it may be the case that some of those points could, if one takes a broad and very liberal view about what BT's Grounds of Appeal encompass could be decided on by yourselves on the merits, the right way to approach this is to allow the industry Regulator to look at things like consumer detriment, and so forth.

Therefore, our submission is that that is the right way to proceed, and that the Tribunal should consider that our four Grounds should proceed in that way. Sir, unless there are any further questions from the Tribunal, those are our submissions.

THE CHAIRMAN: Thank you, Mr. Turner. There are just two points. You have laid a great deal of stress on fairness and appropriateness as being the test we should apply on whether to admit new grounds and new evidence. You did not place very much emphasis on the issue of finality, which often crops up in cases like this; that, at some point, the evidence gathering process has got to stop to enable whichever responsible body it is to make a final decision. I think I know your answer to this, but I would be grateful nonetheless for you to confirm it, because you are saying that, because of the exceptional nature of the facts in this case, namely the Supreme Court's decision, finality plays a lesser role than perhaps it would do in other cases.

MR. TURNER: Yes. I have two responses. The first is, just to be absolutely clear, fairness and appropriateness is the right test, certainly when you are considering whether matters can be considered further by Ofcom. It is a factor that should feed also into the Tribunal's consideration of whether it should decide certain points for itself, but there, you also must be satisfied that these can be fitted into the Grounds of Appeal. There may be things which it is fair and appropriate for Ofcom to consider, but yet, stand outside the Notice of Appeal, and we talked about, for example, practicability in that connection.

Turning to your specific point on finality, finality, in my submission, is an aspect of appropriateness.

It is right to draw attention to the need for a regulatory process to have limits and to come to an end, and I do not shrink from that at all. But I do say, as you apprehend, sir, that, in the circumstances of this case, these are points where raising the banner of finality and saying that the mobile company should be shut out from being able to argue these points is not appropriate. This can be dealt with in an orderly way, subject to the Tribunal's directions, and in a fair way. Certainly, it would be wrong to proceed in a way that essentially tilts matters in favour of one of the parties to these original underlying disputes. Sir, those are my submissions.

THE CHAIRMAN: Thank you, Mr. Turner. There is one other point. I entirely take on board what you say about which is the appropriate decision-maker and how these matters should be resolved, assuming the evidence is admitted, whether it be Ofcom or us, in relation to your Grounds 3 and 4. But, as regards Grounds 1 and 2, you are not, I anticipate, that keen

on the invitation I extended at the outset of deciding the contractual points right away, given that they are short legal points, to take your own terms.

MR. TURNER: It is partly that we have not come to court to argue the substance of that. Further, in relation to perhaps both of them, certainly the 1046 point, I do not know what BT's arguments are going to be in relation to that, because they have not put those forward. So the matter is not ripe for a summary determination now. Perhaps it is something that I may need to consider over the short adjournment. So what I would say is that the prospect of this being dealt with by all the parties on the merits now is not one that I would welcome, because we do not know the other side's case and we have not come prepared to deal with it.

THE CHAIRMAN: Thank you. Mr. Ward?

MR. WARD: Sir, Mr. Turner has saved me a lot of time, but I will still need more than 11 minutes.

THE CHAIRMAN: Make a start, Mr. Ward.

MR. WARD: Of course. The Tribunal will have seen that, in Telefonica's Statement of Intervention, it has addressed three points of substance; first, the point of validity on NCCN 1046, essentially the same as Mr. Turner's point. Secondly is the question whether NCCN 1101 satisfied Principle 2, the welfare test. That again is, of course, the same as Mr. Turner's point, as it principally relies on the evidence of Alix Partners. Then thirdly, there is the question of Principle 3 and practicability, where Telefonica has served its own evidence in the form of Ms. Diane Gregson's witness statement.

We accept that at least these last two are a development of the material that was put forward before Ofcom. The evidence is certainly new and we have sought permission to introduce it under Rule 22. To the extent necessary, we have also sought permission to adduce the arguments that go with it under Rule 16. But what I will show you is that the amount of the new material or truly new material is nowhere near as clear cut as BT seems to suggest. Among other places, it is taken from the annex to the skeleton.

It is, of course, worth bearing in mind that BT has made some important concessions here. It has accepted the first point, the validity of NCCN 1046 should be determined by the Tribunal. We respectfully adopt Mr. Turner's submissions that it should be this Tribunal for the reasons he gives, but we also agree the issue is not ripe for determination today. We have not heard from BT at all as to what its position is on that. There should be some orderly process, which could be a speedy one, but an orderly process by which we determine that. BT accepts that we can at least litigate that point.

On principle 3, practicability, BT again accepts that can be litigated. Indeed, Ofcom is willing to litigate it or have it remitted, but what BT wants to do is shut out most of the evidence that would actually help the Tribunal reach a fair conclusion. On principle 2 BT does not want that litigated at all. What this means is the dispute is going to continue in some form, and in some forum somewhere, whether before this Tribunal or back to Ofcom, possibly both. You will have seen that Telefónica is largely neutral as to where this dispute was heard, we just want it heard.

Our overarching submission is the question is what is in the interests of justice in all of the circumstances. Of course, what the Tribunal is trying to do is reach a fair and correct determination of the issues. Would the NCCNs lead to consumer detriment? Would they be impracticable to implement? Those are the issues of substance, and it is plainly in the interests of the operators, and of consumers that we get the right answer. The additional material we have produced is intended to assist the Tribunal to reach that right answer, whether it is accepted or rejected. What we have instead from BT is essentially a tactical attempt to shut down the argument. It has not acknowledged at all the obvious point that we are seeking to reach the right answer, not just the most advantageous answer for BT. We are left in quite an absurd position that is easily illustrated by Principle 3. If I could ask you to turn it up very quickly, although I will have to go into it in more detail later. BT's skeleton, which I believe is in your bundle 8, is behind the first tab. It does attach to it two schedules, landscape for Three, portrait for Telefónica. We will go to a little of the detail later.

What you will see is that one of Mr. Beard's willing band of juniors has been through this very carefully what is and is not traceable back to something that was said to Ofcom. In the case of Telefónica they say, although we do not agree, that almost everything we are saying is completely new. So what Mr. Beard is really arguing for is that the Tribunal, or possibly Ofcom, should simply disregard all of this relevant material, material Mr. Beard has not suggested is irrelevant, and decide the point on little pinpricks of evidence, or assertion without going to the wider material. What that means is that there would have to be a long and arid argument before the Tribunal about what is new, what is really a development of what has been said before; what is really in four corners of what has been said before. In our respectful submission that cannot possibly be a just way to dispose of these issues, or a means by which to reach the right answer.

I want to make another point clear, just by way of introduction. We are not seeking to argue that all interveners in all appeals should be allowed to admit whatever material they wish.

This case has its own specific facts, and central to it, of course, is the Supreme Court's judgment. This is not a case where Telefónica has somehow deliberately held back material in order to ambush BT or manipulate the process. BT skeleton warns of the prospect of mayhem – "mayhem" is the word used in para. 17 of that skeleton. Members of the Tribunal, it is not mayhem, it is simply reacting pragmatically to the fact that, like it or not, the way the law was described and declared changed as a result of the Supreme Court's decision.

THE CHAIRMAN: Well, yes, but not in relation to Principle 3.

MR. WARD: I will come to that. It did not change in respect of Principle 3, but what changed was the significance of Principle 3 overwhelmingly as a result both for Ofcom and consequentially for the MNOs. But, if there are real doubts about the admissibility of this material, if the Tribunal is concerned about the way this appeal is proceeding, the short answer is to refer the lot back to Ofcom. Ofcom is not constrained by worries about Rule 22, or Rule 16. If the matter goes back to Ofcom, it, in our submission, should look at them having regard to all material circumstances, including submissions that the parties choose to make. In my submission, that may well offer a short cut through this increasingly arid debate.

The first point I was going to make, if it is convenient ----

THE CHAIRMAN: No, do carry on.

MR. WARD: Sir, I am in your hands. I wanted to start with some basic points about discretion even though I am mindful of what you said, sir, that you are much more interested in the application to these particular facts, because this is a matter of discretion, and you will have seen in BT's skeleton at paras 17, it says it would be beyond the Tribunal's jurisdiction to admit this evidence. That is plainly wrong. There is no objection of principle. What the Tribunal must do is exercise its discretion in accordance with the overriding objective, and we learn that from para. 3.1 of the Tribunal's Guide to Proceedings.

If I may just remind you without taking you to it, the overriding objective is to enable the Tribunal to deal with cases justly, in particular by ensuring that all parties are on an equal footing – a point I will be coming back to – that expense is saved and proceedings are dealt with expeditiously and fairly. In respect of the evidence in particular, para. 12.1 of the Guide, says that Tribunal will be guided by considerations of fairness, rather than technical rules of evidence. Then, of course, very importantly, Rule 22, which deals with evidence in particular, makes clear it may be admitted whether or not it was available to the decision-maker.

On top of that, we have much more directed guidance from the Court of Appeal in the 08X procedural appeal. I know it will be very familiar to you, but may I just take the Tribunal to this briefly ----

THE CHAIRMAN: No, please do.

MR. WARD: -- and remind the Tribunal of the key passages. It is in the first authorities' bundle, it may or may not be numbered "bundle 8". The one I have is the bundle of authorities from the CMC on 30th October. There is a rumour it might be bundle 4. If it is, it is behind tab 12. For the benefit of the other two members of the Tribunal who may not be as closely involved in this, this is the appeal in the 08X case dealing with the question of whether BT could submit fresh evidence in its appeal, including, not least, the model of Professor Dobbs on which a certain amount of work had been done during the proceedings before Ofcom, and then more advanced versions were sought to be relied upon. Ofcom had made submissions that in essence this should not be allowed in principle, and the Court of Appeal urged a much more fact sensitive approach. I would just like to remind the Tribunal of a few passages of this, starting at para. 60, which is p.13 of the print out. Paragraph 60 starts with a very, very important point: "The task of the appeal body" i.e. the Tribunal: ". . . 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'. It is not a form of judicial review as we know.

> "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. 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 the material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of a case it is not typically limited to considering the material which was available at the moment the decision was made. There may be powerful reasons why the appeal body should decline to admit fresh evidence which was available at the time, but that is a different matter."

Then, at para.70 after further argument, the Court of Appeal returns to this theme:

> "Under art.4 of the Framework Directive, the appeal body is concerned not merely with Ofcom's process of determination …"

This was not process, like judicial review -

> "… but with the merits. Ofcom is not only an adjudicative but an investigative body, and the Appellant may wish to produce material, or further material, to rebut Ofcom's conclusions from its investigation. It is unsurprising that the CAT should adopt a more permissive approach towards the reception of fresh evidence than a court hearing an appeal from a judgment following the trial of a civil action. Indeed, as Sullivan LJ observed, the appeal body might in some cases expect an Appellant to produce further material …"

In para.72 the court says it 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."

Here we would willingly shoulder the burden.

> "Since the introduction of fresh evidence is not a matter of right, in the event of a dispute … I would regard it as the responsibility of the party who wants to introduce it to show a good reason …"

Here is the kill:

> "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."

That is the key test.

Just finally, before we close the judgment, over the page, you will recall that the Court of Appeal in para.74 says:

> "These points can be illustrated by reference to the comment of the economist member of the panel, to which I have referred, that much of the case turns on economic theory supported by algebraic and mathematical calculations. Introduction of further calculations of that kind before a specialist appeal tribunal is different, for example, from trying to introduce fresh evidence from a bystander on appeal from a trial of a personal injury claim. The CAT may or may not consider that it would be proportionate and just to allow further algebraic calculations to be introduced in support one economic theory or another, but that is quintessentially a matter for the tribunal to decide."

So there is a hint that one might consider differently technical evidence.

Mr. Hunt certainly has a few equations, not as many, as I recall, that Professor Dobbs had, but the general point is that we are dealing with technical expert evidence here primarily, and even the factual evidence provided is of a rather technical kind, as opposed to which car was on the roundabout first.

So, in our submission, this is a broad discretion to be exercised in the interests of fairness and on a basis that is sensitive to the facts of this case. Perhaps if I pause there, this afternoon I will briefly develop the submission as to why the appropriate course is to allow the material in in this case.

THE CHAIRMAN: Thank you very much, Mr. Ward, we will resume at two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Ward?

MR. WARD: Thank you, sir. I wanted to just address you briefly on the content of Telefonica's proposed intervention, and for that one needs to turn to what I have as bundle 7, which is a slim bundle of the Telefonica statement of intervention.

THE CHAIRMAN: By luck or judgment it is bundle 7!

