IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1211/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 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 TWO

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. Mr. Beard, before you resume I had a couple of points that I would raise now, just so that you could take them into account in your submissions.

Yesterday you took us extensively through *Napp* and 08x evidence case in the Court of Appeal, where you were suggesting that there was an asymmetric approach to the admission of new evidence, in that the party seeking to challenge a decision had a wider latitude than the administrative decision-maker defending the decision in terms of admitting new evidence. Can I ask you to assume that I agree with you on that, take that as read, but my question is this: is this situation different, because *Napp* and 08x, as I understand them, were both cases where a decision had been made and the question was whether that decision could or could not be challenged. Here there is no question but that the decision should be quashed, and the evidence is actually not being sought to be admitted for purposes of whether the decision should be sustained or not, but actually to determine what happens upon, the decision, all are agreed, being quashed.

So, really what I would be interested in here is whether that makes a difference on your submission or not?

MR. BEARD: Not.

THE CHAIRMAN: Not - I thought you might say that, but you may wish to expand on that.

MR. BEARD: Yes, the reason it is not is this: let us imagine a world in which there was not a Supreme Court decision in this case. Let us assume there had not been 08x, and here we are in circumstances where Ofcom are coming forward with their determination. In those circumstances, it is open to Ofcom to come forward with an alternative story in order to defend their position. The answer is, no, it is not open to them to do so. We would contend that the same legal argument would flaw their case here because of the way that they have taken their decision and, just as in 08x, if you had not had the Supreme Court ruling there, you would have a situation where you determine the law and the law settles the matter so far as the position in this case is concerned.

Actually, although the MNOs have striven very hard to say that this is an entirely different situation, it is further down the line, it is a much easier situation because, essentially, you have a decision of the Supreme Court that resolves a whole bunch of legal argument that otherwise you would have had in relation to this appeal and that is the determinative of the issues on Principle 2. So it just does not change the issue here. You cannot say, well, in the other case, without the Supreme Court being there, you could have raised these legal arguments and you could have run an entirely new case in relation to these matters and admitted new evidence in relation to it.

THE CHAIRMAN: No, but playing Devil's Advocate, without the Supreme Court being there, I imagine the stance of Ofcom and the MNOs would be that they were right in shifting the burden of proof on to BT, and that is how the argument would run. In a way, the effect of the Supreme Court, you might say, is creating certainty, but the contrary argument is, no, what it does is it opens the field again by causing the decision that has been made to be fatally undermined.

MR. BEARD: With respect, that is not going to be quite right, because if you think about how the appeal works - let us forget about the Supreme Court - the appeal by BT is, if there is uncertainty, you should decide it in our favour; in the alternative, there is not uncertainty. That first limb, if you can dispose of discretely, disposes of the case on appeal, and you do not need any more.

In the appeal, of course you would have the second strand being contested, and no doubt there would have been more material put in by BT to which Ofcom would have put in responsive evidence, and that is all perfectly acceptable.

In a circumstance where you do not need to get into that second limb, and it is not quite a preliminary issue, but it is the determinative legal principle that has been settled here. Given that that has been settled here, you do not need to think about running matters in the alternative, so it does not increase the uncertainty at all. It simply streamlines matters, but if you think about it bifurcated in that way as those two sets of issues, one is if you had reached the uncertainty conclusion, what did you do with it; and secondly, was there, in fact, uncertainty here? Once you have decided on the first limb you do not need to move to the second limb, but that certainly does not mean that if you have a means by which you can effectively separate out that first limb, which we have here because we have got the law determined so you do not need to worry about anything else, it does not mean that you can have, in response from Ofcom or from an intervener, a wholly new story being run.

So those principles in relation to admission of grounds and evidence still pertain in these circumstances. It is actually that the process has been shortened here and made more efficient. That actually goes to why it would be quite wrong for the effect of the Supreme Court, which should foreshorten this, effectively to be reopening and broadening the scope of what could be dealt with as compared to a situation where the Supreme Court judgment had not been given.

THE CHAIRMAN: Thank you. My second question was this, and I am rather anticipating a few points that I may have for Mr. Herberg - we discussed this yesterday - which was how does Ofcom handle multiple disputes which have a similar subject matter, and what we were

discussing yesterday was that either you can progress all the disputes at the same time and reach an outcome at broadly the same time so that appeals of that decision can be pursued, or you have one lead decision and the later issues are only decided finally when the process regarding the first lead decision is completely exhausted.

Here, and I just ask you again to assume this, suppose we have a situation where Ofcom, having decided to sequence the decisions, to have a lead decision and this case following on, jumps the gun and actually makes a decision before the lead decision's process has been completely exhausted - in other words, decides the matter, when it is clear that it is going to the Supreme Court but before the Supreme Court has actually opined. On that basis, is there an argument for saying that because procedures regarding the admission of evidence in front of Ofcom are more flexible, that had Ofcom waited until the decision in the Supreme Court had been handed down before actually proceeding to a final decision, there would have been greater flexibility to admit evidence, that that is a factor that we should take into account now because Ofcom jumped the gun?

MR. BEARD: No, is the answer to that.

THE CHAIRMAN: I thought it might be, but why?

MR. BEARD: The reason is this: leaving to one side how Ofcom should best case manage multiple disputes, because, as I said yesterday, the range of inter-relationships between disputes and how they are raised can be many and multifarious, and therefore it is no part of BT's submissions to try and come out with some sort of template as to how that should be dealt with.

Dealing with the specific situation, what you have got is a situation where the MNOs, and in particular Three, was urging Ofcom to take a final decision. Ofcom, I think it is at para.2.64 in its Determination, says, "Yes, we have considered these matters and we have decided the Final Determination is the correct course". Understood. At that point you are putting people who oppose the outcome to the cost and through the process of dealing with an appeal as has occurred here. Once you have taken a final decision you have taken an administrative step which has legal consequences and ends up with ramifications with how it is dealt with thereafter, including by yourselves. At that point, when you come to ask yourself "should material be admitted in relation to this?" it would be wrong to be saying if this matter were remitted to Ofcom they would have more evidential flexibility, because they do have more evidential flexibility because of the institutional structure and the particular competences they have. But, for you, the test is, given where you are in the institutional framework and given the guidance I referred to yesterday in the case law, is

there good ground for you admitting this sort of material to consider matters, and if there is not good ground for you admitting the material for consideration it cannot be relevant for you to say it is not right for us to admit it because we are at an appeal stage, given what has happened, but if we did not decide the appeal ourselves and then remitted it back someone else could have broader leeway in relation to these matters because that would be getting the institutional structure the wrong way round. You have to decide first whether or not it is right for you to be admitting this sort of material because the appeal is before you, and the appeal is before you because Ofcom, at the urging of the MNOs took a decision. If they had not done so ----

MR. WARD: (No microphone) We did not do that … .

MR. BEARD: I think I said Three.

MR. WARD: (No microphone) You said "the MNOs"...

THE CHAIRMAN: I was careful to put this on a hypothetical basis to Mr. Beard because I know we are coming to Mr. Herberg and I am sure he will give us chapter and verse. If you, Mr. Ward, then want to correct Mr. Herberg, do feel free.

MR. WARD: He may correct me . . .

THE CHAIRMAN: Either which way, but at least I understand exactly where Mr. Beard is coming from. It is we are at this stage of the process, there is an appeal of the Decision that has been made, and the evidential rules as to the admission of new evidence are, as at this level ----

MR. BEARD: Yes, and it would be wrong to be saying someone else or any institutional structure has a broader jurisdiction and therefore, even if we cannot do it, it would be jolly nice if somebody did, so we will decide to remit it back in any event. That would be getting the law wrong in relation to these matters. It is just worth bearing in mind, of course, that we are talking about a situation where evidence and material, as I was saying yesterday, went in before the Court of Appeal judgment in any event, and so those sorts of considerations that go to your broader assessment are important in this context anyway.

THE CHAIRMAN: Thank you. Was that your answer?

MR. BEARD: Yes, it is my answer, and one hopes ---- (Laughter) We will move on.

THE CHAIRMAN: Sorry, I had one further ----

MR. BEARD: Sir, you had two questions, I apologise.

THE CHAIRMAN: I have spotted a third one, which actually arose when my colleague, Professor Reid, was exploring Professor Valletti's evidence with Mr. Turner. Mr. Turner rather firmly suggested that really we could not, at this stage, look into the substance of the

new evidence being adduced. On one level I completely understand that. We do not have the witness, Mr. Hunt, in front of us, and the ability and extent to which we can test his evidence is clearly limited to that extent. But, and this is my question to you, both Ofcom and the Tribunal, albeit a differently constituted Tribunal, have been round the block a good few times on whether ladder pricing NCCNs can be said to be good or bad in terms of consumer detriment, it is too uncertain to tell.

MR. BEARD: Yes.

THE CHAIRMAN: And the Tribunal, which I had the pleasure of chairing, reached the same conclusion after two weeks of extensive economic evidence, and the answer on all those occasions has been a resounding: "We do not know". So, to what extent can the Tribunal feel the weight of the new evidence that it is sought to admit in order to see whether it makes a difference to that resounding "do not know". If I can just give an example from Mr. Hunt's report, which struck me reading it again overnight, if you look at para. 3.1.9 of Mr. Hunt's report, he makes a pretty firm statement about the likelihood of MNOs, altering their retail prices for calls to 0844 and 0871 numbers, and he says it is highly unlikely. When you read that sentence in 3.1.9 you think that is a very firm view.

You then go to the paragraph which purports to support that sentence, 3.3.6, and if you read 3.3.6 what Mr. Hunt does is list the various factors which may affect the incentives of MNOs to alter their retail prices, and what is striking about para. 3.3.6 is the number of "may"s that exist in that paragraph, and which really appear to be suggesting that the statement in para. 3.1.9 is actually a contingent statement.

In other words, if these factors in 3.3.6 pertain, then his conclusion in 3.1.9 of "highly unlikely" follows, but, of course, if they do not then it does not.

MR. BEARD: Yes.

THE CHAIRMAN: My question to you is: to what extent can this "expert Tribunal" – as the Supreme Court put it – probe these matters at what we all accept is not the substantive hearing.

MR. BEARD: I am reluctant to get drawn into the weight that could be given to evidence that we say should not be admitted. We are conscious that on our reading of it, it looks like it is trying to re-run various arguments using slightly different accumulations of data that have been agonised about on a number of occasions before, and in those circumstances the idea that this somehow is the magic bullet in relation to certainty on consumer welfare seems to us a remarkable proposition.

Unfortunately, as is the way with expert material of this sort, whilst that view of the evidence in question might be entirely sound, in order to deal with it comprehensively one would need to do an awful lot more work.

The other thing to bear in mind here is going back to the point I have just made about this being very much along the lines, using the previous material, of techniques that had been deployed previously and have all resulted in conclusions of uncertainty it is worth bearing in mind that in this case actually BT took a radically different approach and actually adopted this extensive Monte Carlo analysis, and said actually it is only if you go to this very different sort of technique that you can begin to iron out the uncertainty. So the view that BT takes in relation to these matters is that that is the sort of technique that would be required in order to step away from the previous type of analysis and the previous conclusions that had been reached. It made that clear, and it is part of the reason why we are so strongly concerned about re-opening Principle 2, because as soon as you re-open Principle 2, even if it is on the basis of what might transpire to be rather flimsy material you have to bring in consideration of a much wider range of material.

If this Tribunal looks at it and says: "We do not think there is much here", then, of course, I cannot stop the Tribunal having that in mind when considering issues of fairness. But, we say that the issues that dictate whether this sort of material should be allowed in and whether Principle 2 should be reopened do not depend on the strength of the material, but we do concur that on a casual reading it appears weak.

THE CHAIRMAN: Thank you. I raise it now because I anticipate Mr. Turner will say the extent to which we can look under the bonnet is highly limited given that we only have the material in front of us without really the mechanism for testing it.

MR. BEARD: Well, I am sure Mr. Turner will put the point ----

THE CHAIRMAN: That is why I raised it.

MR. BEARD: I am very concerned that I am not going to be in a position to say actually, that does not amount to a row of beans here because that is not what we are engaged with. What we do have is, in this case, a situation where plainly this material, taking systems and analysis that had been used in 08x, could have been put in previously.

What I was going to move onto, if that was your last question, was just going back to the criteria in the draft Tribunal Rules. Obviously, the consideration of the Tribunal Rules themselves on admission of evidence, that does not change the underlying legal considerations that have been set out in the relevant case law, of course. So the points that I

made yesterday about interveners stepping into Ofcom's shoes and not having wider powers are clearly still absolutely correct in relation to a regime where hypothetically these draft rules are adopted. So when Mr. Ward and Mr. Turner were saying "If matters are opened up by the Notice of Appeal, in other words, the Notice of Appeal touches on them in some way, then we can put in evidence and we are merely putting in a full defence", those sorts of alluring phrases are a misconstruction of the statutory scheme and the underlying basic scheme, which is not altered by these terms.