MR. WARD: Pure coincidence, I am sure! The statement of intervention is under the first tab. I do not propose to take you through it in any detail, but could we turn to para.18, which I hope is on p.6. It provides a short summary of the three points. The first one is:

> "NCCN 1007/1046 was issued in circumstances that did not accord with BT's duty under the SIA and/or under regulatory law to give proper effect to Ofcom's Determinations."

This is the contractual point. It is, in substance, the same point that Mr. Turner has already explained that Three is taking. Of course, BT has accepted that this issue is fit for determination by the Tribunal. That is a correct concession. The matter was raised in front of Ofcom, as you saw from the letter Mr. Turner showed you, which is under tab 13 of the CMC bundle, bundle 8 for you. You have seen the letter already, I am not going back to it. It is basically the same argument. Of course, it has never been answered. So whatever else one might say about the permissible scope of the intervention it plainly must be permissible for us to revive a point that we raised in front of the Regulator and the Regulator did not answer. In my submission, there is really not much more to say about that.

Point 2 is about Principle 2 and the question of consumer welfare in respect of NCCN 1101. That relies principally on the report of Alix Partners, but there is also a witness statement from Telefonica's Pricing and Propositions Manager, which is under tab C2, towards the back of that same bundle that the statement of intervention is in. I can give you the gist of

his statement in one sentence happily. If one turns to para.4 of the statement, p.2, Mr. Choudry summarises his evidence that:

> "… given the costs and administrative effort involved in changing tariffs, Telefonica would not make any tariff changes unless internal modelling clearly indicated that there was a significant benefit to Telefonica resulting from the tariff change."

He goes on and explains why. As you may well have seen, that is supportive of Mr. Hunt's proposition that these changes are unlikely to trigger the MNOs into action.

So that is our evidence on Principle 2. I echo Mr. Turner's submission that plainly this has a direct bearing on one of the most important issues in the case, and again that the novelty of this material should not be exaggerated, because Mr. Hunt's report in particular builds on Dobbs 3, and then updates it in the ways that Mr. Turner described.

So our broad submission is that it is obviously sensible that that material is considered in the interests of fairness.

On Principle 3 we have a witness statement from Miss Gregson, which is at tab C3 at the back of the Telefonica bundle. Perhaps I can take you very lightly through this evidence. It goes to practicability, and she is an Interconnect and Roaming Analyst. One can see the flavour of her evidence fairly quickly from para.21. She starts by explaining that the relevant NCCNs are far more complex than was the case 08x, and she talks about the large number of different ladders in para.22. Then, over the page, at 27 and following, she talks about difficulties in calculating retail charge payable. These are all very familiar issues, I appreciate. Then, at 43 and following, she talks about the different ways in which one can calculate an ARP and the contentious issues that may arise. At 59, there are a miscellany of other practical difficulties. If one skims the headings, one can quickly gain the flavour of the evidence. Then, at 73, she talks about consequences for resourcing and costs of engaging in this exercise.

It is worth keeping this bundle to hand, as I am going to come back to it for a separate purpose in a moment, but the core submission I am going to make is simply this. We know Ofcom was unable to decide this point on the material before it. We know that Ofcom said they would need to gather more information to answer the point. We know that even BT accepts this issue should now be determined, and Ofcom is willing to determine it. Our respectful submission is a simple one. That should be done on the basis of the relevant evidence. That is our primary case for adducing this evidence, and I am going to come in in a moment to talk about why it is that Telefonica's evidence was less at the time.

That takes me to the judgment of the Supreme Court, which is the central fact in the exercise that we are now engaged upon; the question of how the discretion should be exercised. It explains why we are here. To repeat very briefly Mr. Turner's submissions, it has declared the law to be very different to how it was understood, at least before the 08x case began.

You will remember that, as long ago as 2008 in the TRD case, the Tribunal was saying the burden was on the person seeking to introduce the change. We know, of course, that Ofcom applied the wrong test in its ruling and, like Mr. Turner, I accept its ruling on Principle 2 is invalid. Where we end up then is there has been no determination lawfully on any of the three points that Telefonica advances. Our contractual construction point was not engaged in.

On Principle 2, Ofcom reached the decision that it has to be satisfied. There is no lawful determination. On Principle 3, it was unable to decide. It was unable to decide, and it did not need to decide on its analysis of the law.

The Supreme Court judgment does not decide any of these issues either. It was not addressed to these particular NCCNs, and of course all NCCNs are different. BT's are different from Gamma's, for example, which would have to be looked at separately, despite what Gamma says.

On Principle 2, it does not decide whether these NCCNs satisfy this higher burden, this higher standard that is imposed as a result. Of course, the Supreme Court judgment does not address Principle 3 at all. It undoubtedly shows there was an error of law; no contest about that. It undoubtedly shows that Ofcom's decision cannot stand, but it does not actually give us the answers.

What I would like to do now is to turn to what Telefonica actually said at the time, which is the slim blue bundle, or at least most of it is. For this, I would like to start under tab 1A. This, in my respectful submission, is a very telling document.

THE CHAIRMAN: Tab 1?

MR. WARD: Tab 1A, which is hopefully headed "O2, Request to Ofcom". So this was Telefonica's reference to Ofcom of the dispute. It is dated at the end 23rd September 2010, and we can see that on p.6 of the internal numbering. Right at the beginning, it is worth examining what was said;

> "O2 requests that Ofcom joins it to the dispute between BT and EE about BT's termination charges under NCCN 1007 and 1046".

Then let us just look at the flavour of what O2 were saying, at para.5:

"Ofcom will note the only justification that BT has offered is [it addresses the defects of NCCN 956].

Ofcom will also note that BT has presented no evidence at all that its costs have increased".

At para.8:

"O2 does not regard the justification provided by BT for the increase in charges as in any way legitimate or acceptable. Rather, the unilateral increase in BT's charges without proper justification or evidence of an increase in costs is more appropriately viewed as evidence that BT is able to behave, to an appreciable extent, independently of its competitors and consumers".

So it is all about BT has not demonstrated that these charges are justified.

THE CHAIRMAN: Yes, but is that not the point that ladder pricing is a form of pricing that is not directly related to BT's costs of providing those services?

MR. WARD: In part, sir, but it is wider than that. We can see that from what it says on the next page. So at para.13:

"O2 submits that Ofcom is bound to reach this resolution by virtue of statutory duties and the guidance provided by CAT in its Judgment, the termination rate disputes (TRD)".

You will see the footnote shows it is the judgment of 2008. Then O2 summarises the effect of the judgment, and at para.15:

"In particular, the CAT emphasised the following points at paragraphs 177-179 in the Judgment.

* The onus lies on the party proposing the variation (here BT) to provide to the other party and to Ofcom the justification for the change in terms".

So it is a general obligation, as the law was understood at that time. At 16:

"The reason advanced by BT for the price increase, namely 'that NCCN1007 has been developed' is wholly inadequate".

At 17:

"Accordingly, O2 believes that the rejection of the charge increase should be a straightforward matter for Ofcom".

So that was the aspiration, at least, on the basis of the law as it was understood at the time. Then it says "NCCN 1007 fails to satisfy the other criteria". Then, at 21, very importantly:

"BT has made no attempt whatsoever to explain how NCCN 1007 could benefit consumers".

So that is what was said at the time on the basis of the law, as it was then understood, in TRD. The burden was on BT. BT had not begun to justify it.

Then simplifying rather what happened next, those matters were stayed pending the resolution of 08x, of course. Then, as Mr. Turner explained, after the judgments of the Court of Appeal, Ofcom puts out some provisional findings. If we could just keep this file open and turn to those provisional findings, which are in the first of BT's Notice of Appeal bundles. It may be your bundle 4.

THE CHAIRMAN: Which tab of 4?

MR. WARD: Tab 9, "Provisional Findings". Just to recapitulate, the dispute is stayed for a long time. Ofcom revived it after the judgment of the Court of Appeal by issuing these provisional findings. At p.5, I want to show you just one sentence, which I think Mr. Turner might have shown you already. I am sorry, sir, do we have it?

THE CHAIRMAN: I have it.

MR. WARD: So p.5, at 1.13. This is the crux of Ofcom's findings:

> "Given the uncertainty which we have identified as to whether NCCN 1101 will result in a net benefit or net detriment to consumers, and in light of our overriding statutory duties to further the interests of consumers, we consider it is appropriate for us to place greater weight on the potential detriments that might arise".

Then you will see the same boilerplate at 1.16 and 1.19. That is the basis for the provisional findings.

The parties had a few weeks to respond to the provisional findings, they were dated 4th December, and then if we turn back to the slim Telefónica bundle, we will see what Telefónica said about it. They did not say: "Here is a whole load of modelling" about a foot thick like Matt Hunt's report just in case the law changes. I will show you what it said under tab 1B. On the very first page, in the third paragraph, it says: "We agree with Ofcom that the effect on consumers of the NCCNs is essentially uncertain", so in other words it is endorsing the conclusion in the provisional findings, and then, very tellingly, this is despite the wealth of economic analysis that has been carried out on these schemes in an attempt to justify them under the terms of sections 185 and 192. In other words, BT has done a whole load of work to persuade you otherwise, but it has not shifted the burden as it was then ----

THE CHAIRMAN: Mr. Ward, just to be clear, is it right then that Telefónica put in no expert evidence of any kind to Ofcom.

MR. WARD: I believe so, but let me just check. (After a pause) That is correct, sir. It was perfectly entitled to say on the law as it stood, that was all that was required. There was no need to go further, it was a matter for BT to discharge the burden.

Of course, as Mr. Turner said, if, on 3rd December the Supreme Court had given judgment saying that the burden was actually otherwise, then all the MNOs would have sat up. They would have said: "Goodness me, there is a lot more work to do here", and Ofcom would have sat up probably and said: "What do you say about it?" one would hope, but none of that actually happened. So, the suggestion is that even so the MNOs should have said: "Well, who knows?"

The MNOs won in the Court of Appeal in front of a very strong Court of Appeal. The Court of Appeal has refused permission to go to the Supreme Court. They are having a go even so. We all know that most petitions to the Supreme Court fail, but "Let us contact Mr. Hunt and get this, just in case – just in case." In my submission, that is unrealistic, but I also make this point, if you still have open Telefónica's response, there is in a sense quite a neat overlap between the little they did say and what Mr. Hunt says, because if we turn back to that paragraph, they say, this is despite a wealth of economic analysis that has been carried out in an attempt to justify them: "We also agree Ofcom is correct to place greater weight on the potential detriment to consumers" – forgive me, I have already read that to you, but over the page there is a lot more detailed argument, and then on p.3, in the fifth paragraph Telefónica talks about the problems caused by the combined effect of many different wholesale tier charging schemes in practice. In other words, there will be all sorts of ladders out there, all subject to change at minimal notice, considerable time and effort required to calculate optimal retail prices and then amend and test billing systems, build and charging systems, and so on and so forth. Then it says: "That is even when confronted with a tiered wholesale charging structure that, according to Ofcom's theoretical model would result in a change of retail prices, an MNO acting quite rationally might decide not to amend prices". In other words, all this kerfuffle may take you absolutely nowhere. That is uncannily … in light of what Mr. Hunt later actually concluded on the basis of rather more rigorous analysis, and his report is in the bundle marked MH1, I have no idea at all what it is numbered for you, sir.

THE CHAIRMAN: It is bundle 6.

MR. WARD: His conclusions are neatly summarised on p.19. It is at para. 3.6.1 where he says:

> "In my view it is very likely that the ladder charges of NCCN 1101 would lead to overall harm to consumers.

(a) First, the Dobbs 3 framework predicts only small retail price decreases when taking into account prevailing retail prices.

(b) Second, the threshold MTPE that would be sufficient to find a negative impact . . . is small. And, in my view, the evidence on the MTPE is consistent with a significantly larger value.

(c) Third, given the small changes in average retail prices and profits for calls . . . that are predicted . . . in my view it is highly unlikely that MNOs would change these retail prices in response to the ladder charges. "

That is exactly what Telefónica was saying in its response to Ofcom back in January 2013. I am not saying that in that one sentence of Telefónica's response is the entirety of Mr. Hunt's report, of course I am not, but I do make a point which I am going to come back to which is that BT is asking you to cheese pare on the basis of what is and what is not within the scope of what was said to Ofcom. Here is the first of many very difficult issues that you will face if you go down that road.

If we could now put that away and pick up the authorities bundle from the first CMC again, because I want to go back to 08X in the Court of Appeal, under tab 12. You will see there is a striking echo as between Telefónica's position now and BT's position then. It is the first CMC Authorities Bundle, under tab 12, that is the 08X case in the Court of Appeal we looked at before lunch. If you are with me thus far, I would like to go to p.11 of the report We were looking at this before lunch, and the question was: would BT be allowed to adduce fresh evidence in the 08X case, and I would like to show you para. 48, where Lord Justice Toulson observes:

"There was a good deal of argument about the extent to which the new evidence (Dobbs 3 [among others]) amounted to BT advancing a 'new' case."

The Tribunal will feel familiar with this problem. A comprehensive analysis would be lengthy and I do not believe it to be necessary. 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'."

You see the point I am making, sir. There is a very strong parallel here. BT has gone from "might" to "did" create incentives. Our evidence has gone from unclear backed with short

form submissions, to "would" be detrimental to consumer welfare based on Mr. Hunt's report. So, even though Telefónica made more limited submissions, we do submit that is entirely understandable in the circumstances on the law as it then was. What we are seeking to do now is, of course, expand them, of course that is right, but that does reflect the change that the Supreme Court brought about.

This also bears on the third principle as well, practicability, because the reality is Ofcom did not decide this because it did not need to. If it had needed to one can speculate that it might well have asked the MNOs for some more information. It has compulsory powers to do so, and we saw Mr. Turner showed you that Ofcom was dissatisfied with the information it had.

May I just go back to that briefly. Try notice of appeal bundle 1, under tab 11, which I hope is the Determination in this case, it is dated 4th April 2013, p.162, and the last paragraph on that page, 7.273, under "Final Conclusion" on practicability.

> "We have had considerable difficulty in trying to assess whether it would be practical to implement the charges. . . . as we have been provided with little information as to how it is envisaged that the tiered rates would actually be implemented. The Disputed NCCNs only contain details of the pricing schedule that would apply without proposing details of how it will apply."

As Mr. Turner said, that really is a complaint to be addressed to BT. Then it talks about what remains unclear as the result, and so on.

Then, the conclusion that you have already seen at 7.275 is, luckily, that it is unnecessary to decide it. It is unnecessary to decide it because there is a burden on BT that it cannot discharge.

That is why Ofcom went no further, but if Ofcom had received in the post the Supreme Court's judgment it is a pretty safe bet that, just as Mr. Herberg is saying today, "We need to look at this further", Ofcom would have said back in December 2012, "We need to look at this further, and if we have not got the answers to the questions that we need, we will have to go to BT and we will have to go to the MNOs. If necessary, we will use our s.135 powers, and we will get the information so we can actually reach a right decision".

That is why, in reality, these things are linked back to the Supreme Court's judgment.

The next question is what is it that Telefonica actually said about practicability at the time? For this I want to show you some underlying documents as against BT's table. BT's table is in, I think, your bundle 8, which was the CMC bundle. Behind tab 1 is BT's skeleton argument, and at the back of that is a portrait table - in portrait rather than landscape, which is their analysis of Telefonica's evidence on Principle 3.

You will have seen at a glance that BT basically says Telefonica did not really say any of this at the time. I frankly accept that Telefonica did not say much, but BT has short-changed us here. It has short-changed us, and moreover, as Mr. Turner says, you are entitled to look at the totality.

The real object of my submissions is not to persuade you that everything in Miss Gregson's witness statement can somehow be found in Telefonica's submissions at the time. They were brief. Miss Gregson's witness statement is much more comprehensive. The point I am making instead is that if you are to take out your judicial scalpel and do what BT suggests and cut out a sentence here and cut out a sentence there, the exercise will be artificial - in my respectful submission, preposterous - and patently will not lead to a fair outcome.

I cannot let this table go without at least addressing it in part. So, in the interests of time, I will just take you through a few entries and, if need be, we can be more comprehensive.

You will see that the way this table is laid out is that paragraphs of Miss Gregson's witness statement are referenced on the left. BT then summarises their evidence in the next box. In the box after that it says, "Was any of this put before Ofcom". At para.19 it says:

> "The fact that TCPs other than BT have introduced their own ladder charges add further complexity to the implementation."

In other words, other ladder charges make the situation more complex. I have actually already shown you this passage, but could we keep that open and pick up the slim Telefonica bundle and go to tab 1B, this is the January response to the provisional findings.

On p.3, the paragraph between the hole punches that begins, "The combined effect", I have already read it out ----

THE CHAIRMAN: Yes, you have.

MR. WARD: -- but it does make essentially this point. It says it is all very complicated because there will be lots of ladder charges.

Can we keep that document open, please, but turn over the page in BT's schedule, on the next page, paras.27 to 42 of Gregson:

> "NCCNs 1046 [etc] contain reference to the 'retail charge payable'."

Essentially it is unclear how you calculate it, and then (ii):

> "Actual rates are very complex to implement and would require a disruptive and expensive overhaul of billing systems."

They say this was not addressed at all. Starting again in the slim Telefonica bundle in the same document you have already seen, on p.9 this issue is touched upon. You will see

under the head of Principle 3 there is a page of submission, and the second of those paragraphs you will see, picking it up half way through:

> "There are very many other ways of calculating average retail prices (e.g. relating to zero rated charges, charges for MVNOs, payments made by service providers to MNOs etc, open to the parties to negotiate."

So it is very much the same kind of point that is being made there.

That is not all. There is more on this subject. Can we go back to the provisional conclusions which are in the first of BT's appeal bundles at tab 9.

THE CHAIRMAN: Volume 1, tab 9.

MR. WARD: Tab 9 are the provisional conclusions that Telefonica are responding to. Could I take you to p.100. 6.84:

> "There is consensus between the MNOs that it is extremely difficult to calculate an average retail price on which the termination charges can be based. EE noted that this was particularly the case in relation to zero rated 080 numbers …"

Then 6.85:

> "There also seems to be consensus among the MNOs that current billing systems would not support the implementation of NCCN 1046."

Then at the last of those bullet points there is one about O2:

> "… the cost of implementing NCCN 1046 is 'not insignificant and may be significant'."

The document that relates to, which is footnote 219, is the document that BT refers to in this schedule but it did not make it into the bundle. If I may, I am going to hand it up, together with two other things I will be referring to later, but not now, just so that the Tribunal has it all in one go. (Same handed) What you should have in there is a short letter on O2 letterhead dated 2nd November. You will see that the way this proceeds is that it is a response to two questions asked by Ofcom. The first one we are not concerned with, and then the second one:

> "Please describe any consideration or assessment by O2 of the likely effect on your business of making payments under 080 number ranges, including e.g. internal systems."

Then could I ask you to skim read that answer just to get the flavour of it. The detail really does not matter. (After a pause) You can see the flavour of it, "We could do this, but it is all complicated".

So when we go back to BT's table, which was behind the skeleton, I hope you still have that open, you will see that what is said, in my submission, unfairly, is that these points have not been addressed at all, the underlying material.

We are back in BT's table, second page, behind its skeleton argument ----

THE CHAIRMAN: Paragraphs 27-42?

MR. WARD: Paragraphs 27-42, and in particular the bullet point 2:

> "Actual rates are very complex to implement and would require a disruptive and expensive overhaul of billing systems."

It does not say that in so many words, but the effect of a lot of what you have just seen is very much in that line.

Similarly, on the next page of the table it says, "Description of Telefonica's approach to the calculation of ARPs", and it says:

> "No evidence, submissions to Ofcom merely asserted it would not be able to calculate ARPs, but did not provide supporting evidence."

Here they do at least accept that that letter I have just shown you has a bearing on it, but they say it is not good enough, it is just some assertion. Of course, if it had actually needed to decide this issue, it could have come back to Telefonica and asked it some more questions.

I could go on. I frankly accept I cannot do this exercise for every single box in this table, but I can do it for a few more. But I propose to leave it there, because I am really making a high level submission, which is that plainly there were submissions made by Telefonica. They are not as comprehensive as they are now. But, if you are going to somehow try and sort them out, it will be a very onerous exercise to work out what we can say and what we cannot say. The reason why we say that is the wrong approach is that, if this issue is now going to be decided for the first time, whether by the Tribunal or by Ofcom, it should be on the basis of the available evidence, not by taking a scalpel and working out what was or was not said in the past.

Another point I want to just pick up briefly is I have said why we submit Telefonica was not required to make alternative submissions just on the basis that the Supreme Court may decide otherwise. But the other point that BT and Gamma both make is an even more extreme submission, that Telefonica should have filed a protective appeal. Mr. Turner touched on this lightly and encouraged me to pick it up. We do say the submission is strikingly bizarre, because of course Telefonica won. That is the basic fact about Ofcom's Determination. If it is right that a successful party before Ofcom has to appeal just in case

the law changes in the future, one is going to face a large number of protective appeals in all sorts of cases. That would be bad for the parties, bad for the Tribunal, and bad for Ofcom. As Mr. Turner alluded to, there is a logical flaw in this argument derived from the provisions of the Communications Act. In the clip I just handed up is also s.192 of the Act, which I am not aware of being in any of my bundles.

MR. BEARD: For reasons I do not fully understand, in the authorities bundle, we only get sub-sections 6, 7 and 8 at tab 2, so it might be sensible to slot it in there.

MR. WARD: Let us do that, even though is it, in fact, 6 that is most important. So that will be in the second of the authorities bundles, the one that is prepared for today. Under tab 2. I have got half of 7 and 8. But anyway, this way we will have the set. So, in today's bundle of authorities, tab 2 contains the Communications Act. This could go on the top, 192. This is the section that creates the right of appeal, and it is the right of appeal against the decision by Ofcom. Then if we can just pick it up at s.192(5):

> "The notice of appeal must set out the provision under which the decision appealed against was taken and the grounds of appeal".

At (6):

> "The grounds of appeal must set be out in sufficient detail to indicate to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both".

This would have been a rather more contrasting interesting exercise for Telefonica, because its position would have been it is not wrong in fact and it is not wrong in law. So, in our respectful submission, to say it should have appealed, sir, Ofcom had decided the case in its favour on the basis that Telefonica's submission was correct. Telefonica went to the Supreme Court arguing that the Court of Appeal got it correct. It did not think "We had a windfall here because the Court of Appeal got it wrong".

THE CHAIRMAN: We are talking here about an appeal against a decision by Ofcom. One could have appealed the non-decision decision not to deal with Principle 3. You could say "You got that wrong because it is impracticable.

MR. WARD: I accept we could have done that, but not on Principle 2. On Principle 2, we thought it was right and, because it was right, Principle 3 did not arise. Sir, whatever the strict limits of jurisdiction are or are not here, we do submit that for the Tribunal to hold in this case that protective appeals ought to be lodged in those kinds of circumstances would be to open a can of worms and to encourage a large number of otherwise unnecessary appeals to find their way across the Tribunal's doormat. In our submission, the correct

approach is exactly what was done here, which was to wait and see. If an appeal was brought by BT and if it prevailed in the Supreme Court, to then file a Statement of Intervention addressing the law, as it stood, in light of the Supreme Court's ruling. That was the sensible and responsible approach.

Let me turn now to another factor, which is more general in the case. I have dealt in a sense with the specific features of the three grounds that Telefonica want to advance. But, looking at the case more generally, you will have seen in our skeleton argument that we also rely on Ofcom's decision to step back from these proceedings. But it took advantage of Lord Justice Toulson's suggestion in 08x that it could leave the parties to battle it out in a suitable case.

Ofcom wrote to the parties in September 2014 to tell them that that is what it was going to do. That letter, if you would like to see it, is under tab 2 of the bundle of the parties' main documents for the case management conference on 30th October. I am afraid it is number 2 for me.

THE CHAIRMAN: It is number 4 for us.

MR. WARD: Right, I am going to write that on, thank you. Ofcom's letter is under tab 2, I hope, the letter of 25th September 2014.

THE CHAIRMAN: No, I think we have got that wrong.

MR. WARD: Right. Tribunal 3 is the bundle being offered.

THE CHAIRMAN: What tab again, Mr. Ward?

MR. WARD: 2, the Ofcom letter of 25th September. This was responding to ----

THE CHAIRMAN: One moment, bundle 3, tab 2.

MR. WARD: This is shortly after these proceedings came back to life, when there was an exchange of correspondence between the parties about what their position would be about how they should go forward. It will be familiar, sir. You will see, below the second hole-punch:

> "Ofcom has reviewed its determination in this matter in the light of the Draft NoA and the judgment of the Supreme Court. We have also kept in mind the postscript of Toulson LJ's judgment in the 08x case, in particular paragraph 87 [which is the one that says Ofcom can step back]. Our understanding of the Court of Appeal's intention in that postscript is that it should, subject to the Tribunal's permission, be open to interested third parties to resist grounds and make submissions in appeals from decisions made by Ofcom, even where Ofcom does not wish to take an active

part. Ofcom's position as set out below takes account of the possibility that one or more of the MNOs may wish to resist grounds".

Then, under "General" at the end of the letter, it says:

"Ofcom's present intention (whilst reserving its position) is that, if there is to be an appeal on Ground 1(Limb II) or Ground 2 or Ground 3 by virtue of the position of any other party, Ofcom would not take a substantive position or play a substantive role in accordance with the approach of Toulson LJ, and accordingly would not file a substantive defence [etc.]".