When we look through them, Mr. Turner started with "just and proportionate". We say all of that case law and learning about finality and the nature of the appellate scope is what should be taken into account in considering what is just in the circumstances. As I say, the legal approach is clear in terms of admitting new evidence, whether by Ofcom or interveners.

Similarly, proportionality, allowing the reopening of a process now in relation to Principle 2, when everyone had such ample opportunity to deal with all of these matters, would be quite wrong and disproportionate. We know that the Common Regulatory Framework has concerns about public interest and consumer welfare, but they are baked into the way in which the dispute resolution and appellate structure works. You do not then start again and say "At the end of all of that, we are a bit worried you did not get it quite right in our view, so we had better all start again in the interests of justice". That is not the way it works, and it would be disproportionate to apply these things.

Indeed, the importance of the public interest and issues of consumer welfare is precisely why you have to put up your best and fullest case at the outset, so that it can properly be tested through these mechanisms. It is quite the contrary, the idea that regimes should stay absolutely loose in the interests of broader public considerations and consumer interests.

These points are obviously then echoed or could be picked up through the medium of 2(a), "the statutory provision pursuant to which the appeal is brought". Obviously, that is considering the standard of appeal, but it is also talking about the appellate structure and the institutional position that this Tribunal fulfils in the particular regulatory structure.

In relation to (b), "whether or not the evidence was available to the respondent before the disputed decision was taken", it was not provided to the respondent. It is an interesting question that, if anyone had come forward and said "Actually, the great solution to this is an aggregated version of the Dobbs 3 modelling", of course, that was something that could have been carried out, whether by Ofcom or by others in relation to this".

That is, I should stress, not a criticism of Ofcom at all, because it was not suggested by anyone that that was the way forward at the time, notwithstanding the fact that the Dobbs 3 modelling was well available to everyone in relation to these matters. In reality, it is just a reflection of how the MNOs chose to run their cases.

In relation to (c), "whether or not the evidence was capable of being made available to the respondent before the decision was taken", you have my case on that. More than is ----

THE CHAIRMAN: I do not think that was particularly disputed by the MNOs.

MR. BEARD: I do not think it is, no, and I say that is critical here if you were to be taking into account these matters. Then (d), "prejudice", yes, very significant prejudice. A whole reopening of the welfare analysis and bringing in new evidence in these circumstances would not only undermine the appeal process, but would generate further delays and engage further cost. Just on that delay and proportionality point, it is just worth bearing in mind that Ofcom are, in fact, introducing a new regime for retail charges in relation to 080, and they confirmed yesterday in a press release that that will actually begin on 1st July.

So the regulation of retail charges by those that are providing mobile call services is actually going to be subject to a new regime.

So the prospect of these sorts of ladders actually continuing into the further future is markedly diminished, and that is a relevant factor here. It has been a long time in resolution of this, and these ladders may well be out of the window in four, perhaps five months. In those circumstances, to allow some sort of wide-ranging reconsideration of consumer welfare would seem to us to be wholly disproportionate, a grotesque additional delay that is inappropriate here.

Mr. Herberg can, no doubt, comment on these sorts of matters in due course, but it does seem to us that that is a material factor here. As I will come onto, the bits that this Tribunal does need to determine, we will say, can be determined very briefly and a short timetable should be set down for resolving these matters, because there would be some real oddity about a process that meant that these disputes could not be resolved within the five years that the ladders run and are then removed.

As to whether or not the evidence is necessary for the Tribunal to determine the case, we say absolutely not. The Supreme Court judgment is what decides the issue on Principle 2, the Supreme Court upholding the Tribunal's earlier judgment on 08x. It gives the legal answer. It determines Principle 2. This can be disposed of very quickly indeed.

Unless there further questions in relation to Principle 2, I was going to move onto Principle 3, which, of course, we do recognise raises two questions; whether you should decide

Principle 3 and whether you should admit new evidence that is being proffered by the MNOs in relation to Principle 3. Our short answer is, yes, you should and, no, you should not.

Principle 3, we recognise in relation to practicability was not determined by Ofcom. We recognise that, but it is a matter which we say can be disposed of very quickly and efficiently, and should be. It is a matter that the Tribunal has dealt with before, particularly in relation to 08x, and I just refer you, and we mentioned it in our skeleton argument, but para.408 of the Tribunal's judgment in 08x, where it is emphasised that it would be normally expected that reasonable commercial parties should be able to resolve by discussion any outstanding matters pertaining to these sorts of practicability issues.

Ofcom itself had a good deal of material, plenty to make its decision, but decided not to, because, in particular, it did not need to because of the decision it has taken in relation to Principle 2, and secondly, because of the decision and approach it took in relation to Principle 2, where it said "If there is uncertainty, we would prohibit", so it did not feel that it needed to further.

Of course, as we have also seen, it did refer to the possibility of further evidence being material to its consideration of practicability. But our position is that, in the light of the Supreme Court judgment saying "Where there is uncertainty in relation to a matter, you should not prohibit it, you should not prohibit proposals", we say actually, on the basis of the material that is before Ofcom, this Tribunal can properly review these materials with a proper approach to the impact of Principle 2 on that analysis, and a proper approach to the Supreme Court's judgment on that analysis, and it can determine these matters.

Without going back through the consideration of admission of evidence that I have been through in relation to Principle 2, we say that the same issues on evidence or the same considerations in relation to evidence must apply to the new evidence that is being proffered by the MNOs in these circumstances. In other words, it would not be open to Ofcom to be providing this sort of material here, and in those circumstances neither should the interveners. As I say, what we say is that in relation to this Principle 3 material you can determine it in broad terms, which is all that is required, the practicability of the ladders in question which has been before Ofcom.

Mr. Ward took some time pointing at various tables that we had appended to our skeleton argument, and those tables are pointing out the novelty of many pieces of the evidence. He went to various letters and said, that actually, in this letter, we referred to issues to do with averages, and in our evidence we are talking about issues to do with averages. When one

works one's way through those tables, they are, in fact, accurate in the sense that whilst, if you characterise the issues sufficiently broadly, it is true that points were raised before Ofcom about practicability. If you look, for instance, at what is being said in relation to averages what you see is that in the letter the issue was about how one calculates an average, not whether one should use an average, and yet in the evidence what is being said is that there is a whole range of reasons why an average might not be an appropriate issue or basis for the calculation. That is a different sort of point.

We do not say that you are going to work through and strike each line. We do not say that that is going to be the proper way forward. We say that you look at this material in the round and you say, is it fair to admit it in circumstances where you had plenty of opportunity to put this sort of material, it was not put forward, there is material before Ofcom, this Tribunal can decide the issues.

If this Tribunal were to consider that, in fact, in relation to Principle 3, because it was a matter that Ofcom had not determined, this was a situation where those particular witness statements or the elements of the witness statements that go to practicability, should be admitted, then in those circumstances we still say it is entirely appropriate for this Tribunal to determine these matters on practicability. It has shown that it can do so in the other case, and actually we think this is not going to be in any way a particularly onerous exercise. I know that in the evidence it talks about there being 200 schedules, and it is all terribly difficult, and Mr. Turner took you to those bits in the evidence that talked about the need for manual calculations, which, in my mind, ended conjuring up some terrible image of the abacus department in Three really struggling with these things.

We are talking about hugely, hugely sophisticated entities that are well able to gather material in relation to average prices. After all, average prices are, what revenue did you make from your widgets and how many widgets did you sell? It is not, as they say, necessarily rocket science. The idea that these companies are not able to identify revenue and volume data to be able to produce these sorts of prices is, without wanting to put it too high, quite remarkable. When one actually begins to drill down in relation to the 200 schedules it turns out that, actually, you start off dividing by three in any event because they have got day, evening and weekend schedules, where actually the ladder element is the same across those three, so the ARP calculations become much simpler, and actually it becomes a much, much easier exercise.

So, in fact, we think these are matters that can be expeditiously dealt with. We are very concerned about the idea that it should be shipped back to Ofcom for precisely the reason

that you ship it back to Ofcom and these witness statements are not going to be the end of what is submitted by the MNOs in relation to these sorts of matters.

Further than that, we do not want to have two iterations of the process. We think that in these circumstances where this Tribunal has shown itself well able to deal with these practicability maters, where we have the evidence now before us, where BT can put in evidence just in response to that material, and we can set a timetable for dealing with it, it is a discrete matter that should stay with this Tribunal to be disposed of expeditiously.

So, if you are against me on the admission of evidence, we still stress that this Tribunal is the proper forum, and when we come to consider whether or not there should be a remittal on this, one does have to bear in mind the proportionality of remitting matters back to Ofcom, starting a new process over again in relation to those circumstances, potentially generating another appeal.

Of course, this Tribunal can reach a decision and it can be appealed upwards. We recognise that, but it is taking a stage out of the process, and I go back to the point I have already made: we are talking about the practicability of matters that have been operating over time which, in four months, may not be operating at all. In those circumstances, we are dealing with a situation where it would be wholly out of proportion to remit. As I say, we are confident that this can be dealt with quickly. You have the evidence, such as it is, if you are to admit it, in these bundles. Let us keep this process tight if you are going to admit this material, and move on.

With that, I will move on to the contract grounds, if I may.

THE CHAIRMAN: That is helpful. Did I get a hint in your submissions that you were saying that the decision of the Supreme Court had in some way changed the way in which Principle 3 should be seen, or am I mishearing what you were submitting? It seemed to me that you were suggesting that the rather contract first approach adopted by Lord Sumption had an effect on practicability.

MR. BEARD: What we have got is a situation where the way that Ofcom shapes its analysis in relation to Principle 3 is predicated on its analysis of Principle 2. We say that if you change your analysis in relation to Principle 2, which you have to, that changes the way that you think about Principle 3 as well. We do say that although the Supreme Court judgment is not to do with Principle 3 at all, there was no discussion about practicability, the overall approach that is adopted by the Supreme Court, which says that if there is uncertainty in relation to the compliance with the CRF requirements, then the matter that is subject to that regulatory process should not be stopped. So, to that extent, there is a broader articulation

of principle going on in the Supreme Court which may be appropriately dealt with in relation to submissions in relation to Principle 3, and those are in our notice of appeal. We are not saying the Supreme Court somehow determined by a side window anything in relation to Principle 3.

THE CHAIRMAN: No, I understand that.

MR. BEARD: Far from it, we are not suggesting that for a moment.

THE CHAIRMAN: No, it is more a knock on consequence.

MR. BEARD: Yes, that is right, and it knocks on in two ways: the most direct knock on is in the way that it knocks on to Ofcom's analysis of Principle 2 and its impact on Principle 3. Because it looks more broadly at how a regulator should be thinking about these things, we say that can have a broader impact, not just for Principle 3 but potentially for other disputes that end before Ofcom or potentially on appeal before the Tribunal. That is all we are saying. That is a different point perhaps.

Then I was going to move on to - I am loath to use numbers, because the numbering of the grounds is slightly different for different people, and indeed within Mr. Turner's own skeleton and submissions which is Ground 1 and Ground 4 - the contract ground that is raised saying that the prices are not properly specified. It is, I think, Ground 1 in his statement of intervention. This one can be dealt with very briefly. It was never raised at all in almost five years. It is a credit to the creativity of the legal team that they have come up with this at this late stage. If it were right it really should have been raised at the very outset of proceedings, because Ofcom would not have needed to do anything. This whole process was a complete waste of time. You did not need to have any agonies about Dobbs 1, 2, 3 or anything else. You did not need to have pages and pages of consideration of welfare analysis, because apparently we were not able to put these things forward itself. It is simply remarkable now to be saying, this ground formed no basis of Ofcom's determination, it was never part of the dispute, but we can come in because Ofcom have stepped back and raised a wholly different basis on which the decision should be sustained. Not only does it just leave the appellate structure and the institutional framework that we have been talking about as nought, but it is simply undermining anything that would look like a fair process in relation to these matters. There is just no basis on which these matters can be dealt with. It is never in desperation when beautifully put, of course, but recognising the difficulties of putting forward a wholly new contract ground the approach adopted by Three is a 'what is sauce for the goose is sauce for the gander' argument – BT has raised new contract ground so we should be able to raise new contract grounds.

Mr. Turner took you to the amended notice of appeal, which is in the old CMC bundle at tab 41. I think that is 3 in your numbering. I am just going to make one very obvious background point. This notice of appeal was put in at a time when BT was already pursuing its appeal to the Supreme Court. The way in which the appeal was framed here, and Mr. Turner says: "We will look at the bits that were crossed out in 5, 6, 7 and 8, and that is a different basis". That is not true. That is not a different basis on which the appeal was run when it was initially lodged. The appeal run here mirrored the appeal in relation to Ground 1 that was being run in the Supreme Court in relation to 08X. There were two dimensions to that appeal. One was the dimension which said because of the CRF it is only in situations effectively where there are problems with end-to-end connectivity that you could ever have regulatory intervention, given the overall structure of the CRF and what it was intended to do.

The second part of the Supreme Court's appeal was even if it is broader than that narrow compass, because of the structure of the CRF and what the regulatory framework is intended to do, if you have that you do not stop. That is Ground 1, limb 1 and Ground 1, limb 2 in this appeal. In making the amendments to the notice of appeal we have simply unpacked that. That is all these amendments are intended to do. They are simply intended to reflect the way in which (a) these matters were dealt with before the Supreme Court; and (b) most importantly the way that the Supreme Court ruled on them.

We entirely recognise that Ground 2 is additional and separate, because Ground 2 is all about the Monte Carlo analysis, which formed no part of the 08X process. Of course, the Monte Carlo analysis is what we say would mean that, even if we lost in the Supreme Court, we should still win in this case on the facts, because there is not uncertainty, actually these levels are favourable to consumers. But, we leave that for the moment because that is the stayed ground; if you were to remit Principle 2, it is difficult to see how that could remain the case.

What then is worked through in the marked up amendments is simply a substantial amendment in terms of the length and numbers of words at pp.14, 15, 16, 17, 18 and 19, which are setting out the framework and then the Supreme Court judgment. Then, when you come to the grounds of appeal, you see at 55: "As formulated in the protective appeal, Ground 1 contains two limbs, limb 1 and limb 2". So, what it is just doing is saying these were here previously but we are unpacking them properly, because what happened was the Supreme Court did not accept limb1 it only accepted limb 2.

THE CHAIRMAN: Did the Supreme Court not, in fact, focus much more on the contractual argument rather than the framework argument? My reading of Lord Sumption's judgment, and obviously you will correct me if I am wrong, is that he invited specific address on the SIA and the significance of clause 12, which was not, I think a ground that you were particularly forcefully advocating?

MR. BEARD: No, I come back to that. Actually, we said it is not key, and when we were invited to give first submissions we did not, because we said that is not the key to the way in which these matters are to be dealt with, and the outturn of the Supreme Court judgment is to say that, given the overall structure of the regulatory framework, in those circumstances commercial freedom must be given a primacy unless you have clear proof that there is something that effectively operates in breach of the Article 8 considerations, and that in these circumstances where you do not have anything in the contract which is stopping that, then the material goes through. I will come to the judgment in just a moment.

The point that is then being raised is that somehow where we have reflected what we see as being relevant to the Supreme Court ----

THE CHAIRMAN: I think paras. 69.7

MR. BEARD: Yes, what you have is, starting at 69 (i) is effectively Ground 2, limb 1. Ground 2, limb 2 is then at (ii), and Mr. Turner said that 69.7 suggests that there was a new argument being run here on contract. We say, no, that is not right. We say that this has always been the way in which we were saying negatively there is nothing to stop us, in the interests of commercial freedom, putting in place these arrangements, and all that could stop us would be the way in which the Directives are to be interpreted, and they do not, because you are only uncertain about the adverse impact. That has always been the position; it is a predicate to the position, because if you were saying, actually, under the contract we cannot do this then the thing never gets off the ground. So, all that is being said here is there is commercial freedom under the contract. It has to be commercial freedom under the contract because, of course, that is what we are dealing with.

So when that is then worked through, what we see, and I will come on to it, 69.10 is a fair reflection of what the Supreme Court says here.

If we then go to the Supreme Court judgment. There is a version in the authorities, but I think you were taken to the version in the BT second bundle at tab 20. (After a pause) What you have is a discussion, in the initial paragraphs, of the legal framework, the changed notices, the Ofcom Determinations, and then the Decision of this Tribunal and the Court of Appeal.

Then, at p.28, there is a consideration of the function of Ofcom in resolving disputes, so it is the discussion about what Ofcom's role is under the terms of the Regulatory Framework, both European and domestic level.

Then you have the reference at 35 to contracts, and then consideration in the Judgment of clause 12 from para. 36 onwards, and then clause 13. So the discussion of clause 12, through 36, 37 and 38, is setting out what those provisions of clause 12 are. But effectively, the predicate of BT's argument is that it is entitled to put these things forward unless it is stopped by the regulatory scheme. But this is just Lord Sumption's consideration of them. In 13, he interpolates that those contractual terms will be, in fact, constrained themselves by the Article 8 objectives.

Then you have got the Clause 13 matters that are then canvassed. I think the point you were perhaps referring to, sir, was at 41, where:

> "[Counsel for BT] declined to go into this question at all, and there was little argument on it even after the Court called for further submissions on the point".

Sir, you may well be aware that the judgment had an interesting final passage, in that a draft judgment was put forward and there were a series of protestations about the terms of the draft judgment that led to there being further submissions put forward in relation to certain matters, including in relation to these contractual issues. But, as I say, it was no part of BT's case there to say "You have got to get into the details of these contractual points". So, even when we were asked specifically to put forward further arguments on contracts, that was not what we were doing. We were just saying "This contract gives us the commercial freedom and is not blocked by regulatory scheme".

So, when we get onto consideration of the welfare test in the judgment, in particular, we have got, leaving aside Principle 3 and 42, recognition that the welfare effect was essentially unknown, or rather inconclusive. Then 43;

> "In my opinion, it is not consistent with either the contract or the scheme of the Directives".

So he is recognising that he has not seen anything that suggests that the contract is problematic; in other words, that commercial freedom, on his basis, is seen to exist, and the scheme of directives does not give the basis for rejecting those charges.

So what is being recognised here is effectively the predicate of BT's argument, which is the contract on its face does not stop them, because they have been putting it forward, and the scheme of the directives, which has been the focus of the appeal, because that was the essence of what Ofcom was talking about, that does not stop them either.

"On this point, therefore, I think that the CAT were right and that the Court of Appeal were wrong to overturn them.

Ofcom submitted that the degree of risk which is acceptable must relate to the gravity of the adverse effect [and then there is consideration of that]".

Then there is a discussion of how the Court of Appeal reads things, so the anti-competitive effect of price control. Then there is consideration of arguments that were actually put forward by BT about comparing the position in a non-SMP situation with an SMP situation, which is 47 and 48.

THE CHAIRMAN: Yes, I think it was the second half of 47 that I was thinking of.

MR. BEARD: Right. We did not rely on the Interconnection agreements. That is not what we are doing here. The references to the contracts that we are dealing with are simply saying "The contracts are not stopping us. We have that commercial freedom that is not being barred by the regulatory scheme". Certainly, that was the way that that appeal was pursued, and why, to our mind, 43 is worded as it is, and indeed, the prior provisions are worded as they are.

But, more particularly, the reason I take you to all of that is, are we running some kind of brand new argument in relation to contractual terms? The answer is, no, we are not doing that. What we are doing is we are saying we have commercial freedom in the contract, and it has not been suggested to stop us and, in those circumstances, neither can the Directives when applied by Ofcom.

I have to say all of this does not have any nexus with the point that is actually being raised, or rather the question that falls to be considered in relation to this contractual ground, because the issue in relation to the contractual ground has to be, is there a good basis for raising it now? Having not raised it previously, would it be fair to allow this matter to be raised? We have given those answers. So the 'source for the goose, source for the gander' argument does not apply in any event, even if you could conjure up that there was some sort of new argument being put forward in these circumstances.

Then finally, I think, in relation to this ground, Mr. Turner has the argument where he said, "If you have got to look at Principle 3, you should keep it in, in any event, because it is adjacent to Principle 3 issues", and that is obviously not a sound basis for considering whether or not a new ground could be developed as a defence for a decision that is nothing to do with these sorts of contractual issues at all. It does not fit with anything that the appellate scheme is to do with, and it would be a wrong approach in law to say "We are

having a look at practicability issues, so we should have a look at some new contractual point that is now being raised". So we say there is nothing to the specified point at all.

That then will take me to two final issues; first of all, 1007 and 1046, and then a couple of concluding remarks. On 1007 and 1046, the key point from BT's point of view is that this issue arises as part of the relief questions in the 08x case, because, although Mr. Turner, I think, took you yesterday to the judgment that was given by this Tribunal in relation to consequential relief, what the order says in relation to relief is that it is 956 and any valid successor that applies.

I will just take you to that, if I may. It is in the BT2 bundle, at tab 16. (After a pause): I should have added finally in relation to the previous matter on the contractual ground, of course, there no good reason for remitting that in any event.

If we just look at the order itself, actually the critical part is in 1(6), which is definition of ----

THE CHAIRMAN: Yes, I see.

MR. BEARD: Because, if you look at (6), it refers to NCCN 956, which is obviously the ladder that applies in relation to 0800 numbers, and it defines NCCN 956 as that ladder schedule or any other such validly issued. So, although we recognise the points that were made in relation to judgment, what has happened is, because of the Supreme Court judgment and the order which says "The Tribunal's order is reinstated", we recognise that there is a question about what a valid successor to 956 that comes out of that relief process. In those circumstances, for us to say that in relation to 08x we recognise that that issue arises in relation to relief, but we are going to hold some wholly unreal fight about whether or not you can determine the validity of 1046 before this Tribunal put in a slightly different constitution is not something that we are interested fighting about. So when, in the course of the remittal submissions from the MNOs, they said, actually this 1046 validity issue should be dealt with in the 1046 appeal proceedings, BT just came back and said, okay, that is fine, but there is no concession more broadly as to how this Tribunal should deal with matters that are raised before it afresh. All we are saying is, yes, we are pragmatic about these things, we recognise that it comes out of that process. We do not mind where it is dealt with as long as it is dealt with expeditiously and efficiently by this Tribunal. Given that we have a Tribunal that has a common chair and therefore knows about both of the cases, we are agnostic as to whether or not ----

THE CHAIRMAN: We could equally have a determination in these proceedings?

MR. BEARD: Yes. So when Mr. Turner said we were objecting, that is not the case. We do not have any objection to it being determined in these proceedings. That is not a problem for us. We are not standing on any ceremony about this. We recognise that Principle 3 does need to be determined by the Tribunal. We have accepted that the validity of the 1007, 1046 point does need to be determined and we are content for it to be determined by this Tribunal. What we say is, please can we just get on with this? That is the essence of what we are saying.

THE CHAIRMAN: That is coming across loud and clear, Mr. Beard.

MR. BEARD: I will not say it again. Well, I might say it again. I am not really sure that there is much more to talk about in relation to 1046 because Mr. Turner is not right to say that we are insisting it is dealt with in the relief proceedings. We are not standing on ceremony about the composition of the Tribunal. We think it can all be dealt with and this streamlined process can deal with it. We say, therefore, Principle 3, our primary submission is without the additional evidence, and the 1046 matter, let us get on and set down a timetable for dealing with it, for submissions and responsive evidence and set a hearing with those matters.

Principle 2, plainly not: it would be hugely unfair to do so, and, as I have said, we consider that allowing that sort of remittal on a wider basis, or consideration by this Tribunal on a wider basis, is a submission that has lost sight of the structure with which we are dealing, it has lost sight of the period over which we have been dealing with these things. It will, to use the old cliché, be justice delayed being justice to some extent denied, given the extensive additional cost and delays that will be engendered. It is fundamentally unfair to BT.

We recognise, of course, that Three and Telefonica want ever further to postpone these matters, but the industry is working these matters out. In any event, there are processes that are going on with Ofcom to change the way in which all of these pricing systems work.

In addition, as we have made clear, in relation to Vodafone and Everything Everywhere, arrangements and accommodations have been reached. Obviously the terms of those are confidential, but sensible commercial parties can come to sensible agreements in relation to these matters.

As we further noted, there has actually been an arrangement reached between Vodafone and EE in relation to the ladders that used to be Cable & Wireless ladders in relation to these matters. So what we are seeing is, in the light of the Supreme Court judgment, a degree of pragmatic settlement in relation to that matters.

We say let us get rid of the final matters that are outstanding in relation to Principle 3 and 1046, and with that in mind sensible resolution of these matters can no doubt be pursued. To permit the reopening of Principle 2 or opening up that other contract argument would be unjust, contrary to the proper approach to the law on materials and grounds and grossly unfair to BT.

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

THE CHAIRMAN: Thank you very much, Mr. Beard. Miss Love, I think.