It is plainly entitled to do that in the light of what Lord Justice Toulson said, but we do respectfully submit that it is a relevant factor in these proceedings, because the first thing it means is it is left to the private parties to carry the can in the case. They have to, in a sense, provide a full defence, not a partial defence. That contrasts the position in 08X, which, sir, you will remember Mr. Herberg on his feet, a detailed cross-examination, evidence I think from Mr. Cullen. There was a full defence, or at least it was almost a full defence. I think some things were … But, in any event, we are in totally different territory here, where Ofcom is saying "It is up to you. You must carry the can". Of course, we cannot know, if Ofcom have decided to fully defend the case, what it would have said. We do not know. It is just speculation. What it has said might have affected what the MNOs need to say, just as in an ordinary case where a supporting intervener looks at the Regulatory Authority, whether it is Ofcom or whoever, and says "We need to augment what they are saying, but not repeat it". But we will never know, and I do not mean any criticism of Ofcom in saying this. It is just that that is not what has happened.

But there is a second reason this is significant, because it tells us something about what is left in this dispute now, which is essentially a dispute between private parties. It is absolutely true that this dispute takes place within the common regulatory framework, and the application of the duties in the common regulatory framework are very important. It is not pure contract. I am not going back over that ground. But what you actually have in front of you is two private parties left to battle it out. This matters because those parties are not Regulators, they are not acting as arbitrators. As you have said, sir, in argument in the last CMC, Ofcom's position was rather like an arbitrator. This matters because it tells us that the basic reasons why BT objects to this evidence are just misconceived, because at the heart of BT's argument is the argument that because Ofcom could not do this, the private parties against BT cannot either.

That does have to grapple with the essential difference. Ofcom is a Regulator – as you put it, sir, almost acting as arbitrator in this case. We are just private parties arguing over wholesale charges. Why, in our respectful submission, should we be constrained in this way?

Can I just make one further point clear though in light of Ofcom's skeleton? We have made no admissions or concessions about Ofcom's ability to run new points or not. That does not arise because Ofcom is not trying to. The issue for you, sir, is whether these private parties should be allowed to run the points that they wish.

Our submission is there is just no reason that they should not just because Ofcom as a Regulator may face a different regime.

The crux of BT's argument is its reliance on a series of cases about competition penalties, *Napp, Tesco* etc. I am going to take you to *Napp* in a moment. The critical point about those cases is those are cases where the Regulator acts as prosecutor, prosecuting a criminal charge in order to impose a financial penalty against one or more parties who are defendants to that criminal charge. The consequence of that action is that party enjoys the full rights of defence. It gets a detailed statement of objections, it gets access to the file, and the Regulator is held to the things that he has put in the charge sheet.

Just to make that good, we have handed up a small extract from **Bellamy & Child**. I know it is obvious but if I could just remind the Tribunal. It is a short extract dealing with the statement of objections. 13.057 it starts – I can skim through this very rapidly.

> "Initiation of proceedings. The first stage of the Commission's investigation normally involves the fact-finding [measures] above."

If it wishes to move to decision-making it initiates proceedings.

Over the page, after it started its investigation 13.060, the statement of objections;

THE CHAIRMAN: A page is missing we do not have p.1070.

MR. WARD: I am very sorry. I will just read you what it says, a couple of sentences, because it is very obvious and we will supply a complete copy. 13.060 says:

> "Respect for the rights of the defence requires that an undertaking should be afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim."

Then it says to that end the Commission is required to inform the parties of the objections raised against them. Do you have 13.061?

THE CHAIRMAN: Yes, we do.

MR. WARD: Good. Then it says the statement of objection serves to crystallise the Commission's objections at the start of the procedure. So that is where the Commission puts its case, and tells the accused it may be facing fines of hundreds of millions. Very importantly, it also has to provide them with the underlying documents, and that we can see in 13.063, if you have it?

THE CHAIRMAN: Yes, we do.

MR. WARD:

> "Where the Commission relies on particular documents as evidence of infringement, copies of these documents must be supplied so as to enable the defendant to comment on their probative value. If that is not done the Commission may not rely on the documents."

Then, finally, for this purpose, access to the file, which is 13.067:

> "Access to the Commission's file is one of the procedural guarantees intended to apply the principle of equality of arms, and to protect the rights of the defence. Right of access to the file means the Commission must provide the undertaking concerned with an opportunity to examine all the documents in the investigation . . ." etc.

What this says, and there are similar rules that apply, they are now the CMA Rules, they are in similar form. The point of this is the person facing this criminal charge as it is, under Article 6, knows the case against them, and that case crystallises, and it cannot move on, and the Commission cannot say: "Actually, now we have thought about it we want to fine you €500 million for something slightly different." That is patently unfair.

That has led, in the UK, to the somewhat restricted approach taken in *Napp* to the ability of the OFT to rely on new material. Can we now go to *Napp*, which is in the bundle of authorities for today, under tab 3. This is, I suppose, the still leading statement of when are the circumstances in which the Regulator can adduce fresh evidence in a penalty case? The Chairman of the Tribunal was Sir Christopher Bellamy on that occasion. Could I ask you to turn it up at p.25 of the judgment? All I am going to show you is even if this was a penalty case, and even if Telefónica was a Regulator, there would still be relevant discretion to consider in this case. We are not there, I am not relying on that discretion. My primary case is we never even get here, but I want to disabuse the Tribunal of any sense that even a Regulator could not possibly rely on fresh evidence.

Would you go to para. 64 of the judgment? We take the view, first, that it is impossible to deduce from the Act and the Rules – the Rules being the equivalent of the provisions we

have just looked at, that there is an absolute bar on the admission of new evidence before this Tribunal, whether submitted by the appellant or respondent. There is no absolute bar. Then, it says over the page, 65: "The Act and the Rules imply that the procedure before the Tribunal should be evidence based, in course of a determination 'on the merits'. Of course, penalty cases are truly on the merits.

> "It follows that the question of what evidence is presented on the appeal, and how that evidence is to be handled, is a matter for the discretion of the tribunal: see notably Rule 20 [as it was then]. Such discretion is, of course, to be exercised judicially, but it is not in doubt there is discretion."

So, even here, there is discretion. Then if we just note in passing at para. 69: the Tribunal notes that the proceedings are criminal for the purpose of the European Convention. Then, moving on to para. 76, the Tribunal says the appellant is not limited to placing before the Tribunal the evidence he placed before the Director. At 77 it says:

> "We doubt, however, whether exactly the same liberal approach . . .can be applied to the Director. In our view, the exercise of the discretion to allow new evidence by the Director at the appeal stage should strongly take into account the principle. The director should normally be prepared to defend the decision on the basis of the material before him."

This is entirely understandable in the context of a criminal penalty.

> "It is particularly important [his] decision should not be seen as something that can be elaborated on, embroidered or adapted at will . . . It is a final administrative act, with important legal consequences."

The case has to be put to the suspect. Then at 78:

> "Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented."

In other words, what is the point of this process of statement of objection, access to the file, and so on and so forth, if the Director can just make it up as he goes along?

Then, over the page, even that is not final though:

> "For these reasons our provisional conclusion is that there should be a presumption against permitting the Director to submit new evidence that could properly have been made available during the administrative procedure."

But only a presumption. The door is not closed, and it says in 80:

> ". . . there may well be cases where the Tribunal is persuaded not to apply the presumption we have indicated. As stated in the *Guide*, the procedures of this

> Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation. That includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense . . . Those considerations may militate against permitting new evidence by the Director, but in some circumstances considerations of fairness may point in the other direction. An obvious example is where a party makes a new allegation or produces a new expert's report which the Director seeks to counter."

We do not have that exactly here, but BT, of course, has amended its Grounds to add a new Ground to reflect the Supreme Court's judgment, but very much in the same sense, a new factor has come into play in our case.

Then it picks up at para.81:

> "One factor that may well be relevant in this connection is the fairness of the appeal process itself."

Then it says in the fifth line:

> "The Director, at the administrative stage, may not always be able to foresee (…) from what direction or in what strength an attack might come …"

In other words, matters may develop.

Then particularly we would emphasise para.82:

> "Another possibly relevant consideration is the situation of adversely affected third parties such as competitors …"

We are not competitors - probably we are competitors of BT in certain respects - but we are here because we are counterparties to the agreement that is the subject of this dispute:

> "Such competitors may choose formally to intervene, or they may have their point of view put by means of material presented by the Director. We are not persuaded that it matters very much which route is followed; we simply indicate that what is fair as regards closely involved third parties may also be relevant to the exercise of the Tribunal's discretion to admit further evidence."

We do not rely on this. We say it does not apply. Our case though is that even if it did apply you could see a person in the position of the Regulator would not be entirely closed down from admitting fresh material in circumstances such as this case.

I want to turn now to another point that BT makes about the ability to raise fresh evidence, because we do submit that its version of events is strikingly one-sided. What it says in essence is that the ability to adduce fresh evidence is a right only enjoyed by the appellant. We can find that in para.42 of his skeleton argument. It is perhaps not necessary to turn it

up. If it was right, it would be a startlingly one side analysis of the appellate system. That system would basically be rigged in its favour. What we have here, of course, is BT, itself, advancing a new ground of challenge. Of course, BT continues to insist it is not a new ground because it is worried by that word, but you, sir, gave it permission to adduce that material under Rule 11(3), which deals with new grounds. So that debate is now only of historic interest.

The point is that BT has advanced a new ground, and our case is, in substance, responsive to that ground. BT's case is that it is simply not possible for a respondent to adduce fresh evidence in a case of this kind. We have seen, there is nothing of that kind in the language of Rule 22, and there is nothing of that kind in the 08x case either. We have been over that already this morning.

The test is simply what is in the interests of justice? That is what the court said in 08x. BT reads that as if it was qualified by the words "or at least if you are an appellant". On BT's case, under Rule 22, a respondent could not adduce evidence, or rather an intervener on the side of the respondent could not adduce evidence even if there was good reason, and even if it would be in the interests of justice. Our submission is that is patently unfair. It is contrary to the principle of equality of arms as well. The authority for that is in our skeleton argument.

There is a further very bad point indeed that BT takes on this, which is that the Framework Directive only gives it a right of appeal. It has to have an effective right of appeal. Therefore, it is BT's procedural rights that must be looked after and nobody else's.

Of course, an effective appeal is a procedurally fair appeal. A procedurally fair appeal is an appeal where there is equality of arms.

BT also complains that the MNOs have not sought to reopen the issues in the 08x in quite the same way - in other words, the matter has been remitted from the Supreme Court and nobody in the 08x case is saying, "Let us have another hearing before the Tribunal". There really are two obvious answers to this. The first one is, of course, in the 08x case we had a hearing of the Tribunal. It was in April 2011. It is water under the bridge. Here we are trying to decide what that hearing will look like in the first instance. There has been no hearing.

Secondly, of course, we are dealing with a separate set of ladders. Arguments that may or may not arise in 08x may or may not arise in this case. So there is no significance one way or another on this point.

I want to turn now to a point which is, I think, mostly made by Gamma, but also I think at least touched on by BT, which is, are we precluded from raising these points because the Tribunal must decide the appeal by reference to the grounds of appeal under s.95(2).

The first point I make is that language is by reference to the grounds of appeal. That evidently allows some leeway as to the extent to which the interventions on the side of the defendant respond to those grounds. The material that we are seeking to adduce is responsive to BT's grounds. It is. It raises additional defences - I say "additional" in the sense that we do not have Ofcom's defence - it raises particular defences to them, but in that sense it is responsive. It is entirely legitimate for a respondent to run additional points over and above whatever was in the original decision-maker's decision.

If we actually look at the points, Ground 1 I have already dealt with. It was raised before Ofcom. Ofcom never answered the point. It has been in play. BT do not even object, so I will not spend any more time on that one. In my submission, it is plainly in there.

Ground 2, which is a welfare ground, is responsive in two ways to BT's pleaded case.

Could we turn that up in - I think it may be your bundle 3.

THE CHAIRMAN: That is labelled bundle of main documents for case management conference.

MR. WARD: Yes, thank you. If we turn to tab 41, that is the mark-up that Mr. Turner showed you earlier, and I am happy to work from that version. Could you go to p.27 of the notice of appeal, para.70. This is after the effect of the Supreme Court's judgment has been set out. BT's case is:

> "It follows from the above that Ofcom's consideration of principle 2 in its analytical framework … and the conclusions Ofcom drew in relation to that Principle, were wrong, unnecessary and contrary to the terms of both the SIA and the CRF. They are also contrary to the approach taken in the Supreme Court judgment. The 2013 Determination falls to be quashed on this basis alone."

Our answer is, yes, Ofcom's analysis was wrong, but its conclusion was right. So in that sense we respectfully submit that this is plainly responsive to BT's pleading. It just says, "You are right they made an error, but you are wrong because it did not actually matter, it did not count".

If there is any doubt about it, we can see also that the pleading could be viewed as responsive to BT's Ground 2, where BT says at para.71:

> "… 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 … it was wrong to find that there was any material risk of consumer detriment …"

So here BT is joining issue on the question of substance and whether there was or was not material consumer detriment.

Where we are at the moment is Ground 2 is stayed, but if the argument now is that this material of Mr. Hunt cannot be deployed for essentially a technical reason, there lies the answer. BT has put the issues of substance in play. We are deploying them in a slightly different way, but, in my respectful submission, there is no jurisdictional bar here.

On Ground 3, the position is even more straightforward. Paragraph 81, and Mr. Turner showed this, says:

> "In the event that this appeal [goes forward] … BT intends to provide further evidence on the practicability of the proposed price ladders in this case."

It is joining issue on the question of substance. If it can, in my respectful submission, so can we.

So, members of the Tribunal, there are two more things I want to address you on. Remittal, first of all: is remittal the right approach? I said when I opened my submissions that for Telefonica, it is happy either way: it is happy with remittal; it is happy for the Tribunal to decide the point. We do agree with Ofcom that ordinarily, where a decision-maker in public law has made an error of law, the matter would go back for reconsideration. I have also made the point that, if the matter is remitted, these intricate questions of exactly which bits of this material are admissible or not do not or need not arise.

I say need not, because Ofcom says "You should actually decide the issues of admissibility before remitting". But, in my respectful submission, that is simply illogical, because Rule 22 and Rule 16 apply to the manner in which the Tribunal will dispose of these issues, were it minded to grapple with them. But it is perfectly open to the Tribunal to simply remit Principle 2 and Principle 3 issues to Ofcom for fresh consideration. Then these issues of admissibility simply do not arise.

THE CHAIRMAN: But you would accept that we could narrow the remission?

MR. WARD: Indeed, you could. You have the power to make directions. Absolutely, you could. But, in order to narrow them, one would have to reach a view on all these, in my respectful submission, rather palliate issues that we have been ventilating today. A practical way to achieve justice here is simply to cut through them, and say, "Ofcom, you are the primary decision-maker. You have got Principle 2 wrong, we all agree. Principle 3, you never decided. Ground 1 of Telefonica's submissions, you never decided. Go back and do it again".

Finally, my final, final thing was I was going to address you briefly on the draft rules that were handed round on Thursday.

THE CHAIRMAN: Yes.

MR. WARD: Sir, may I just give you a bullet-point answer to each of the five considerations in Rule 21.2?

THE CHAIRMAN: Yes.

MR. WARD: Just ticking through them, if I may, first, the statutory provision pursuant to which the appeal is brought and the applicable standard of review. Answer, merits (see 08X), I made those submissions this morning. Secondly, whether or not the evidence was available to the respondent before the disputed was taken. It was not available, in the sense that there was not some pre-existing document, like "Here is a memo that we should have provided that we are only providing now". It is obviously right that it could have been made available, in the sense that it could have been worked up, subject, of course, to the point Mr. Turner made about the Genakos and Valletti report, which was not available. But it is not the case that Telefonica were sitting on some sort of prize exhibit that it just was not bringing forward, as a desire to manipulate the process. So that deals with (b) and (c).

THE CHAIRMAN: No. Does it not mean that, if the material could have been adduced under (c), it was capable of being made ----

MR. WARD: Sorry, yes, I meant to accept that, subject to the point about Genakos and Valletti. Then there is the question of prejudice, the prejudice that may be suffered by one of more parties if the evidence is admitted or excluded. In our submission, the principle issue of prejudice is to the question of whether we are going to decide these issues correctly. BT has said it would be prejudiced. It would be prejudiced if this went forward, because it would have to address this material, and we would accept, of course, some further delay. But what it does not say is that it is prejudiced in the sense that the material is no longer available or, because of the fluxion of time, witnesses cannot be found or documents cannot be found, or anything of that kind.

Of course, we accept the logic of what we are saying is there will be some additional process here, but there is going to be some additional process, one way or the other, at least in respect of Principle 1 that BT accepts and Principle 3 that Ofcom, at least, accepts, and indeed BT accepts there should be some, albeit rather truncated process of Principle 3.

Then (3) really is the most important; whether the evidence is necessary for the Tribunal to determine the case. In our respectful submission, it patently is for the reasons that I have sought to expand upon through my submissions. This material is directly relevant to the

issues the Tribunal is trying to decide. What BT is seeking to do is persuade you to decide the case with only part of a deck of cards. The exercise we went through on Principle 3 points to the absurdity of it. Little bits will come in. Lots will be excluded. Yet, the Tribunal is supposed to actually make a finding at the end of that as to whether or not these charges are practicable. The only sensible way to do that is on the available evidence. Sir, unless I can be of any further assistance, those are the submissions for Telefonica.

THE CHAIRMAN: No, thank you very much, Mr. Ward.

MR. TURNER: Sir, I do not know whether this will help or not, but Mr. Ward covered at the end the draft rules, which I did not have the chance to cover. I can either quickly make some points now which might give Mr. Beard some assistance, or I am also perfectly happy just to let him have his go, and then I will deal with this tomorrow.

THE CHAIRMAN: It is probably helpful for Mr. Turner to deal with them now, so do deal with them now.

MR. TURNER: It is very quick. Do you have a copy then of the extract that was handed up at the outset?

THE CHAIRMAN: Yes.

MR. TURNER: The draft rules, 21.2, say that:

> "In deciding whether to admit or exclude evidence, the Tribunal will have regard to whether it will be just and proportionate".

Pausing there, that is not very different from the test that I am urging either. It goes onto say "including by reference to the following criteria". So nobody is saying that those criteria are intended to be exhaustive. In my submission, that is also suitable, because these criteria, which may apply to different extents in different cases, are things which it is sensible to take into account.

My first point though is that the reference to it being just and proportionate, justice includes fairness, and proportionality may include issues of finality. I should also add that the public interest considerations that I referred to in terms of matters such as practicability and detriment to consumers are also brought into play by those words.

Sir, also I am not sure if it was implicit in what the Tribunal has already heard. Practicability too has been accepted, and the Supreme Court pointed out it is something that goes to the public policy objectives laid down at the EU level, not just consumer detriment. Two of those are engaged there. If things are really impracticable, it does not help the interests of consumers, and it also bears on another of the issues, which is efficient

innovation and investment in infrastructure, and so forth, if you have got something which is impracticable to operate. So far, so good.

So justice and proportionality are the key criteria, and we would agree with that and say it is in line with what we are saying, including by reference to the following criteria. So I dwell on (b) and (c), whether or not the evidence was available to the respondent before the disputed decision was taken, and whether the evidence was capable of being made available to the respondent before the disputed decision was taken.

This is very interesting, because there is a difference now between whether the respondent is Ofcom, the public authority which has got its industry-wide vantage point and gathers information from everybody before it makes its decision, or an individual private party. It is a real difference, and it operates in this sort of case. If the respondent is an individual mobile company, not Ofcom, then the answer to these questions is often very likely to be "No, it was not available" or "No, it could not be made available". Why is that? We can make two points, but one of them I would like to illustrate with something that I have had drawn to my attention, which is Ofcom's Dispute Resolution Guidelines, which shows you their process.

The third point is this. The process before Ofcom is one where Ofcom, with its special vantage point, is the Industry Regulator. If you want to go to p.16 of that document, which we will be going to in a moment, which is a very handy table showing the process, something like that will have been in operation at the time of these disputes. That is purely illustrative. My first point though is that the process before Ofcom is one where Ofcom gathers information from the industry parties, the individual companies, over the course of time during the investigation. It has a special privileged vantage point. It has information gathering powers as the Industry Regulator.

Individual companies do not have, in many cases, all the relevant material that might be needed to put forward the best case by themselves, particularly when one is, as here, considering overall market impacts. The question is what is the market impact of introducing these NCCNs to the industry at large? What Ofcom is able to do is to raise questions with the individual participants, gather the information from each of them – its pricing information and so forth – and put it together. But the individual parties cannot do that.

In this particular case Ofcom did, and partly affected, we would say, by its view of the prevailing law, go only to one party, Everything Everywhere, and got information from it on pricing, and that might have been affected by its view of the law in the uncertainty test.

Mr Hunt goes – because at that point three mobile companies are combining together: Vodafone, Everything Everywhere and Three at this point – and he gets information from each of them. He puts that together and he says: "I have something that perhaps mimics what an industry Regulator might have been able to do, and I can produce a better report with this, and a better view on what the market impact is likely to be."

If you go back to the position of an individual company in a dispute, they cannot do that, and the idea that they should all have clubbed together at that point and organised themselves in that way is not something which is reasonable to have expected. That is why I say, looking at these draft CAT Rules, if you take that criteria, you can see that in some cases the position of an industry Regulator, the body from which the appeal is brought to you, is really important compared to that of an individual market participant.

That takes me to the second point, and the document that has just been handed up.

THE CHAIRMAN: To be fair to you, Mr. Turner, this extract relates to appeals from regulatory decisions rather than from for instance, the section of the draft rules relating to private actions, that is as I understand.

MR. TURNER: The Dispute Resolution Guidelines?

THE CHAIRMAN: No, no, the Rules you were referring to.

MR. TURNER: I am sorry, yes. Nevertheless, it helps me illustrate the point though of how this could work in this context. Certainly, in comments on these Rules I am sure consultees will be aware of the differences between a case where you have a regulatory appeal in a Competition Act case, or something which is really a dispute resolution between private parties, but where the industry Regulator needs to get information and go around assembling it before it reaches a decision which can then be the subject of an appeal. That takes me on to this second point.

If you go to p.16, section 5 "Resolving a Dispute", you have an indicative timeline. It helps illustrate the important differences between what happens before Ofcom in its administrative process and a court or tribunal case.

You see at the beginning a dispute is referred, inquiry phase meeting, and then the dispute is accepted, and it is Ofcom that defines the scope and the parameters. You then have information requests sent, that is where it goes around culling the material from the industry parties, deadlines, consultation, which typically are meetings, discussions with stakeholders and further analysis. Then, towards the end, produce a decision. That is when the output, in terms of a draft or provisional decision, appears for comment by the parties. That is the

time when they can see how it has all been put together. Then you publish the final statement, a Determination.

Importantly, I would note the following: first, it is not like a court case where the parties set the parameters and put in initial pleadings or anything like that. On the contrary, the putting in of detailed expert evidence, even on behalf of one party from its own vantage point is highly atypical, rather they say: "Here is a serious issue. We cannot get to the bottom of that ourselves by virtue of our individual position, but you, the industry Regulator, can gather the material."

In a case where something like overall aggregate market detriment is the issue. The industry Regulator, which is itself both a judge and an expert, contains a team of economists, goes and performs that function. In that process, the parties then, as you can see from this timeline, have limited opportunities, and defined opportunities to participate in the process. They do not see what other parties put in typically, it is invisible, so in terms of responding, let us say, to what material BT has put in, they do not get an opportunity to grapple with that until this provisional determination, depending on its terms. That is why the parties are only then able to give a specific response to what Ofcom has done. What it means, finally, is this, where you have had, as here, a fundamental flaw in Ofcom's decision making process, it has affected the way that Ofcom has walked through this process and, over time, proceeded to gather information to discharge its function. Because of its error of approach it may well have taken wrong turns in what it chose to gather, and chose not to gather. That is why this is a very good sort of example of a case where it is sensible, where there has been a fundamental flaw in the procedure by Ofcom to allow the matter to be fairly tested again if the parties can bring forward material on that. That is why, when you are asking yourself, how should now this procedure go forward, if one takes consumer detriment? In the Tribunal we are now, because Ofcom is standing back, individual parties before you after Ofcom has taken this wrong turn.

Sensibly, one might say that Ofcom has taken a wrong turn and has not gathered the right collective information. There are advantages to sending it back to Ofcom with directions to keep it tight and on track, so that Ofcom can perform its collective function on something as important as consumer detriment.

Sir, those are my additional submissions. I am grateful for your time.

THE CHAIRMAN: Thank you, Mr. Turner. Mr. Beard

MR. BEARD: Sir, members of the Tribunal, you set out a series of questions at the outset. I will try and pick those up as I am going through, working through Principle 2 issues, Principle 3

issues, and the two contractual grounds. Just looking at this disputes timetable, one wonders whether there is a further question that is outstanding here, which is whether or not telecoms dispute resolution appeals are, indeed, the modern day version of *Jarndyce v Jarndyce*, given that we are effectively five years into what, on this timetable, is supposed to be a four month process plus appeals. Of course, I will come back to that when I am talking about prejudice to BT in relation to these matters, because there is a degree of casualness about the way in which the MNOs approach those sorts of considerations, quite understandably, because they would prefer that matters were delayed very substantially, and were reopened very widely in relation to these matters, because they do not like the Supreme Court judgment in particular.