MISS LOVE: Sir, we support the submissions that were made by BT, both in its skeleton argument and by Mr. Beard. You will be delighted to hear that I do not plan to repeat any of them, and I have just three brief points to add to what Mr. Beard has said. Firstly, I do want to address a few points by Ofcom and the MNOs on this question of s.195(2) and protective appeals, which I am conscious probably has its genesis in our skeleton argument. Secondly, very briefly, the question of prejudice to us of allowing Three and Telefonica to rely on grounds and evidence not before Ofcom. Thirdly, briefer still, the question of what would happen if, contrary to what Mr. Beard has said, you were minded to agree to these applications or to any part of them.

Starting with the protective appeals point, in our skeleton, basically all that we did was to point to the wording of s.195(2) - I am not going to invite you to turn it up at this point, but I think it is bundle 9, tab 2, and it is the second to last page, and that says that this Tribunal decides appeals on the merits and by reference to the grounds of appeal set out in the notice. We made the, one might have thought, fairly obvious point that what that language suggests is that it is the notice of appeal and the grounds in that notice that really set the parameters of what this Tribunal is doing.

We made the further, again, one might have thought, obvious point that, in turn, that suggests that if you think Ofcom may have got it wrong on something - law, fact, discretion - and you want to be sure that you have preserved your ability to raise that in front of this Tribunal, the obvious course of action is to put in a notice of appeal.

That has provoked some objections from Ofcom and the MNOs, and I think - I cannot remember if “striking and bizarre” or “strikingly bizarre”, the transcript will clarify, but that is how Mr. Ward saw it. I just want to go through some of the objections and explain why we are unpersuaded by them.

I want to start with the suggested risk of lots more appeals. Ofcom in its skeleton argument said that there would be pre-emptive appeals encouraged, and that would be undesirable. That is para.18. Mr. Ward, in the same vein went further. He talked about a large number

of protective appeals in all sorts of cases. I think what is being suggested is that if we are right then there is a sort of nightmare vision that protective appeals by parties who succeeded in front of Ofcom are the new sort of home contents insurance of telecoms determinations - everyone goes for it whether you are likely to need it or not - and presumably this Tribunal is then swamped by lots of cases in which everyone is appealing even though they seem to have won, although you might fairly ask how that differs from what has happened in the last five years anyway.

We disagree with that because we say the reality is that the parties who succeed before Ofcom will do exactly what they probably do now. They will look at the decision carefully, they will see if there are things they do not agree with, is there some different basis that Ofcom could have endorsed, and how significant is it and how likely it is that there is going to be anything that changes the landscape. If one is talking about a protective appeal there is a question of what you are protecting against. In this case it is pretty obvious. The Supreme Court had granted permission in 08x at the time of the Final Determination, so it was quite clear where the risks lay. There are not going to be further appeals against each and every area. These are commercial parties and they are going to exercise commercial judgments.

The other point is that, of course, there have been some pre-emptive appeals already anyway. I think it is Tribunal bundle 2, BT 2, we have referred to EE's appeal in the 08x case, despite the outcome. I am not inviting you to turn it up at this point. The critical part of it is in footnote 3 of our skeleton argument to para.9, in which the Tribunal actually noted that EE had no quarrel with the outcome and what they disagreed with was the reasoning and approach.

That brings me on to the next point from Ofcom. I am anticipating what Mr. Herberg has in his skeleton. He says that our view is really inconsistent with the decision of the Court of Appeal in the *Everything Everywhere* judgment on mobile termination. That is, I believe, in bundle 9. I have got it down as being in tab 15. In my bundle it is actually in tab 7. Again, I am not inviting you to turn it up now. I will leave the pleasure of working out which tab it is to Mr. Herberg if he chooses to take that challenge up. I do say that if you look at the passage that Ofcom relies on in its full context it is quite clear that what Lord Justice Moses was concerned with was the question about what it means to say a decision is wrong on the merits. If you take it up at the last sentence of para. 22: "There remains scope for dispute as to what is meant by showing an original decision is wrong on the merits".

Paragraph 23 looks at the s.192(6) factors. Paragraph 24 points out, and this is what Mr. Herberg relies on, that the appeal is against the Decision and not the reasons, so you have to show that whatever reason you have could affect the Decision.

Interestingly, in para. 25 Lord Justice Moses says that although usually the successful opponent will show what the alternative should have been, that will not necessarily always be the case. We do say that passage was addressing a different point, and it does not follow that if you cannot point to a different outcome you are shut out of the appeal process. The 08X EE appeal shows the contrary.

The final point I want to touch on on this is protective appeals: are Three and Telefónica just saying that there was not really anything for them to appeal against?

I think what Mr. Ward said was that it would be an awkward drafting exercise because they were happy with the approach and the conclusions.

Again, when you look at the points they want to run, and when you look at the creativity and indefatigability of the MNOs to date in their disagreement with tier charges, which Mr. Beard has already paid tribute to this morning, again we are sceptical. Three says they want to argue that these NCCNs were not valid under the SIA, so they could have just put in a notice of appeal saying Ofcom should have decided this on a different, rather shorter basis. You have observed, as Mr. Beard observed, the real question here is why this was not apparent to them back in 2012.

On Principle 3 you gave the answer – they could have appealed against the non-Decision.

On Principle 2, again, the case that Telefónica and Three now want to advance is very clearly intentioned with at least some of what is in the 2013 Determination. Ofcom is saying we cannot quantify direct, we cannot quantify indirect, we cannot quantify MTPE, there is uncertainty, and one could have said: "Actually, Ofcom, you could and should have gone further, and as you see NCCN1101 at least is likely to cause consumer harm." As Mr. Beard has said that is what EE were saying from the very outset.

If, what they are saying now, is so unimpeachable was the 2013 Determination in all respects that they could not have come up with a notice of appeal, they are selling themselves short.

Now, we are not saying that the only way an intervener could ever raise a point before the Tribunal is to appeal. If you want to make a point that is genuinely responsive to the Grounds, in the sense that Mr. Beard outlined today, then obviously, subject to whatever terms the Tribunal lets you intervene on, you can do that.

We can see that in some cases, though this is not one, there may be grey areas about whether a point is responsive. What we do say is that the reference in 195(2) to deciding by reference to the grounds of appeal is consistent with, and reinforces Mr. Beard's point that there is a process here, there is a statutory process. There is the process before Ofcom, there is the appeal process, and the notice of appeal is central to the second part of that process. To allow points to come in here – contract, Principle 2, different Principle 3 – that do not just respond to the notice of appeal, they go much further, it turns this into a procedural free for all which means BT, and everyone who supports BT in this, is really facing a moving target.

The final point that I just want to touch on here is that Mr. Turner seems to accept that 195(2) places limits on what the Tribunal can decide, and that points that are not necessarily encompassed by the Grounds could be excluded. He says that it does not really matter because this Tribunal is empowered under 195(3) to refer other points that are important to the resolution of the dispute back to Ofcom. We disagree. There is a rather question-begging definition of what the dispute is. One might have thought it is what you put in front of Ofcom in the first place, and we agree with your reading that the point has to be properly before the Tribunal for subsection 3 to be engaged. Subsection 2 refers to deciding the appeal by reference to the grounds, and 3 refers to the Tribunal's decision, which connotes the same decision on appeal.

Moving on to the question of prejudice. To the extent that you are looking at considering exercising your discretion and looking at fairness, that is fairness to all of the parties, that is clear from the language of Rule 21.2(d) of the new draft Rules – "one or more of the parties". That is not just the MNOs, it is also the interveners who support BT, which is us and TalkTalk.

It is not only that, Mr. Ward referred yesterday to, contrary to what we say, our ladders being different to BT's. The fact is that Three and Telefónica are actually treating the lawfulness of our tiered termination charges, which they have never challenged, as being effectively tied up with the lawfulness of BT's ones.

You have heard from me in my skeleton, and Mr. Lask in his, that we are not being paid in accordance with the sums that we have invoiced. So, by their own conduct, what they are saying is that we are swept up in this appeal. At the risk of abusing Mr. Beard's *Jarndyce v Jarndyce* analogy, we are the wards of court waiting on the outcome.

We thought – in fact, we still think – that the Supreme Court's judgment in 08X has resolved the approach in law to the question of whether a wholesale operator can change the

structure of its termination charges. We actually intervened before the Supreme Court to ensure that our voice was heard on that issue, and we think that applying that approach to what the MNOs chose to put before Ofcom here means that these NCCNs should not be prohibited.

If Three and Telefónica get to raise these new grounds, if they get to put in this new evidence, that is a second bite of the cherry, and we are left back in uncertainty, and we are still not collecting our charges and we are put to the cost of responding, and everything that Mr. Beard said about his clients applies in spades to mine. I am not saying we are going to incur the same costs as BT, we are not necessarily saying we want to enter the Dobbs, Genakos/Valletti/Hunt issues, but we are also put to the cost of responding, but we do not have the resources of BT, and these might still be significant sums to a smaller operator. So this is a free for all that is leaving us out in the cold for longer and adding to our costs. We cannot just leave it to BT because there is a risk of our interests not being adequately protected, quite apart from the fact that BT is a competitor of ours whose interests are not aligned. For example, Three has put in some very specific evidence about our tiered charges – just to give you the reference, I hope it is in 5, tab D, paras. 123 to 126 of the Sareen witness statement. We disagree with what Mr. Sareen and what Three say about our charges and their consequences, but we cannot leave that for BT to deal with, we are going to have to respond ourselves.

The final point, which that leads to, I just wanted to touch on is what would happen if you agree to these applications? TalkTalk has said in their letter of 23rd February, that if you did go down that route they would seek permission to file evidence and submissions in reply, and we are saying now, we are laying down the marker, we would, in that circumstance be seeking the same permission. Quite apart from the fact that there is now evidence specifically about our charges, and that is evidence we need to respond to. The simple fact is that our SoI and our evidence were prepared on the basis of the grounds as we understood them at the time, and basic fairness requires that if the grounds are now going to be expanded out of all recognition we should get to respond.

Unless I can assist further?

THE CHAIRMAN: One point, Miss Love, if the matter is to be reopened, is your position like Mr. Beard, that it is the Tribunal that should determine these matters, or that matters should be remitted to Ofcom for it to determine?

MISS LOVE: We endorse Mr. Beard's position on that. This is something that should not detain the Tribunal long, and we very much hope will not.

THE CHAIRMAN: Thank you very much. Yes?

MR. LASK: Sir, I appear for TalkTalk. I shall not take up too much of the Tribunal's time. Essentially, we agree with and adopt the submissions of BT and Gamma. For all of the reasons that they have given we say the MNOs' application should be refused. We would add only this: if the MNOs are permitted to rely on fresh evidence TalkTalk would, as it has said in the letter of 23rd February, ask for an opportunity to respond. We laid down this marker in our letter of earlier this week; we also raised it in our statement of intervention, and I would note that neither Three nor Telefónica have objected. They are right not to because if, contrary to BT's and Gamma's compelling submissions on this point, it is fair and appropriate to allow the MNOs to rely on their fresh evidence, it must also be fair and appropriate to permit TalkTalk and Gamma and BT to respond. Many of the points contained in the MNOs' evidence are either new or are at least developed in considerably more detail than they were before. Telefónica at least accept that.

So TalkTalk has not had an opportunity before now to address the case as it is now put, and as Miss Love submits for Gamma, as with Gamma the outcome of these proceedings will go a long way to determining TalkTalk's entitlement to apply its ladder charges. So to deny an opportunity for us to respond would give rise to the very asymmetry and unfairness that the MNOs rail against.

I would also add that, as the Tribunal recognised when granting TalkTalk permission to intervene, TalkTalk is well placed to assist the Tribunal in determining these issues, being both a terminating provider and a retailer of mobile call services for whom BT's ladders would be perfectly practical to implement. So that is all I wish to add, sir, unless I can assist the Tribunal any further.

MR. BEARD: Thank you very much. Just before Mr. Herberg stands up, you asked earlier about consideration of the Hunt evidence and I put forward the position of BT. Miss Lee reminds me that, in the Tribunal's judgment, which is at tab 15 and it need not be got out, tab 15 of BT2, paras.302 and 340 were paragraphs where the Tribunal particularly considered the difficulties with relevant empirical evidence where the Dobbs modelling approach was being adopted. I am grateful.

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

MR. HERBERG: Sir, you heard from I think it was Mr. Ward yesterday, who quoted Ofcom's Statement of Intent as to its position in this matter, that it does not intend to take a substantive position or play a substantive role on the appeal. Nevertheless, what I hope to do is to assist the Tribunal by addressing at a relatively high level of principle, although

descending at some points perhaps rather more into the arena, on the proper approach of the Tribunal in this case, although we do not take an overall substantive view as to the decisions of the Tribunal. What I will seek to address in substance is the proper approach of the Tribunal to admitting new grounds and fresh evidence, and we do say there is potentially some difference between the two, and also the question of remission.