Turning then to Principle 2, which is really the issue which is most centrally affected by what has happened in relation to the Supreme Court. It is worth remembering that this case was stayed pending the outcome of the Supreme Court decision. The Supreme Court has definitively announced the law and, in doing so, it has just upheld what this Tribunal did previously. That is a matter which Mr. Turner and Mr. Ward, although on occasion referring to it, glossed over it quite markedly, and it is important, even in relation to their own submissions about what they could have known, what the state of the law was, and how matters proceeded, because of course we are talking about disputes raised in 2010 and 2012, and those disputes, of course, were proceeding, rolling along before Ofcom, at a time when this Tribunal had declared the law in a particular way. Of course, they knew, we knew, Ofcom knew that in relation to these matters the issue of the burden of proof, which had quite rightly been referred to in TRD, that had been approached in a particular way by Ofcom which had been challenged before you, sir, in the Tribunal, was rolling forward to the Court of Appeal and of course further on to the Supreme Court.

That does inform the consideration of issues of fairness here in relation to admission of material. The interveners, essentially, in relation to Principle 2 want to reopen the whole evidential assessment made by Ofcom because they do not like what Ofcom assessed. All parties knew that the welfare assessment was a matter on which, if you wanted to influence Ofcom in relation to the disputes that were raised, in particular by EE, then you needed to put forward material in relation to those matters.

It is just worth going back to that EE dispute that Mr. Turner took you to right at the outset, which is in VEH1, I think at tab 4. This is actually the later of the disputes, 1101 and 1107.

THE CHAIRMAN: Is this the request to Ofcom to resolve a dispute?

MR. BEARD: Yes. This is a dispute that is being raised - the other two are already pending - after the CAT had given its judgment in August 2011, and if one turns on to p.3, at 1.7:

> "EE's position, in summary, is that the termination charges in [the ladders] are unfair and unreasonable and represent the abuse of a dominant position by BT in the market(s) for the termination of the non-geographic calls covered by those NCCNs, the introduction of which charges will act as a material disbenefit to UK consumers, or in the alternative, there is doubt as to whether they provide a benefit to UK consumers."

Those alternative cases are the basis on which EE proceeds - in other words, there was a disbenefit, or it was uncertain, either way you should reject the ladders.

For these MNOs now to be saying, "Well, it is uncertain about what the law was at the time, and it was terribly difficult and we did not really know what it was that we should have been putting in in order to make good our case", is a little rich in circumstances where the very essence of the dispute was actually there was a clear detriment to consumers.

As it was, everyone put in lots and lots of material. They did so prior to the provisional findings and after the provisional findings. In our skeleton argument at paras.65 to 68, we have set out some of the key paragraphs in the Provisional Decision and indeed in the Final Decision where Ofcom looks at and traverses vast swathes of the material. There are lots and lots of paragraphs. I will just give you the references, if I may, in relation to these matters. For your notes, the provisional conclusions are tab 9 of the first BT bundle, and the Final Determination is at tab 11, so it is all in that bundle. I will focus, if I may, on the Final Determination, just because it may be an easier way of dealing with these matters. In the Final Determination (tab 11), section 4 is "Analysis and provisional conclusions", and this is just for 1101. Obviously it is replicated for each of the ladders.

THE CHAIRMAN: Sorry, what page are you on?

MR. BEARD: I am sorry, I have skipped through to p.53. I was just coming to the start of this section of "Analysis and provisional conclusions".

THE CHAIRMAN: Would it be a good idea to start where exactly Ofcom describes and defines the scope of the dispute?

MR. BEARD: Yes, I am happy to do that. That is in section 2, 2.42. That is 1101 and 1107 and 2.45 is 1046. So the scope to determine whether it is fair or reasonable for BT to apply termination charges in those ladders for those number ranges which are based on the level of retail charge. So that is the dispute that is at issue. It is rather similar for 1046. I do not think there is any issue there.

You have already seen that there is a summary of the information relied upon in resolving the disputes at 2.48 through to 2.49. The point I make is that there were swathes of material coming in, and indeed an understanding that in putting forward material, as I have illustrated just in relation to the later of the two disputes, but it applies obviously, *a fortiori*, in relation to a dispute that was rolling on during the period of time when the Tribunal reached its judgment that these two issues were in play. Obviously this Determination talks further about the 08x Determination.

As I say, if we go on to the analysis and provisional conclusions, what we have here in a section running from 4.29 right through to 4.139 is a detailed consideration by Ofcom of the economic evidence that had been provided by all parties. What you will see is that there are an awful lot of references to, in particular, EE, including citations by EE of empirical studies by people like NERA - you can see that at 4.41. You can see BT's views and comments by one Professor Dobbs, to whom we will come back, at 4.47. Then there is a detailed discussion by Ofcom of EE's analysis, for instance, at 4.52. I am only glossing this because obviously what we have here is a consideration of all the different effects, the views of the parties, and so on, being digested by Ofcom in relation to a wealth of material that had been put forward in relation to the dispute that had been framed in terms, by EE in particular coming forward saying, "These are the issues we contend for", and then it being encapsulated in that language that we have already seen in section 2.

Then if we just go on there, those matters were considered in some detail, and actually if you go on to section 7, starting at 7.50 - I was going to somewhat casually say that these are matters which it might be useful for the Tribunal to review in more detail, but that feels like a cruel thing to suggest in all the circumstances. What we have here, starting at p.116, is Principle 2, so starting really at 7.38, but then running right the way through to 7.225, is a consideration of all these issues that have been raised, including, for example, the Monte Carlo simulation. I am not going to pretend that I understand how Monte Carlo simulations work at all. I understand they are extraordinarily complicated and are intended to, and in this case did, effectively eliminate the uncertainty as to how these matters would pan out, although Ofcom disagreed. Nonetheless, what you have is a very detailed assessment of these matters. Just if I may, because I will be coming back to Professor Dobbs, and because Professor Dobbs is apparently now inspirational for the MNOs, 7.40

> "Respondents comments on our assessment of the Direct effect mostly relate to our theoretical assessment using the modified Dobbs 3 model."

So this suggestion that somehow you did not know what it was that you were dealing with, you did not know whether or not you had to make out a case of real detriment or merely uncertainty, and that actually it is jolly nice now that someone has been able to gather these MNOs' data and put them through the Dobbs 3 model. That approach is something that you clearly could have done right at the outset here. Indeed, it was a focus of the discussion that was going on as to how you dealt with these sorts of issues. I have obviously emphasised here in the final report. As I say, the provisional conclusions are also in tab 9. I am not going to work through those in detail, but they essentially set out the sorts of concerns that led to all sorts of responses and material being put in on detailed economic matters.

THE CHAIRMAN: Mr. Beard, am I right in thinking that, although the respondents commented on the Dobbs 3 model, they did not adduce their own expert evidence, or would that be wrong?

MR. BEARD: I believe that that is right. There is obviously no reason why they could not have done. Obviously, they were at the same time party to the 08x proceedings, where there was no lack of vigour in transferring resources from telecoms companies to economics consultancies. But nonetheless, they decided here that they were not going to bother. That is not a good ground on which they should now turn up and say "Mr. Hunt is terribly clever. He has turned up with aggregated data that has been run through the Dobbs model. You must now consider this material".

So everyone knew the assessment was underway. They knew the terms of the assessment. They knew that they could argue it one way or another. As I say and as the Tribunal has put it, arguments about who held the burden of proof, whether or not it was mere uncertainty or whether you needed to show one way or another detriment or benefit, were issues that were more than live at the time and shaped the way in which these disputes were proceeding.

That legal position, notwithstanding the fact that, midway through the process, the Court of Appeal took a particular decision, was uncertain throughout, because it started off obviously with Ofcom pursuing a TRD type approach on burden of proof. It then shifted, as a matter of the declaration of the law, when this Tribunal had declared the law as per its judgment in August 2011.

THE CHAIRMAN: But, at that time, these proceedings before Ofcom were stayed. Is that right?

MR. BEARD: I do not think they were ever stayed.

THE CHAIRMAN: There was a pause, was there not?

MR. BEARD: It depends which ones you are talking about, sir, because, of course, the 2012 ones had not actually started. I took you to the later EE material. But I think it would be fair to say that they were not necessarily stayed, but they were undoubtedly drifting.

THE CHAIRMAN: Stayed is a judicial term which may not be appropriate to an administrative process. But my understanding is that the first reference was at some point in the latter half of 2010.

MR. BEARD: Yes, I am sorry. I think I said that ----

THE CHAIRMAN: Yes, I think that is what you said. Clearly, the four month aspirational deadline to resolve these disputes was dramatically exceeded, but I infer that the reason for that was because Ofcom were allowing the 08x case to be the trailblazer, as it were, for this decision.

MR. BEARD: That is right, yes. I think that is right. That is the reason why matters were drifting.

THE CHAIRMAN: Yes.

MR. BEARD: Whether or not that was wise is a separate issue entirely, but that is, I think, what happened, and then this further dispute came in, in circumstances nonetheless where the point I was making was simply that you have a situation where what might have been thought to be the legal test was at issue in different directions, if it can be put somewhat neutrally, at different points during this process, because it has gone on for so long. But for someone to turn round and say "The Court of Appeal had decided and, in those circumstances, we should all just proceed as if the Court of Appeal were the final word", in circumstances where BT had made very clear that it was pursuing an application to the Supreme Court, in circumstances where the first Tribunal had made a finding diametrically opposed, in practical terms, to that of the Court of Appeal, and the terms of the appeal that was being brought was effectively to restore that, to say "It did not matter, we could give up or take our foot off the gas or not deploy quite so much effort", type of thing, which was the way that Mr. Turner put it, as if the Supreme Court judgment had come somehow earlier in the process is just by the by, for two reasons.

First of all, at the time the dispute resolution processes were starting or at least in what might euphemistically be called the early stages of them in relation to the earlier ones, you had the Tribunal's view that actually you needed to prove detriment, so you knew very clearly that that was the threshold that you had to be aiming at in terms of any evidence that you were putting in, and that that, as I say, continued for a substantial period.

Secondly, the fact that you knew that those matters were the subject of appeal is no basis for suggesting that you should change your approach, unless you want to bear the risk that actually those appeals are successful against the Court of Appeal's judgment, and it may transpire that a singularly clear legal issue has been resolved, which shows that Ofcom has got it wrong.

That is what is also important in relation to the focus on the Supreme Court. Ofcom carried out a very comprehensive analysis of a vast amount of factual material that was being submitted, and essentially said the outcome goes in one direction, uncertainty, and that has a particular consequence. The challenge being brought in the Supreme Court was not, "No, Ofcom, you could not reach your conclusion on uncertainty". It was, "Once you have done so in relation to all of that material, the consequence of that was different". But there is no suggestion that the Supreme Court means that there is a requirement more broadly to reopen matters or any basis for reopening matters, as appears to be a sort of running theme in the MNOs' submissions.

So you could and should have put matters in. The Supreme Court did not change the law. It merely declared finally and settled the law, which had been the subject of debate during the relevant period, and you had a vast amount of material being put in.

So, in those circumstances, when it comes to the assessment of the fairness of whether or not, in particular, the MNOs can now start running a new argument about Principle 2 and adducing new expert evidence in it, those considerations are going to be relevant. I need to put them in the context of the overall statutory structure and relevant case law. But, for the MNOs to come along and say "Mr. Hunt's report should be submitted, and we did not put it in because we did not know about the law change and, if the Supreme Court had come out with its judgment earlier, we might have thought differently about it", actually that is kicking up dust using the Supreme Court judgment.

If you thought that the analysis of the Dobbs model came out with a positive answer for you, then that is evidence you should have gathered and put in earlier on. It is expert material that you could and should have developed sooner, and that does not matter, whether applying the current rules or the proposed rules. It is plain that you could and should have put in any expert material that went to those sorts of conclusions, and you were not blinded by the state of the law and you were not blinded by the nature of the process or the nature of the dispute which was being dealt with.

Dobbs 3, as I say, was a matter that was developed, a model that was developed in the 08x proceedings. All of the MNOs were well aware of that. So, had they wanted to plug in the

numbers, either individually or cumulatively, and have their experts submit them using Dobbs model or Dobbs varied model, or whatever else, that was well open to them and something that they could clearly have done.

The references made by Mr. Turner to the Valletti material do not alter that, because the central function of the Hunt report is plugging in the cumulative numbers, and what is said is “There is some new thinking on how you put place a waterbed calculation in all of this”. Of course, there are constant changes in relation to academic material time to time. There are all sorts of ways in which academic inputs to models may be revisited, but that does not justify you, having set aside a desire, if they ever had one, to put in expert material at the time during the course of the dispute resolution process, and now to be saying: "Actually, things have moved on from the expert report we never put in, to the expert report we now want to submit".