Sir, can I just start with one point, which is really by way of correction? In the first part of our skeleton, we set out the overview of the parties' grounds and evidence, which you referred to, sir, in opening. There is one correction that needs to be made to that. You will already have that well in mind, and it concerns the position of one of the contractual grounds.

What we said at paras.9(b) and 11(a) of that skeleton, which, sir, I omitted to say is what we call bundle 1 and I think you all have it at bundle 8, at tab 6. What we said, sir, was that it was agreed on all sides that what is Telefonica Ground 2, in other words, the proposition that NCCN 1046 was issued contrary to the provisions of the SIA, given the extant ladder pricing proposals, that it was agreed that that was a new ground. That is obviously not the case. At least Telefonica has made the point, and we accept rightly made the point, that this issue was raised during the Ofcom determination process in the letter of 30th August 2011, to which you were taken.

We accept and recognise that that point was taken in that letter. It is perhaps fair to point out that the point was not taken in the initial submissions, and indeed, the point was not taken in response to the provisional determination, which did not deal with the point. It was silent on it. It was not taken that we had omitted to deal with it. In fairness to Ofcom, I say that. But nevertheless, during the framework, during the scope, the span of the determination process, it is clear that the point was raised.

It may be that that is going to be one of the less significant points for the Tribunal, because, of course, BT accepts that that point does need to be determined one way or another in one of the two sets of proceedings. There does not seem to be any substantial dispute that that point is going to need to be determined, so I say no more about it. But 9(b) and 11(a) are incorrect to that extent.

Sir, can I deal, first and slightly more substantively, with the question, as I call it, of sequencing and, connected to that, power to remit, as opposed to separately the question of whether you would remit on anything or not, which I will deal with subsequently?

At paras.13 to 15 of our skeleton, we address the question of what we call sequencing. The point we made there was that, before deciding what, if anything, should be remitted to

Ofcom, on the one hand, or retained and decided by the Tribunal, on the other hand, it is appropriate to decide what arguments and evidence are properly in issue; in other words, to decide, at least as a matter of principle, on the MNOs' entitlement to advance the ground and rely on the fresh evidence sought now in their interventions. If one is going to remit to Ofcom, it may not technically be necessary actually to admit the new material, but we do say the Tribunal should form a view on that matter in informing its decision as to what to do, if it needs to do anything other than reject the applications.

That, of course, does raise the issue of the extent of the power to remit, on which I do not think, in fact, there is much dispute between the parties as a matter of principle. We certainly accept that, if the Tribunal were to quash the decision on the basis of the acknowledged error in relation to Principles 2 and 3 and simply made a general remission of the matter to Ofcom without more to reconsider, then Ofcom would in principle consider the matter having regard to all relevant circumstances, including such fresh material as the parties put before it in the course of that redetermination.

THE CHAIRMAN: You would effectively remake your decision.

MR. HERBERG: Indeed. That is the way Telefonica puts it at para.44 of their skeleton, and we agree. That is subject to Ofcom's discretion, which you, sir, I think mentioned yesterday, and I do not think I need to take you to. But there is a discretion under s.186 as to whether to handle a dispute at all or to the extent requested.

THE CHAIRMAN: Mr. Herberg, let us assume we have a contractual argument that was never actually referred to Ofcom as a dispute at all, and it is wholly new. You would consider even taking that into account if there was a fresh remission?

MR. HERBERG: Sir, there would be a number of steps. First, I apprehend that, if the matter is quashed and remitted, the original scope of the dispute, as set by Ofcom, still remains in place.

THE CHAIRMAN: Yes, and you would have to expand that.

MR. HERBERG: That is effectively whether it would be fair and reasonable, is the way it was put, as I recall, for BT to be permitted to make the changes in the NCCNs. One question, therefore, which we have not included, because we might have to address it, is whether "fair and reasonable" would itself accommodate the contractual grounds which are now sought to be put forward. That would be an issue. The undesirability of such a satellite to the satellite litigation may be a reason why, if the contractual grounds are to be determined, it may be better for the Tribunal to determine them before remitting anything else, which is anticipating a possible position which I will put before you later on.

THE CHAIRMAN: I think Professor Reid has a point.

PROFESSOR REID: I wonder if I could ask you two things. You have talked about the possibility of general remitting. Two things concern me there; first of all, on resources. Is this the best activity for you to be engaged in in the near future? Are there other things that you might do? Might there be an element of repetition in what you do do? Then finally, something that we have spoken about is seeking finality as being an important goal of our function. Does this assist us in this direction, or does it further defer matters and make finality more elusive?

MR. HERBERG: Those questions, to some extent, may go to the desirability of remission, which is something I will come to, but I am slightly putting to one side for now. If the matter were remitted to Ofcom -- maybe I should turn up s.186, because it does engage with the question of resources to some extent. I think that s.186 should be in the first of the two bundles of authorities, which is our tab 8, the Tribunal's bundle 4 and, within that, tab 3.

I would draw your attention to the terms of s.186 as it now stands, which are a few pages into tab 3. You will see that s.186:

> "Action by Ofcom on dispute reference
>
> (1) This section applies where a dispute is referred to Ofcom under and in accordance with section 185.
>
> (2) Ofcom must decide whether or not it is appropriate for them to handle the dispute.
>
> (2A) In relation to a dispute falling within section 185(1) …"

which, to cut a long story short, is this dispute -

> "… Ofcom may in particular take into account their priorities and available resources in considering whether it is appropriate for them to handle the dispute."

That means that, under the law as it stands in s.186 now, Ofcom would, on a remission, be able to take into account the resources and priority matters to which you refer if the matters are remitted to us.

You may, sir, be asking - in a sense, this is a prior question - should the Tribunal take that into account before, if it were remitted to Ofcom, Ofcom takes it into account? We certainly acknowledge the burden which the 08x investigation generally has placed on Ofcom, as well as, of course, the parties. There has to be finality, there needs to be finality, but it certainly, we accept, is one of the considerations that would be relevant for the Tribunal to take into account.

Is there a method of short-circuiting this? The Tribunal grasping the nettle and deciding the matters for itself, rather than sending it back to Ofcom and having a further process before Ofcom and then potentially there being an appeal from that and it coming back to the Tribunal.

PROFESSOR REID: Exactly so, thank you.

MR. HERBERG: We accept that is a relevant consideration for the Tribunal to take into account. I should mention one further complication, which is that s.186 has been amended since these disputes began. The section which I read to the Tribunal is the current section. The old section, which I am afraid is not in the bundle, does not include subsection 2A.

THE CHAIRMAN: I do not want to get too far into this, Mr. Herberg, but does s.186 not refer to the original reference of a dispute by a communications provider, whereas here we will be dealing with the situation under s.195, which would be where the Tribunal is making a decision disposing of an appeal, and as part of that decision remitting the decision to Ofcom with such directions as appropriate. I understand, but you can correct me if I am wrong, that under s.195 Ofcom has any particular discretion in terms of how it deals with such a remission. If we remit, you have to deal with it.

MR. HERBERG: It might dependon the terms of the remission. That is why I raised this point in answer to the Tribunal's question, but also in relation to a very general remission. I was dealing first with the general remission and I was going to come on to say you have powers to be much more specific. In making a completely general remission which is at liberty, 186 might arguably be relevant, it might be said, you have gone past that stage, you have set the scope, that remains in place and the remission means you have just to get on with it, you have no choice. In answer to the question, certainly it is appropriate for the Tribunal to take those considerations into account.

We do say that if we were faced with a general remission, it would be for Ofcom to decide what was relevant and how to handle the dispute, but there would thereby effectively be an opportunity for all the parties to advance arguments and adduce fresh evidence not put in on the last occasion. If the Tribunal chooses to take that course and make a general order of remittal it would be helpful for the Tribunal to indicate that it understood that to be the position and the consequence as to how Ofcom should proceed in the matter.

THE CHAIRMAN: I think what you are saying is that whatever we ultimately do, let us be clear what we are doing, so that you know what it is.

MR. HERBERG: Sir, it is not beyond the bounds of possibility that there might be different views on either side of me, and we would rather those matters at least were sorted out now.

The same of course applies if the Tribunal exercises the ample power which it has under s.195(2) to quash and to make a more limited remittal which we say it does have the power to do - just simply by way of example, remitting Principle 3 but not Principle 2 questions, if I can put it that way, Ground 4, not Ground 3, in the terms of the Telefonica appeal. Obviously, if the Tribunal decides to take that course, we say it should make it very clear to Ofcom and the parties exactly what issues it is being directed to reconsider and on what basis. Again, on those remitted issues, it seems to us that Ofcom would, in principle, be entitled and perhaps obliged to entertain fresh arguments and evidence, because it would be effecting a re-determination.

THE CHAIRMAN: Yes.

MR. HERBERG: I will come back to offer a few remarks on the appropriateness of the various courses of remittal and indeed not remitting and retaining to the Tribunal without seeking to completely come off the fence and advocate a particular course.

Can I turn to a really significant point, which is the approach to permitting new grounds. Before doing so, the first point is that we suggest that it is appropriate in this case to distinguish the applications to argue fresh grounds from the applications to admit fresh evidence. There has been a tendency, an understandable tendency, on both sides of me to elide what are applications for new grounds and applications to admit fresh evidence. The former is, of course, under Rule 16.6, the power to permit an intervention on such terms and conditions as it sees fit. The latter is Rule 22, which simply says the Tribunal may admit or exclude evidence whether or not fresh, effectively. Of course, you have got the new Rule on that being consulted on as well to consider. I am not suggesting that the test is fundamentally different under either of those Rules. Many of the same considerations will be relevant. No doubt important questions of whether it is fair and appropriate in Mr. Turner's original approach, or just and proportionate (happily again rhyming) in the language used in the new Rule 22, which is being consulted on. Considerations may be relevant to both of your exercises of discretion. There may be specific considerations about fresh evidence in particular, and in any event it is helpful to recognise what is in issue.

If one analyses the arguments, the grounds of the MNOs which are sought to be put forward, they separate out quite nicely into new grounds and new evidence. On what are two contractual grounds, Ground 1 and 2. Three's contractual argument that the NCCNs are too imprecise seems to us to be simply a new ground. It is a fresh ground and acknowledged to be a fresh ground.

The second contractual ground, the one shared by Three and Telefonica, about the overlap with the other NCCNs, that is not entirely a new ground, but again it is purely a ground, and neither of those two, as we understand it, makes an application to admit new evidence, fresh evidence, in relation to either of those grounds. Mr. Turner did suggest that Ground 1 had some overlap with the argument on practicality, as I recall. When you raised the possibility of seizing the nettle and determining the ground now, he did not object on grounds that we need all the evidence on practicality in first.

It seems, in principle, that those two are contractual points, as they are said to be, which can be determined free of fresh evidence.

By contrast, Ground 3, which is in principle a consumer welfare argument, is not, overall at least, a new ground. BT itself made the point that the MNOs had been arguing during the Ofcom determination process that NCCNs were positively detrimental. Indeed, ironically, it was Telefonica in its submissions which drew attention to at least one point in its submissions in its response to the provisional determination where it appears to have positively agreed with Ofcom that the welfare effect was uncertain, as opposed to detrimental. Overall, with those wrinkles, it is hard to say that that ground, as an overall ground, was not before Ofcom during the time of the determination.

Similarly Ground 4, practicality Principle 3, is clearly overall not a new ground. It was clearly a matter before Ofcom.

There could be very difficult questions as to which sub-grounds and sub-arguments under those two grounds are new or not, and that is part of the exercise which both sides have dipped their toe in in schedules and skeleton arguments, and neither has really seriously invited the Tribunal to go through paragraph by paragraph.

We, for our part, suspect it is extremely difficult to actually separate out the extent to which each of the sub-points are entirely new, are developing existing points which are made, are reactions to lines of reasoning in the Decision, or which were actually covered below and in the nature of reinforcing points. It is extremely difficult to separate those out.

THE CHAIRMAN: If one is looking at the consumer detriment point and looks at the issue that Ofcom was trying to determine, Ofcom was not really trying to determine whether the outcome was uncertain, it was actually trying to determine what the outcome would be, whether it was positive, negative and ultimately to Ofcom's regret the conclusion was it was uncertain, but it certainly was not determining was it uncertain or not? It is seeking to determine what the effect was based upon all the evidence that it had.

MR. HERBERG: I entirely accept that that is what was aiming to do and, indeed, in due course the Tribunal decided it could not do, so in that sense it is plainly not a new ground, because the MNOs are now coming back to saying we can no longer argue that this is uncertain because that is no longer good enough under the Supreme Court test, we are now doing no more than what you were always doing under that ground which is trying to show that the welfare changes were actually detrimental, so that just reinforces the point that it is not a new ground in overall scope.