Indeed, just picking up the point that was raised about the nature of that Valletti material. It is just worth remembering that Professor Valletti actually did give specific evidence in the 08X proceedings, and did so specifically in relation to the UK. So the idea that Professor Valletti was someone that you could not contact and could not get involved with and, indeed, get further information from and, indeed, submit further material from, is somewhat surprising. He was Ofcom's expert, indeed, during 08X as I recall, but there is, of course no property in a witness in these circumstances.

So, Professor Valletti did not change this analysis. Mr. Hunt's approach could certainly have been adopted by Mr. Hunt or some other expert if, indeed, any of the MNOs really thought that this was something that this was important to develop in the dispute at the time. They plainly did not. They plainly took their foot off in terms of producing evidence and now they profoundly regret that. But their regrets are no good basis for this Tribunal now to be opening up a matter that was clearly and plainly determined by the Supreme Court in relation to Principle 2.

I focused to start off with, with the nature of the process a little, and the nature of the material in question. But, as I say, it is vitally important to consider this issue of the assessment of fairness, and what everyone accepts is a discretion on the part of the Tribunal, albeit a discretion with real limitations. Those limitations come from the principle of finality and related to the principle of finality the nature of the statutory scheme that we are dealing with, because in his additional submissions, of course, what Mr. Turner did in trying to say: "Look, Ofcom do a lot of gathering, and now, once we have seen what they have gathered, we might want to do something different ourselves because we are individuals,

actually Mr. Turner, going through that, did recognise that this is an administrative decision making process. That is what we are dealing with here, and I will come on to why it is there is a relevant comparator with administrative decisions in competition cases, even though they come with fines – they are different for that reason, we see that. But it is an administrative decision making process that has been put in place by the European law scheme, and by the domestic law scheme. Yes, you raise a dispute. You are not happy about a third party in the telecoms industry – here EE was not happy with what BT was dong – but rather than going to court which, perhaps might have been an option for them, they did not, they went and talked to the Regulator. In those circumstances the Regulator takes a decision on the dispute. The intention is it happens quickly. It did not here. But the Regulator takes a decision. At that point that decision is the focus of any further challenge. It is whether that decision stands up, whether that decision is right in law, whether or not that decision has the relevant factual basis that is the issue. Ofcom can defend that decision if someone comes along and says "No, it is not. I want to go to the Tribunal, your decision is flawed." If someone comes along and does that, the target they have as the appellant is the Decision and, at that point, Ofcom cannot start making up new reasons for the Decision. I will go to the case law, which says that if an appellant puts in further material Ofcom might be able to put in rebuttal and responsive evidence, we can see that. But Ofcom cannot turn up and say: "Actually, we like our conclusions, we may have spent hundreds of pages on our reasoning, but we would like to do it differently, thanks". You cannot do that. That turns this appellate process that has been put in place by the European regime and by Parliament into a moving target. What is an appellant supposed to be focusing on? How is the Tribunal supposed to manage this sort of process? If, for example, Ofcom, rather than saying in this case actually we are going to back off rather, have said: "We did get it wrong, on the basis of the way the Supreme Court does these things, but we have been chatting to this nice man at Alix Partners, called Mr. Hunt, and he has come up with a new way of modelling things. We are not going to issue a new provisional finding, we are not going to issue a final Determination, but we are going to pop in before the Tribunal a report from him, which sets out why it is although we spent a vast amount of time considering all of the material that you would have ample opportunity to put in. Although we had done that, and we had reached a conclusion about uncertainty on consumer impact, we think Mr. Hunt is right, and so you can forget all the bit in the long report that you have been agonising about, and you have spent ages preparing your grounds of appeal in relation to, and you have been

focusing on and potentially putting evidence in, forget all about that, just look at this new report here."

Mr. Herberg is an eloquent advocate, but I would challenge him to get past any Tribunal the idea that that was a legitimate basis on which a decision could be defended. There is a very, very simple issue. If someone intervenes in support of a decision, it does not mean they get more leeway than Ofcom, it cannot possibly mean that. This is not about sacking or skewing the appellate process, it is just the nature of an appellate process. You are appealing against an administrative decision. So, if Ofcom cannot turn up and say: "Forget about our reasoning. It does not matter, we will rely on Mr. Hunt", neither can the interveners.

Mr. Turner and Mr. Ward obviously say: "We are concerned individuals that want accuracy and correctness. We are a campaign of the righteous to ensure that, no matter how long it takes, consumers are protected by reference to these inordinately high prices we charge for 080 numbers", but I leave that to one side.

In relation to what they are saying, they are conflating a situation where, if there had been a fight at the outset between two private parties, the terms of that fight would have been dictated by pleadings and directions admitting evidence and so on between the two private parties. But that is not what we are dealing with here. The interveners can only come in and say: "We want to defend the Decision."

They are both candid, and each say: "We cannot defend the Decision on Principle 2, we just cannot do it so we would like to have another go". Just as Ofcom cannot have another go, neither can they. As I say, that statutory framework that puts in place administrative decision making and an appeal to this Tribunal is protecting finality and, in doing so I tis doing justice because it is saying: "Look, there is a dispute resolution process. If you are serious about your concerns about the dispute, go and put your evidence in there. Let the Regulator make a decision on the basis of the evidence, and if you do not like it you can appeal it. If you do like it, and the Regulator decides to defend it, then you can come along, as part of the choral support mechanism, by way of intervention and say: "We have these other points we want to make that align with the Decision; they are supporting that Decision. People are entitled to do that; that is the role of the intervener. But, it is not the role of the intervener to say Ofcom made this Decision, but we do not really like Ofcom's Decision very much, we think you should do it on a completely different basis. You would not ever have that permitted in the course of an appeal where Ofcom is present in the proceedings. It does not suddenly become possible when Ofcom drops out. Instead, what

you have is a situation where the intervener comes into the place of Ofcom when Ofcom has dropped out. What is strange here is that the interveners had come across to step into Ofcom's shoes to defend the Decision, and the first thing they say is: "We cannot". Fine, they cannot; that is the end of this matter. You do not start again and say: "Let us have another go", because you are undermining the finality of decision making that is run through an administrative process whereby the dispute is defined; people put in material, a conclusion is reached and then that conclusion can be challenged and, of course, it can only be challenged by someone bringing an appeal and specifying in their appeal what the grounds are. As you will see from some of the relevant case law, what you do have is an asymmetry between an appellant and a respondent in relation to these matters. It is no great shock that there is an asymmetry because that is the nature of administrative decision making. Regulators bemoan this. They think it is terribly unfair. Well resourced people, getting involved in a debate with them, they reach a decision, and then, whether or not by an appellate mechanism here, which is on the merits or it ends up being a judicial review, for example, they find that people are putting in further material, putting a slightly different case from that which had been put before. Sometimes they protest before that, that that is going too far, you cannot do that. What everyone recognises is that the administrative decision-maker cannot re-make its decision during the course of those proceedings. That is as true here, where the challenge is on the merits to the decision, as it is in a judicial review where it is on more limited grounds, but again to the decision.

If I may, picking up on the finality point, perhaps we could just turn briefly to *Napp*, which is in the authorities bundle for today at tab 3. Mr. Ward took you to certain of these paragraphs. He did so saying, “This is terribly different here because it is a criminal charge that is at issue in relation to competition proceedings”. I am not going to get into a fine-grained debate about criminal charge, not criminal charge, because what is important here is not whether or not a criminal charge is at issue, but whether or not there is an important administrative decision that affects people’s legal positions. That is plainly what happens in relation to regulatory decision making. It is for that reason that when we look at p.29, para.77, we see:

> “It is particularly important that the Director’s decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director’s position. In our view, further investigations after the decision of primary facts, in an attempt to

> strengthen by better evidence a decision already taken, should not in general be countenanced."

Just to be clear, we are not asking for an absolute rule. We recognise you never say never in relation to these sorts of evidential matters. But there is very good reason why this judgment says in 79 that there is a presumption against permitting the Director, or indeed Ofcom, or someone effectively subrogated to Ofcom, an intervener stepping into Ofcom's shoes, submitting new evidence.

If we just go on to 78, Mr. Ward emphasised the undermining of procedural safeguards by way of statements of objections and access to the file. By parallel, what you have here is a prior dispute resolution process that is supposed to be under a narrow time scale, which is defined by the regulator having received the dispute, and as Mr. Turner helpfully showed in relation to that time line, has all sorts of steps, including the provisional decision being provided, which gives everyone an opportunity to comment in relation to the proposed reading.

It is actually a very close parallel here, but then it says:

> "There would be a risk that appellants could be faced with a 'moving target'. The Tribunal itself would be in difficulties if, instead of determining the appeal essentially by reference to the merits of the decision in the light of the material relied on by the Director at the time, the Tribunal was effectively adjudicating on a 'bolstered' version of the decision. The Director himself concedes that he cannot 'make a new case' before the Tribunal."

That appears to be Ofcom's position. Obviously Mr. Herberg can comment if I am wrong, but that is what I understand their position to be.

The interveners are saying, "We can bolster, we can go further than bolstering, we can reconstruct it", and that is not an entitlement for them in those circumstances.

THE CHAIRMAN: Mr. Beard, are there not actually two stages, just taking administrative decision making generally? The administrator defends its decision, let us say on a judicial review, and is limited in terms of the additional evidence it can adduce in defending that decision. I take that point.

Let us suppose that the defence of the decision fails and is quashed and is sent back to the decision-maker to revisit. If that happens then you are not saying that the decision-maker is confined as to what material it can take into account?

MR. BEARD: No, there may be constraints on what can be done in those circumstances, and they may be constraints that are imposed by dint of the direction of the Tribunal. Here we

have a situation where what is being determined - I am just focusing on Principle 2 for the moment - is whether or not having had an extensive process of consideration and submission of evidence, an administrative decision having been taken, the law now having been clarified in the sense of a final determination, so it cannot change any further in relation to these matters, in relation to the appeal against Ofcom's decision, can this Tribunal say there was a long administrative process where all evidence was gathered that anyone wanted to put forward and was considered and consulted on and the subject of provisional findings and final decision and determination, and so on? In those circumstances, can we, just as has been said in relation to 08x, say, "In relation to Principle 2, the answer is that Principle 2 is met by these ladders?" The answer to that is, yes, because the factual assessment has been done and all that is changing is whether it should be "uncertainty" means "prohibited", "uncertainty" means "allowed". We say that at point to engage in a wider process would be contrary to the function of this Tribunal, because in order to determine that element of the appeal all you need to do is say, "This was the decision that was the subject of extensive consideration, that it got put effectively in the wrong box", and that can be corrected and must be corrected. Not to correct that by way of an order of this Tribunal and instead to say, "Well, it is possible that all sorts of other material could have been put forward, could now be put forward", not only by the MNOs but potentially by other people, and so a wholesale reconsideration of these matters could occur would be wholly unfair and contrary to the principles of finality in relation to the appellant structure that I am talking about.

So, yes, there are obviously two stages in relation to these sorts of challenges, but here we are talking a particular outcome following a particular process.

I have touched on *Napp*. We have included in the skeleton argument reference to *Tesco*, para.124(e).

THE CHAIRMAN: Where do I find that?

MR. BEARD: It is tab 6 in the bundle. It is a lengthy judgment, but it is only 124 to which I am going to refer. The question the Tribunal is asking itself is: is this appeal made out on the merits in relation to Principle 2, and should more evidence be admitted in relation to the consideration of that appeal? We say simply, no. I would just ask you to read para.124, which essentially summarises the *Napp* position and deals with the submission and permission to admit new evidence in relation to such an appeal.

Finality is an important consideration. Allowing new evidence in relation to Principle 2 in this appeal would undermine that finality in circumstances where there was ample

opportunity to put that sort of material forward, this Tribunal should dispose of it, and it would be wholly unfair for there to be a grand reopening of these matters.

Indeed, if Principle 2 does get remitted and Mr. Hunt's material is put in, of course what you end up doing is reopening a vast swathe of material, including in relation to Ground 2, because as soon as you start admitting one expert report you then start getting into the Monte Carlo analysis, responses and developments of the Monte Carlo analysis, responses to Mr. Hunt, and it turns the whole thing into another grand occasion before Ofcom.