THE CHAIRMAN: No, indeed. The question, if I might put it this way, was what was the consequence in terms of consumer detriment or advantage of the NCCNs before Ofcom.

MR. HERBERG: Indeed.

THE CHAIRMAN: -- without actually trying to steer the question in one way or the other, simply what is the outcome of the debate.

MR. HERBERG: I accept that. My submission now, sir, is that in a sense the debate as to exactly what is a new ground or not is unnecessary to determine the questions with which you are faced, because of the point which you, sir, made at the very outset, and the questions you asked. As I understand it, Ground 3, Principle 2, is wholly dependent in the MNOs' camp on the new evidence which they are putting forward. So this is solely a question of fresh evidence. I have not heard suggested by any party in answer to the question which you asked, sir, that actually there is any life in this ground other than based on the new evidence which is put forward. I suggest, for what it is worth, that that ground really resolves into a question of should you, or should you not admit the new evidence, which the MNOs seek to bring forward. If you should not, then the Ground itself collapses. If you should, then we say there [recording unclear] independent reasons to effectively knock it out as a Ground. It resolves into a Rule 22 issue. It may be that that is the same position under Ground 4 as well. There may be some residual argument there on the basis of the material already before Ofcom. But Ground 4 is potentially heavily dependent on new material. I will come back to Ground 4 separately when I talk about the individual Grounds, because there were actually applications for new evidence from almost all sides in relation to that Ground, it is not simply the MNOs, you have certainly Gamma and TalkTalk putting in new evidence, so that is perhaps in a slightly separate category. We do say that Ground 3, therefore, really reduces to a question of fresh evidence.

Against that background, can I turn to the general approach which we say the Tribunal should adopt to the admissibility of the interveners' Grounds. The starting point, of course, is that the order of 5th November 2014 gave Three and Telefónica permission to defend the

appeal on any grounds which Ofcom could have advanced. It already had permission for that, had it been so advised, it is only otherwise that they are required to apply for permission from this Tribunal.

As I understand it, neither Three nor Telefónica have sought to base their cases for admission on the proposition that Ofcom could have advanced this material, and so actually they do not need permission in any event. I certainly have not had that submission being made and we say there is no need to pursue the other difficult question as to the extent to which Ofcom could have advanced any of these matters if it had chosen to do so.

Mr. Beard did address this and he took you to some of the cases involving competition law penalties *Napp* and *Tesco*, which suggested obviously in the Competition law penalty context that a Regulator would face severe difficulties in seeking to advance its case by reference to entirely new arguments or evidence on appeal. But, as he himself conceded and the case clearly say, even in that context which one might think the Tribunal would in that context take a particularly restrictive approach to permitting fresh grounds or evidence, even in that context Mr. Beard accepted that the cases say "never say never", and there was a discretion on the Regulator to develop a new case.

I do not think we need to take it further than that. We do say there is no jurisdictional bar on that happening, but equally, we do not say that it would ordinarily be appropriate for the Regulator to do so and, in particular, we are not suggesting in this particular case that it would have been appropriate for Ofcom to have done so. I do not think that submission is being advanced to you by any party as the reason why permission should be granted.

THE CHAIRMAN: No.

MR. HERBERG: I proceed on the proposition that Ofcom could not have advanced the fresh grounds and that is why we have to consider the scope of the Tribunal's power to permit fresh grounds to be advanced by way of an intervention pursuant to its discretion under Rule 16.6 and then for fresh evidence under Rule 22.

Mr. Beard has a very simple position on this. He says that if Ofcom cannot do it then neither can the interveners; that is simply the function of an appeal process, they stand in no better position. We invite the Tribunal to consider whether that can be right. The starting point, we say, is Rule 16.6 itself, which contains a wide discretion to admit an intervention "on such terms and conditions" as the Tribunal thinks fit. There is a wide discretion on the face of it. We do not see any rule or principle which necessarily confines an intervener to the points Ofcom has addressed in the proceedings below, or to points it has raised in the proceedings below. It may often be inappropriate but we do not see any jurisdictional bar to

that being done, and that is why we set out our proposition in our skeleton at para. 17(c) and I will just read it because it is a summary of Ofcom's position.

> "There may be good reasons why, on the facts of a particular case a Tribunal in addition may permit an intervener to raise a ground which Ofcom could not have raised. Most obviously, it may be unfair to an intervener to be precluded from running a particular point. The question of fairness to an intervener will, of course fall to be assessed in the light of, *inter alia,* the grounds relied on by the appellant. An intervener's grounds may also raise questions of fairness to other parties."

Gamma and, as we understand it, BT, suggest that that is the wrong position to take. They say that any party which wishes to defend an Ofcom Decision but on separate grounds, can do so by way of filing a notice of appeal, but it cannot seek to do it by way of intervention. They press in reliance s.195(2) which provides that the Tribunal shall decide the appeal on the merits "and by reference to the grounds of appeal set out in the notice of appeal". Hence it said the appeal cannot be decided by reference to notices of intervention, it must be decided by reference to the notices of appeal.

Can I deal with that latter point first? I will come back to the point of whether there is a separate route of appeal. We invite the Tribunal to consider if that is not an overly formalistic way of reading s.195 (2). We do not think the point is right for a number of reasons. In the first place, s.195(2) does not say that the Tribunal shall only determine an appeal by reference to the grounds of appeal. Clearly, the Tribunal can take into account the terms of intervention, and we say there is nothing in the statutory wording to say that it cannot take in a new ground of intervention which has been permitted as part of the intervention.

Sir, in setting out that position, we also, I think, part company to some degree from Three's approach, which accepted that an intervener's grounds must be, as they put it, within the framework of the grounds of appeal before they can be considered by the Tribunal. As I understood it, Mr. Turner's position was that grounds which were not within the framework of the grounds of appeal, whatever precisely that means could be raised, indeed, could actually be included as grounds, but the Tribunal could not decide them itself. If it was going to quash a decision because an appeal would otherwise be successful, it could remit those grounds to Ofcom for reconsideration. As I understand it that is the way he took the position.

THE CHAIRMAN: So effectively the power to remit is wider than the power of the Tribunal to decide the matter itself?

MR. HERBERG: That would seem to be the consequence because that was what he said effectively should be done, if it is the case that the grounds are outside the framework of the appeal you would still have a power to remit and ask Ofcom to determine them.

THE CHAIRMAN: No doubt, he will clarify in reply, but that is what I understood.

MR. HERBERG: We suggest, by contrast, that the correct approach is that the appeals must be decided, of course, by reference to the Grounds of Appeal, but not exclusively so. The Tribunal is entitled to consider any ground on which an intervener has been given permission to rely upon. The 195(2) was not intending to exclude that as a proper course of action.

We say that is a conclusion, which is consistent with, indeed is impelled by the adjudicative nature of the dispute resolution jurisdiction, which recognises that there may well be competing interests and arguments of appellants and interveners which, if made at the right time, should be accommodated on an appeal to the Tribunal from what is an adjudicative decision.

This is particularly the case, since, of course, who is the appellant and who is the intervener depends on, if I can put it this way, the fortuity of who wins and who loses to Ofcom. It would be truly bizarre, were the winner to be disabled from advancing arguments which it had advanced before Ofcom, which is on the hypothesis that they do not come within the framework of the Notice of Appeal of the other side, arguments which the party could have taken if it had lost. Indeed, if that were right, it might be better for a party to lose before Ofcom, because you then have a free rein in what arguments you can put, what you can challenge the decision on appeal.

THE CHAIRMAN: Is that not Miss Love's point, which is that one can, as it were, cross-appeal?

MR. HERBERG: Let me come to that, because that is how Gamma, I think, tried to save the position. They say "Any party which is content with the Ofcom decision, but wishes to attack the reasoning, can itself file Notices of Appeal, rather than seeking to advance its case by way of" ----

THE CHAIRMAN: Yes. Suppose Ofcom decides a case by reference to three grounds, A, B and C, and it dismisses A and B, but agrees with C and, as a result, the outcome is as one of the parties would like it to be, but the other party appeals, then one could quite easily have a cross-appeal, whereby the party succeeded says "Ofcom got it right because of its decision on Ground C and we are happy with that, but, on A and B, Ofcom got it wrong and we appeal on those grounds".

MR. HERBERG: Yes. We say that is simply not open, as a matter of law, to a party to do that. In the first place, it must be recognised that there is no such thing as a cross-appeal or a respondent's notice in a technical sense. A party in that situation would simply have to be advancing an appeal, and we say that is inconsistent with the recent decision of the court of appeal in *Everything Everywhere v. The Competition Commission*. Miss Love referred to it, but perhaps took it rather quickly. Can I take you to that decision, which I think is in bundle 9 for everyone at tab 15?

THE CHAIRMAN: Please do

MR. HERBERG: Sir, this was a case concerning an appeal against an Ofcom price control decision.

THE CHAIRMAN: Right.

MR. HERBERG: Sir, this was an appeal against an Ofcom price control decision and, as you will know, the 2003 Act requires price control matters to be referred by the Tribunal to the Competition Commission, which can be seen from para.6, but that complication does not affect the point in this case. The court was quite clear that its reasoning goes beyond that very particular situation. At s.195(2), in that case as well, the Tribunal was required to decide the appeal on the merits by reference to the Grounds of Appeal set out in the Notice of Appeal.

Lord Justice Moses, with whom Lord Justices Patten and Longmore agreed, addressed the issue of the power on appeal at paras.23 and following, if I could take you to that passage at para.23 of the judgment:

> "It is for an appellant to establish that Ofcom's decision was wrong on one or more of the grounds specified in s.192(6) of the 2003 Act; that the decision was based on error of fact, or law, or both, or on an erroneous exercise of discretion. It is for the appellant to marshal and adduce all the evidence and material on which it relies to show that Ofcom's original decision was wrong. Where, as in this case, the appellant contends that Ofcom ought to have adopted an alternative price control measure, then it is for that appellant to deploy all the evidence and material it considers will support that alternative".

Then at para.24:

> "The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error".

That is clear, we say, with respect, sir. You cannot have a successful appeal based on an attack on reasoning. You have to show the decision cannot stand in the light of the error.

> "If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control matter should be adopted by the Commission".

That is dealing with specifically price control, but it clearly goes beyond that. Continuing:

> "If the Commission (or Tribunal in a matter unrelated to price control) [so that is our situation] concludes that the original decision can be supported on a basis other than that to which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail".

Sir, we make two points on that. First, we say what is clear is that an appellant can only succeed on an appeal if it can show an error in reasoning, and that the decision cannot stand in the light of that error. So a party which objects to reasoning, but concurs in the result, cannot appeal because it would be a doomed appeal.

THE CHAIRMAN: I am not sure that is right, Mr. Herberg, because the rule that an appeal is against a decision and not the reasons for the decision is actually a formulation that derives from appeals generally, not simply appeals to the CAT. Indeed, I think it was dealt with in the *PPC* decision, where the appeal against the decision of the Tribunal there was based on different grounds, but obviously affecting the outcome. The law is, as I understand it, quite general in relation to appeals, and not in any way specifically tied to appeals to the CAT. So I am not sure that Lord Justice Moses is saying anything particularly specific as regards appeals to the CAT. I stand to be corrected there.

MR. HERBERG: What he says, sir, whether it is limited to the CAT or not, is clear in its terms. He certainly is applying it obviously to decisions of the Tribunal and the Commission, whether or not it has got a more general affect. He says in terms it is not enough to identify an error in reasoning. It can only succeed if a decision cannot stand in the light of the error.

THE CHAIRMAN: Yes. Clearly, that is what the appellate court is looking at. It is looking at the outcome of the decision, but that does not mean to say it is precluded from looking at either the reasoning being wrong, or indeed an alternative way of reasoning the decision, which might be right.

MR. HERBERG: With respect, the permission may be very different in an appellate civil court. Because of respondent's notices, there is an ability of a disappointed party to raise reasoning issues upholding the decision, for example, by another matter. That would be quite

different. In an appellate, one cannot normally appeal against simply taking a freestanding appeal against a decision in your favour where you do not like the reasoning.

THE CHAIRMAN: Yes. That is, of course, exactly what EE did in the original *08x* case.

MR. HERBERG: That, sir, was two years before this decision. I am going to suggest that, in the light of this decision, no one objected to EE doing so. I seem to recall there was some discussion of EE's position and intervention.

THE CHAIRMAN: Yes.

MR. HERBERG: No one objected to it. A point was not raised and was not taken. But, in the light of this, I submit to you, sir, that that is not a proper approach. In the civil court as well, even if this is a wider application, sir, it would not be possible for me, when I receive a judgment where I win, but I really do not like some of the reasoning and it is going to cause me major problems down the line and commercial difficulties, I am in that tricky position where I cannot appeal. It may be that I have to wait for the next to come along, and then challenge the reasoning in another case.

So we do say, wider or not, that the idea that a party can appeal an Ofcom determination in its favour because it does not like the reasoning is, on the strength of this decision and on principle, one which is not available. Miss Love rather dismissively talked about the undesirable consequences, but there could be very undesirable consequences in all these cases. Telecoms operators have wide interests above and beyond the individual case.

It may frequently be the case that there are aspects of the reason which they do not like in a determination. If there was free rein for a party to submit an appeal on the basis of parts of the determination where they did not like the reason, as opposed to the decision, it would provide, we say, an extremely unwelcome avenue of yet further litigation in an already heavily litigated field, and would have most undesirable consequences. It does not have to be a floodgates argument where we would be deluged by appeals. One does not need to caricature it in those terms, but it would, in principle, we say, be an extremely unwelcome development, or unwelcome position. It would be unwelcome, firstly, because in particular cases where you would be happy if you won but you are worried about the other side appealing and you wanted to raise the point, you would have to file a protective appeal in every case in case the other side appeal. That would be necessary simply to protect your position because you might not be able to accommodate your points by way of an intervention on someone else's appeal, so say Mr. Beard and Miss Love. Therefore, you would have to continually be submitting protective appeals which you could withdraw once the other side had not appealed. That is one disadvantage.

The other disadvantage is, of course, people simply deciding, whether anyone else is appealing or not, to plough their own furrow and attack the reasoning and try and secure a better position from the Tribunal for the future.

THE CHAIRMAN: I do see the force in your point. One can take it just into a general common law case. One has a contractual dispute and the party who wins does not like the puisne judge's description of the document for consideration so he takes it to the Court of Appeal on an entirely academic point. I do see the force of your submission.

MR. HERBERG: It would not be permitted, and there is absolutely no reason why it should be permitted here.

THE CHAIRMAN: But the words in s.195(2) are quite specific by reference to set out in the notice of appeal, "the grounds of appeal set out in the notice of appeal", those are quite specific words, are they not?

MR. HERBERG: So they are, by reference to, but it does not say solely by reference to. That goes back to my first argument. In a sense, what I am dealing with now is the safety valve and ----

THE CHAIRMAN: I am questioning your safety valve, that is the difficulty.

MR. HERBERG: I am questioning the safety valve which Miss Love and, I think, Mr. Beard rely on, which is do not worry, there is no injustice, one can only appeal. If I am right that one cannot appeal, then there would be a huge problem if 195(2) were read in the way in which they invite you to read it. We would venture to go as far as to suggest that there would be considerable difficulties with the principle of equality of arms and with rights under the European Convention on Human Rights, and possibly indeed with obligations under the Common Regulatory Framework if it were genuinely the case that a party which had, in good faith - like EE, to take the example - it is very helpful actually to look at the EE position as a template to test for this. Let us assume for a moment that I am right that EE actually should not have appealed, EE's concern, you may recall, in the original 08 litigation was that it was dissatisfied with the original Ofcom 080 and 0845, 0870 determinations, even though it had won. It complained that ladder pricing was fundamentally wrong because it was not cost reflective.

THE CHAIRMAN: Correct, and it did not like Ofcom's acceptance that, in principle, ladder pricing was acceptable.

MR. HERBERG: Indeed, it did not like the principles, therefore, it was fundamentally opposed to Ofcom's analytic framework and the fee principles, that they were fundamentally bad.

THE CHAIRMAN: Assuming that BT had not appealed that Decision, do you say that there was no way in which EE could air that issue of ladder pricing ----

MR. HERBERG: Sir, yes, just like the appeal from a puisne judge, EE had won, it would have had to reserve its position to a future case because ladder pricing would have been struck down. There was no ladder pricing. It would have been a hypothetical issue, "We have won, but by the way we do not like the way Ofcom reached its decision, it should have simply chucked this out on a more fundamental basis that this was not cost reflective. Its principles were up the spout, its approach was wrong".

That is an argument that would have been purely hypothetical. It is also an argument which would not, in Mr. Turner's terms, have been with the framework of a notice of appeal. It was quite separate from the grounds on which BT did, in fact, appeal the decision, which was that we got P2 wrong, we got P3 wrong and commercial uncertainty, all its arguments. It is quite clearly an entirely distinct and separate argument that would not come within the framework of the appeal.

If I am right that there is no appeal, assume now that BT did, as it did, appeal, the proposition with which I am faced on, it seems, both sides is that EE would simply not have been able to argue its case, which it adopted all the way through, that the NCCNs were bad because they were not cost reflective. That cannot be the right conclusion, sir. We say the Tribunal would have to adopt a measure of violence to s.195(2) which we say it does not need to, but in any event it would have to to avoid a conclusion that litigants were shut out. I say "litigants", because in an adjudicative dispute resolution scenario you do effectively have private litigants arguing before Ofcom in an administrative process.

Mr. Beard's sanguine, the fact is that only one party is challenging on an appeal and they are appellant cannot be right when one actually works through the consequences. The consequences would be that EE in that case would have been shut out from ventilating arguments which it has to be proper for it to advance on an equality of arms basis. That is why I said before that it might be better for a party to lose in front of Ofcom, because of course if EE had lost in front of Ofcom then it could have advanced its argument and it would have been BT that might or might not have been shut out.

Just to follow that through, again using the example of EE as a template, we say it also shows that Mr. Turner's approach would not work because his suggestion is that EE could have advanced its grounds of appeal by way of an intervention, but the Tribunal could not decide them because it is not within the framework of the appeal in that case.

He would have been saying that the Tribunal's only remedy would have been to remit the matter to Ofcom. Of course, in that case Ofcom had addressed the grounds and had already determined them. It would have made no sense at all for the Tribunal to have remitted to Ofcom the issue of EE's complaint, which was a matter which it had decided. It would make no sense for it to be said that the Tribunal in some way cannot determine those points on the appeal, but nevertheless had some power to say, "Well, there might be something in them, although we have not looked at them, we are going to send them back to Ofcom". Ofcom had already determined them. What was called for was an appellate decision on them.

So we do say, with respect, that Mr. Turner's approach runs into difficulties on that score. We say that the obvious conclusion is that the s.195(2) stipulation that the appeal should be determined by reference to the grounds of appeal was not intended to oust the jurisdiction of the Tribunal from considering proper grounds of intervention which had been permitted, which were thought to be appropriate to be allowed to be run, even if unrelated to the grounds of appeal.

THE CHAIRMAN: Yes, I confess I see entirely the force your point, and if the section stopped by reference to the grounds of appeal one would see a great deal of attraction in your submission. It is the words following that which cause me some trouble.

MR. HERBERG: Sir, we say that the entire sentence, which does not say, "and nothing else must be looked at", or "only". - "and by reference to the grounds of appeal set out in the notice of appeal". Sir, I say those additional words should not give you additional difficulty. They merely specify the location of the grounds of appeal. The arguments of an intervener set out in its statement of intervention are not grounds of appeal, whether set out in the notice of appeal or elsewhere. My point is not that they are effectively grounds of appeal and that is why they must be looked at ----

THE CHAIRMAN: You are placing a great deal on the words "by reference to".

MR. HERBERG: "And by reference to", yes.

THE CHAIRMAN: That is the key to your submission.

MR. HERBERG: What it was not intending to do was to do was to say "and solely by reference to the grounds of appeal as set out in the notice of appeal". It was giving a general direction to the Tribunal as to the approach to the appeal on the merits, and when you are looking at the merits you are not just looking at them *de novo* in the round, you are looking at them by reference to specific complaints about the decision as set out in the notice of appeal. The point of that section was dealing with what sort of appeal is it? It is an appeal on the merits.

That might give rise to a suspicion that we are talking *de novo* an entire appeal. It is a specific type of appeal on the merits. It is by reference to the grounds of appeal set out in the notice of appeal, you must tie your appeal to the specific grounds you are there setting out.

THE CHAIRMAN: Yes, I think in the 080 evidential Decision I said that it is an appeal on the merits but viewed through the prism of the notice of appeal, which may have the vagueness that you require.

MR. HERBERG: We accept that, but the point is that what the drafter of s.195(2) was not doing was seeking to say anything about the interventions, the interventions are not even in the Statute, interventions are drafted on in the Rules. What it was not seeking to do was to set out what can and cannot be done in relation to interventions. It had a quite different pre-occupation. It was a pre-occupation about the nature of a merits appeal, and therefore it would be quite wrong to read it as Miss Love and Mr. Beard invite you to read it, as imposing some sort of straightjacket on the Tribunal as to what can be adduced by way of an intervention. Interventions are carefully controlled in any event by the Tribunal. So we say it does not derange the statutory wording, and there is a compelling case why that must be the position when one looks beyond it.

There is one other point, sir, I am reminded I wanted to make to you about para. 24 of the judgment of Lord Justice Moses in the *EE* case. It is the last sentence, if one looks at what he is saying there. "If the Commission", in our case it is the Tribunal,"

> "If the [Tribunal] concludes that the original Decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original Decision is wrong and will fail."

I just ask who is showing that the original Decision can be supported other than on a basis on which Ofcom relied? Normally, Ofcom cannot do it, it is the decision-maker. All Mr. Beard's strictures, *Napp* and *Tesco* come into play.

What is clearly being contemplated here is that an intervener may precisely be saying, yes, there is a problem with the decision, but it can be supported on reasons other than the basis on which Ofcom relied. In that situation the appellant will not have shown you the original Decision was wrong, and will fail. So this, itself, contains a recognition that an intervener can intervene to make a point, even if it is not in the framework of the grounds of appeal, that the decision can be upheld for other reasons.

Let me, against that background, very briefly offer some submissions on the interveners' proposed grounds. I will do so very shortly. In relation to the contractual grounds, Three's

Grounds 1 and 2, Telefónica's Ground 1, we make only one point, and it is a point which has already been ventilated between BT and MNOs and I can, to some extent, leave it to them, but I should say something. Ofcom made the point in its skeleton, and we made this point in the October case management conference, that in considering the extent to which the contractual grounds are new points it would be just and proportionate, fair and reasonable, to permit them to be argued, it is necessary to consider the status of BT's own contractual argument based on the SIA.

You have heard from Mr. Beard on this. As we point out in our skeleton, BT did not, before Ofcom, in this dispute resolution process, rely on any specific provisions of the SIA clauses 12 or 13, or base any arguments based on that. That was at the time when the Supreme Court Appeal was running, and it was entirely consistent with its position in the Supreme Court, where it was also not advancing any argument based on the SIA clauses 12 and 13. There is a footnote to my skeleton argument where I refer to BT's grounds of appeal to the Supreme Court. That is not in the bundle, and perhaps I should just hand up a copy of the passage to which I referred in that footnote. (After a pause) It is purely so the point is before you, I do not want to go into it in detail. One sees at the bottom of para. 37- this is BT's notice of appeal: **

> "Ofcom decided that having regard to what it referred to as its statutory duties it was appropriate for it to place greater weight on this *potential* risk to consumers [emphasis added] and Ofcom therefore prohibited BT from making the new and innovative pricing changes. That precautionary approach was a remarkable one. BT had not been found to have SMP in relation to wholesale termination of X numbers, not subject to any ex-ante SMP condition in relation to market, apart from any legal constraints it can go about its business without regulatory interference, and yet its pricing proposal was prohibited merely because Ofcom was uncertain about its impact overall. Ofcom's approach was a clear case of regulatory overreach as the Tribunal in effect held. The Court of Appeal was plainly wrong to disagree on this point."

Then you see footnote 30: **

> "For the avoidance of doubt the errors committed by the Court of Appeal as set out are fundamental, and are relevant where any bilateral negotiation leads to a dispute resolution before the Regulator. They do not exist only because of the particular provisions of the SIA, which are referred to in the judgment, giving BT certain

contractual rights to alter its prices, plus this application does not rely on the specific provisions of the SIA which are applicable in this case."

Mr. Beard's position had the merit of consistency, and you have already picked up the passage in Lord Sumption's judgment, where he, with some puzzlement, speculates on why BT did not want to rely on its contractual rights.

Mr. Beard is absolutely right, we would acknowledge, to make the point that he did, in much more general terms, rely on commercial freedom, innovation, all sorts of more general duties and entitlements of BT as a reason why, in a case of uncertainty, NCCNs should be permitted unless there were positive detrimental reasons to interfere with them, so in a position of uncertainty the wrong result was reached.

We fully accept that that point – the 'burden of proof' point, if I can put it that way – was before the Supreme Court and was in embryonic form in the notice of appeal. It would be impossible for any party to say that they were not on notice that the general point about burden of proof was not a live issue.