Though Mr. Turner and Mr. Ward say you can delineate these things, you can put in place directions to make it tight to deal with, it is just not plausible that any sensible direction is going to sensibly constrain that to a limited process. What we are saying here is that in relation to the material we put in, because of course, as BT, we recognise that we were not necessarily going to be successful in the Supreme Court and therefore we had to deal with the possibility that Ofcom would be working on the basis of only uncertainty and that on any appeal, if we were to bring one, we would only be dealing with, if it is uncertain, then it can be blocked. We put in Monte Carlo analysis that was saying that actually these ladders were not only fair, but we could show that, by dint of the Monte Carlo analysis, they were not certain. They were beneficial, and we do not accept the Hunt analysis at all.

So you are not just remitting something small and narrow here. You are reopening the whole of Principle 2. That is not appropriate. That is contrary to finality and, in circumstances where all of this material and all of these points could have been made sooner, it would be grotesquely unfair to BT to make it go through that process, having dealt with these sorts of issues.

The next case I was going to go to was the *BT v. Ofcom* case. I think you have been referred to the version in the old CMC bundle at tab 12.

THE CHAIRMAN: Yes.

MR. BEARD: This is the judgment of Lord Justice Toulson in relation to Ofcom's contention for a very, very bold position in relation to the admission of any further evidence by an appellant. Of course, this is the important delusion that occurs in the Turner/Ward submissions; that they start off referring to case law that deals with an appellant who is taking on an administrative decision, and then they say, "If the administration decision-maker drops out, then it becomes a fight between individuals and, of course, individuals should be able to put in what they like. They are big enough and old enough and ugly enough to be able to deal with anything that is thrown at them". But that simply fails to engage with the process. This authority does not suggest that interveners have some sort of

broader power or should be afforded, under the Tribunal's discretion, a broad margin to put in further material, which is material that otherwise a decision-maker could not put in, because what was being said by Ofcom here was that BT, who was coming along and putting in material that at the time was considered scandalous, like reports from Professor Dobbs, versions 2 and 3, that obviously came to have a different role -- was it later on? Mr. Herberg is whispering that there may have been 4, 5 and 6 involved. If that is the case, it may well have been right. I thought it was 2 and 3, I apologise. I thought, at that stage, it was the early ones.

In any event, what you see is that, at para.16, the submission being made on behalf of Ofcom was that a very strict rule should be applied in relation to not permitting an appellant to adduce fresh evidence that a decision was erroneous. This was, as, Mr. Chairman, you well know, a matter that you had considered. Indeed, the preceding tab is this Tribunal with you at the Chair in relation to these matters.

The dispute pertains to the 08x case. There was an argument about whether or not this material should go in. What we see is the terms of BT's appeal, from para.45 onward. What you see at 50 is a reiteration of objection to the CAT admitting new evidence. Ofcom also objected to the CAT admitting Dobbs 2 and Muldoon 2. So there was a range of objection.

Then, over the page, we see the discussion of 192, and the paragraph to which Mr. Ward referred you, para.60. What I would just emphasise here is that one has to read this paragraph in the proper context of this case; that here, we are dealing with an appellant:

> "The task of the appeal body referred to in art 4 of the Forward 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'. There is nothing in art 4 which confines the function of the appeal body to the judgment of the merits as they appeared at the time of the decision under appeal".

So what is being said here is that, in the appeal, the appellant may be able to put forward further material. That might, in turn, allow the regular to put in rebuttal material, but that is very different from *ex ante* the regulator being able to put forward a different case defending its decision.

"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 the material which the appeal body may consider is unsurprising".

I will not read the rest of it. Mr. Ward took you to it. Then at 61:

"The construction for which Ofcom contends would be capable of causing real injustice, because it would preclude the appeal body [entirely] 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. 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 that would cause injustice, but that is the *Ladd v. Marshall* approach to which I will come".

As, Mr. Chairman, you know, *Ladd v. Marshall* is the set of rules that limit the extent to which an appellant court should admit fresh evidence, and it is a very, very narrow compass in those circumstances. At 63:

"There are differences in wording between the Competition Act 1998 and the Communications Act 2003 [so between the provisions that govern infringements and the Communications Act], but the Tribunal 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".

This just goes to reinforce the point I was making about *Napp*. Although Mr. Ward seeks to distance the reasoning in *Napp* on the basis that it was to do with completion cases, that is not the way Court of Appeal talks about it here. Then at 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".

Then it looks at some licensing cases, one licensing case in particular. Then, over the page, you get this consideration of the *Ladd v. Marshall* rules, where counsel for Ofcom were saying *Ladd v. Marshall* was a general application. There, you see at 69:

"There are significant differences between the procedure for determining a dispute under the Communications Act and an ordinary civil claim. A civil claim is ordinarily determined after a trial at which witnesses give evidence and can be cross-examined. A dispute under the relevant part of the Communications Act is determined by Ofcom on paper. Whereas oral

> examination of witnesses on a civil appeal is highly exceptional, because there should have been proper ownership for it at the trial, any oral examination of witnesses in a dispute of the present kind will necessarily be at the appeal stage".

So it is recognising that actually, because of the appellate structure, you might actually have some differences in the way that you run proceedings before the Tribunal, and we know that, just as happens in competition infringement cases, you do get witness evidence, notwithstanding this is a procedure before the CAT. But nonetheless, what you have is a situation where the Court of Appeal is recognising the administrative function of Ofcom, and focussing on the defence of that particular decision and, in particular here, considering whether the appellant can come forward with new material, including potentially putting up witnesses for cross-examination.

Then, in 70, which Mr. Ward read you, you have got the consideration of the Framework Directive, where Ofcom is not only an adjudicative, but an investigative body. So again, it is reinforcing its administrative function and:

> "The appellant may wish to produce material, or further material, to rebut Ofcom's conclusions. It is unsurprising that the Tribunal should adopt a more permissive approach towards the reception of fresh evidence than a court hearing an appeal from a judgment following the trial of a civil action. Indeed, as Sullivan LJ observed, the appeal body might in some cases expect an Appellant to produce further material to address criticisms or weaknesses".

In 71, which Mr. Ward skipped over:

> "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 an 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. That is a factor, among others, to be borne in mind by the CAT when considering the discretionary question whether to admit fresh evidence".

I just interpolate "by an appellant" is the focus here. So, if there is an appellant engaged in a process and you had not put this sort of material forward and you could have done, then, in those circumstances, there might be reluctance, even with an appellant coming forward to challenge a decision. But none of this is suggesting that the respondent, in other words the

decision-maker or those who stand in the decision-maker's shoes if the decision-maker steps back, should somehow have a broad compass to admit more material. I should read on the rest of 71:

> "That is a factor, among others, to be borne in mind by the CAT when considering the discretionary question whether to admit fresh evidence. Other factors would include the potential prejudice (in costs, delay or otherwise) [all of which apply here] which other parties may suffer if an Appellant is permitted to introduce material that it could reasonably have been expected to place before Ofcom. These are not necessarily the only factors".

Then you have got the part that Mr. Ward read, but I would just emphasise:

> "The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for evidence to be admitted".

But there, could an appellant even do so? It is recognition of the position that circumstances are infinitely variable and, therefore, never say never. At 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 previously indicated that it did not intend to decide the question at that stage, is an issue in the appeal before the Tribunal and it would be wrong for this court to express a view about the substance of that issue".

So one of the points obviously that was arising in 08x was did people understand what was actually going on and being decided by Ofcom. That does not arise here, as I have already shown you in relation to the context of Principle 2 discussion. Then also, in 83, there is a reference to absence of prejudice.

Then you have got this postscript, which is the part that has been referred to by Ofcom as giving it the licence effectively to step back from proceedings. But I would just emphasise nothing in that postscript is suggesting that the statutory structure and the way in which administrative decisions are to be challenged and the ability of a decision-maker to put in material, other than that which was relied on from the decision, is somehow altered, or that, if someone steps into their shoes, they are able to put in further material. So, when there is a discussion about interveners and BT battling it out in relation to these matters, it is a battle about the defence of Ofcom's decision. Ofcom's Decision is not a general battle, it is not a general civil claim that we are dealing with here. So, as I say, the test of fairness does require us to consider the overall system, that is not meaning that there is some non-

asymmetry or unfairness to interveners, because the system is built around administrative decision making, and challenges by appellants against that, an appeal on the merits does not become a *de novo* hearing either for the decision-maker or for any interveners. References to the public interest in relation to those matters will not assist further in relation to the issues.

I will come back, when I deal with some of the contractual matters to just touch on this issue as to whether or not what was raised in the Supreme Court was a new point, but that really goes to contractual issues, it does not deal with the matters that we are dealing with here, because essentially the issue that matters for Principle 2 is what the Tribunal referred to as the burden of proof issue, and everyone knew that that was in play throughout the process. In those circumstances those are my submissions on Principle 2.

I am conscious of the time, obviously we are not going to finish today, I wonder if the sensible thing is to pause there and I was going to pick up Principle 3 and then the contractual matters, which will be much shorter.

THE CHAIRMAN: Yes, Mr. Beard I think that is a good idea. There is one point I wanted to raise with you and also Mr. Herberg in anticipation of something I may have for him tomorrow. You began your submissions by suggesting that this process was a link into *Jarndyce v Jarndyce*. What do you say is the appropriate course for Ofcom when it has a series of disputes which raise the same point? Clearly what happened here is that we had the 08X decisions, and they were consolidated in one appeal before the Tribunal, and closely following in time the referral of disputes to Ofcom which culminated in this Decision a number of years later. Although I do not have the chronology entirely to hand Ofcom clearly decided to sequence those and allow 08X to go ahead, and this referral to follow behind when those live issues had been determined.

MR. BEARD: Yes.

THE CHAIRMAN: Are you suggesting that is not the right course in this sort of case?

MR. BEARD: No, I am not suggesting any general rule as to how one deals with these things. Indeed, there may be all sorts of circumstances where it is appropriate for serial disputes to be stayed to wait, to drift, whatever the technical arrangement is in these circumstances, but that will depend on the nature of the different disputes, the circumstances which arise, whether or not there are interim solutions that can be put in place and so on that deal with problems, because it may be that you need to accelerate them simultaneously; maybe there are ways of gathering them and dealing with them procedurally fairly but on a streamline basis, so I would not want to suggest that BT is coming up and saying: "You cannot stay,

you cannot wait". The point I was making was a much broader one that what we have had is a very long process in relation to pricing ladders that were intended to be innovative new pricing. It has taken a terribly long time to get the novelty through in what is normally a fast moving market. Some of those delays might have been due to the manner in which Ofcom proceeded and those delays were sensibly taken, but they are, nonetheless, delays. What I am concerned about, given where we are, is that there are not further delays given where we have been over the last five years in relation to these matters, so I am not coming up with some magic formula. Indeed, I think it would be difficult to do so. Whether it is regulatory appeals, judicial reviews or, indeed, actually civil claims, you end up with a whole range of potential solutions as to how to marshal different, but potentially related, disputes, complaints or, indeed, proceedings.

THE CHAIRMAN: Yes, hindsight, of course, is a wonderful thing, but in this case it might be said it would have been better had Ofcom delayed its decisions still further to await the outcome of the Supreme Court.

MR. BEARD: I think, as they say in football, we play what is put before us. We had a decision, we had to appeal it.

THE CHAIRMAN: I understand that.

MR. BEARD: And so the question is: should this Tribunal determine the appeal? This Tribunal is only engaged because Ofcom took a wrong decision. On Principle 2 there is no issue, this Tribunal should require the replacement of that conclusion in relation to Principle 2, and should not permit further litigation in relation to it.

THE CHAIRMAN: I understand. It may not matter in the light of what Mr. Beard is saying, Mr. Herberg, but I think it would be helpful if we simply had an understanding of when Ofcom was, as it were, putting the brake on this dispute, and when it was putting its foot on the accelerator in terms of resolving it. I used the term "stay" earlier on, and that is probably an inappropriate word for administrative process, but it would be helpful, I think, to understand what Ofcom's thinking was over time in terms of how it was dealing with what should have been a four month process. I make no criticism at all on you taking longer here because I do understand the thinking of prioritising the disputes, but I would just like to have a chronology to hand, if possible.

MR. HERBERG: (No microphone) Sir, yes, and I think from your remarks there are two aspects in particular which I should address tomorrow. One is the original timing of the disputes and why, as it were, the second tranche of tiered termination charges caught up with the first lot, as it were; and, secondly, in relation to this set of tiered charges why … did not wait for

the Supreme Court. Those are the two different aspects that you might like some assistance on.

THE CHAIRMAN: That is right. In the earlier cases it is the application of the break, and in the later cases it is the application of the accelerator after the Court of Appeal's decision.

MR. HERBERG: Sir, yes.

THE CHAIRMAN: As I say, they may not matter, but it would be helpful. In that case we will rise until tomorrow and I assume 10.30 is fine for finishing in good time tomorrow?

MR. HERBERG: Yes, sir.

THE CHAIRMAN: I am grateful. 10.30 tomorrow, thank you very much.

(Adjourned until 10.30 am on Friday, 27th February 2015)