We do maintain the position that what was not put before Ofcom, and what was not a live issue in the Supreme Court until the hearing itself, was the issue of BT's rights under the SIA, which you, sir, had raised, and which obviously formed a matter of debate before you in the Tribunal and then, also importantly, before the Court of Appeal, because the Court of Appeal had taken a very different view and decided there was no significant difference between clauses 12 and 13 in the wording, both resulted in an appeal to Ofcom if a party chose to do so, and therefore there was no magic, no significance in BT's asserted contractual entitlements to make the changes any more than the MNOs might have a contractual entitlement to disagree with them. The contract was set at nought in the Court of Appeal.

That is clearly not the position in Lord Sumption's judgment. I am not going to take you back to it ----

THE CHAIRMAN: No, no.

MR. HERBERG: What one sees in the judgment is a very significant part of Lord Sumption's reasoning, if not the entirety of the reasoning, was precisely that BT, under the contract had pricing freedom. He analyses clauses 12 and 13 and he relies heavily on that. It may not be the entirety of the judgment, but it is a very important part of it, and that is what has now been imported into these proceedings by way of, in particular, BT's amended notice of appeal at para. 69.7, to which you have been taken. That now specifically relies on SIA clause 12, which is something which has been conspicuous by its absence up until now.

All of that is relevant, as you will appreciate, because it may mean that when you consider whether the MNOs should be permitted to press contractual arguments it can, with some fairness, be said that BT is now relying on contractual provisions in a way in which it has not up to now, and has only recently been given permission to in its amended notice of appeal. It might be said that BT is now saying we rely on our contractual rights under clause 12, even if we rely on other things as well, why should the MNOs not be permitted to say: but you do not have these contractual rights because we have contractual arguments which say that it should be set at nought.

I fully accept that the MNOs' arguments, certainly on the uncertainty argument, are very different in nature to BT's arguments, and I would also agree that there is no reason why they could not have been raised at the outset to the extent that the SIA was regarded as being important, but neither side was regarding the SIA as important in its submissions to Ofcom.

In relation to Principle 2, and Ground 3 for Three, Ground 2 for Telefónica - welfare ground - I wish to say very little to you. You have heard effectively the real debate here, which is as to fresh evidence, as to the MNOs' reasons for not having adduced the material before Ofcom. I do not wish to venture further into those waters. There are clearly competing considerations for the Tribunal.

I would, however, wish to say a few words about Principle 3; Three's Ground 4, Telefonica's Ground 3. That is a ground on which all parties, as I understand it, agree it will not be necessary for a decision to be reached. A decision has to be reached. It has not been reached until now. It is perhaps right, as we understand it, that the Tribunal is any case, to some extent, faced with new material. But, as I understand it, both Gamma and TalkTalk are currently relying or seeking to rely on new evidence, witness evidence of Peter Farmer, witness statement exhibits of Damon Harding. They also trail, for the Tribunal's note, Gamma, para.3 of its Statement of Intervention, that it might wish to put in further fresh evidence, and Miss Love mentioned this, further fresh evidence if the MNOs are permitted to put in evidence on this point. But, even before gets to that, they are already putting in fresh evidence themselves as to practicality. It does, at first sight, seem a little startling that they can rely on fresh evidence and, at the same time, say the MNOs cannot rely on fresh evidence.

There is also, we say, a fundamental point on this ground, which is that whoever has to re-determine this point, whether it is the Tribunal or Ofcom, it is an issue of fact sensitive based practicality which has to be decided, and it is very difficult to see how that evidence

can now effectively be frozen and decided on the evidence, as it stood before Ofcom some while ago when it considered the matter before, if only because this is about the practicality of ladder pricing and there has been obviously a fairly considerable length of time in which other ladder pricing has been in place.

THE CHAIRMAN: Yes.

MR. HERBERG: It seems to us pretty likely that, whoever the decision-maker is, they are going to want to know about the experience that one has had with ladder pricing over the last year or two, and whether that sheds any light on the practicality or not that is referred to in evidence. So it is quite difficult to see how the practicality argument could, as it were, be artificially frozen back then, and not updated, at least to some degree, to take account of new material. That does not mean that everything should be allowed, if one was going to do a dicing exercise and try and work out what should be allowed in and what is not. But it may be, as Mr. Beard ultimately suggested, that one has to approach these matters in the round, and one has to look overall at whether it is just or proportionate to put in the fresh evidence or not.

If clearly, everyone appreciates fresh evidence is at least relevant, BT has indicated it would wish to put in fresh evidence, if evidence is allowed in by the MNOs.

THE CHAIRMAN: In response.

MR. HERBERG: I accept that, but evidence that is relevant to the question is, of course, obvious. Of course, Ofcom itself in its determination did recognise that it needed further evidence to help it with that decision. You have been taken to that by the MNOs. It is true that the test it may now be meeting in determining that question may be different as a result of the Supreme Court decision, as Mr. Beard pointed out. It may no longer be simply uncertainty. It may be something more is needed to stop the changes. The evidence will have to be assessed. It does not seem to me to make ----

THE CHAIRMAN: Yes, the [recording unclear] have consequentially shifted, as Mr. Beard explained.

MR. HERBERG: Indeed.

THE CHAIRMAN: But, as you say, the evidence is still ----

MR. HERBERG: Indeed, the evidence is still relevant. It does not affect the relevance. It may affect exactly what has to be proved and where the burden lies.

THE CHAIRMAN: Yes.

MR. HERBERG: In relation to the fresh evidence test, you said the retention was in the new and the old rules. I do not wish to make detailed submissions on those, except to say that, as we

understand it, the new rules effectively embody the Toulson approach in the 08 decision. They are not at variance with that, and there is no reason, we say, why the Tribunal cannot take account of those considerations in deciding this application, even though they are not in force yet, because we do not see it as representing a variation in the existing law. It is more an elaboration and a working out of some of the factors which are, in any event, relevant.

THE CHAIRMAN: Yes, indeed. We put it forward really as an articulation that might help the parties, rather than anything else.

MR. HERBERG: We agree that that is the proper way to do it. We certainly agree that new evidence should not be admitted as a course of routine, only where it is appropriate and in the interests of justice to do so. It obviously depends upon the circumstances of the case. The primary question here is whether the fact of the Supreme Court judgment and BT's response to it by way of its amended Notice of Appeal is a sufficiently unusual feature such as to justify new evidence, having regard to those considerations. We do not wish to make further submissions on the detail of the points under that.

Sir, finally, can I then say something very shortly about remittal itself and the appropriate course?

THE CHAIRMAN: Yes.

MR. HERBERG: Ofcom's general stance is that, as the Statutory Regulator charged with resolving disputes, it is ordinarily appropriate for it to decide the main substantive issues in the first instance, subject to the control and the appeal to the Tribunal. That approach was broadly endorsed by the Tribunal in the particular circumstances arising in *BT v. Cable & Wireless and others*. It might be helpful for me to show you that briefly, sir, if you have not already seen it. I do not think it is particular controversial as between the parties, but it perhaps gives some assistance as to approach. It is again bundle 9, and it is the first tab in that bundle. There is a helpful approach and an articulation of principle by Mr. Justice Roth, sitting as Chairman of the Tribunal.

This was a case where Ofcom had erroneously concluded that the appellants should not be awarded interest. That decision was quashed, and the question was as to the appropriate rate, which had been raised in the appellants' pleadings, and that was limited to Ofcom for decision, rather than by the Tribunal itself. In that decision, one sees that at para.6 and following of the decision, and what is relevant, and, in view of the time, I will not read it all to the Tribunal, but paras.6 to 9 address the question of remittal or non-remittal, because

one side, Sky/TalkTalk and the Altnets, suggested the Tribunal should determine the rate. They acknowledge further evidence and a second hearing:

> "Ofcom as respondent, supported by BT as intervener, submit that this matter should be remitted to Ofcom".

What the judgment does is set out some of the considerations, which would ordinarily predispose in favour of remitting to Ofcom where you have a substantively new matter without laying down hard and fast rules. I leave that passage for the Tribunal to consider. What we then set out at para.37 of our skeleton right at the end, we set out some of the particular circumstances in this case, which may, as we put it, taken together, exceptionally lead to the conclusion that it will be for the Tribunal to determine all the issues together. So we are, I am afraid, firmly sitting on the fence on this issue. If we are directed to reconsider, I do not pretend it will be with any enthusiasm, but, of course Ofcom will take up the decision and have to re-determine.

But there are at least some factors. We certainly do not say it follows automatically, even on Principle 3, which is perhaps the part of the case most at large. We certainly do not say that it is incumbent on the Tribunal to remit to Ofcom on the facts of this particular case. That really arises out of the relatively exceptional history of this matter.

In particular, one feature which I have not mentioned under para.37 is that, of course, the Tribunal, you personally, sir, and the Tribunal as a collective through its previous judgment, has already got a relatively high degree of expertise and experience of the matters in the broad framework which have been canvassed under Ofcom's analytical framework, Principles 2 and 3, and the types of arguments being made thereunder. On Principle 3, of course, what is being suggested is that the position is now different from that which the Tribunal found in that case. So it is, we say, a relevant factor in this case that might incline the Tribunal to consider with Mr. Beard whether it could not even retain control of a matter like Principle 3, which has to be reconsidered rather than remitting to Ofcom. On the other hand, we fully accept that with more material said to be coming in from all sides, the Tribunal could equally take the view that it is better that Ofcom considers everything in the round before it comes back potentially to the Tribunal if the parties cannot reach accommodation and then there is a further appeal.

So that is the least directed submission that has been made because it is genuinely not one where I am impelling you to one result or another, I am seeking to put considerations before you.

THE CHAIRMAN: I think what you are saying - I entirely understand that ordinarily, particularly where there is an issue at large - the frontline regulator ought to take the lead, subject to control by the courts. What you are saying, and we will obviously take a view on this, is that this is an exceptional case, not the norm. I think you are saying no more than that.

MR. HERBERG: Sir, yes. I am saying there are grounds on which this could be viewed as an exceptional case to take a different approach.

Sir, one other possibility, of course, is that the Tribunal could do what you perhaps, sir, were thinking about at the outset, which is to decide the contractual points, if they are appropriately to be allowed in, maybe not at this hearing but as an issue before then deciding on the remission, so it could dispose of those and get those out of the way rather than sending back to Ofcom the contractual points as well. That might have some attractions, given the nature of those particular points. Then it could remit on Principle 2 if it thought it appropriate to remit at all on Principle 2, and remit on Principle 3.

Sir, that leaves only one point for me to deal with - I notice the time - and that is the question which you asked me at the end of yesterday to do with acceleration and to do with stepping on the brake at various points.

THE CHAIRMAN: Yes, indeed.

MR. HERBERG: I think that might take me five or ten minutes. I am in your hands, sir, as to whether I deal with it now and slightly delay our lunch or deal with it at two o'clock.

THE CHAIRMAN: If it is no more than five or ten minutes perhaps we should deal with it now.

MR. HERBERG: It may be less than that. You asked, as I apprehend it, two questions. One is about the beginning of the procedure and one is, as it were, about the end. The first question is: why not hit the brake at the beginning and effectively determine all these together? That is one to which I think there is a clear and immediate answer. We could not, as it were, hit the brake because effectively, if I can put it this way, the car had already crashed by the time, in the rear view mirror, the new disputes came along. The timetable is simple. The NCCNs in dispute in this case were referred as to NCCN 1007, 1046, were issued by BT on 1st April 2010, and then NCCN 1046 superseded it on 25th August 2010. Those are the NCCNs concerning 0800 and 0808. Those disputes followed the determination of the earlier 080 dispute which was made on 5th February 2010. There was no question of consolidating either of those. It was not after Ofcom had finished its deliberations and determination that it even arose.

Exactly the same applies in relation to the other three NCCNs which concern the other number ranges - NCCN 1101, 1st October 2011, NCCN 1102, 1st November 2011, NCCN 1107, 1st December 2011. All of those were after the determination of the 0845, 0870 disputes on 11th August 2010. So the question did not arise at all in relation to these number ranges.

Sir, the other question was as to why continue with the current disputes after the Court of Appeal but before the Supreme Court? That is a matter which was given careful thought and consideration by Ofcom, not just at that stage but indeed all the way through as to weighing up what clearly were very different competing priorities, as to, on the one hand, delay and prejudice being caused potentially by these disputes being unresolved; and on the other hand, the need for finality and the risk that court proceedings might, to some extent, upset the apple cart. It was considered at various stages. The parties were consulted. The issues were canvassed back and forth.

Sir, as to the sequence at the crucial stages, the Court of Appeal decision was on 25th July 2012 and at that point it was, perfectly appropriately, we say, considered sensible to restart work on these determinations. Once the Court of Appeal had spoken, had determined the law, we considered when BT petitioned the Supreme Court, at that stage there had been no determination and there was no reason to stop work. On 4th December Ofcom provided provisional conclusions. So the dispute advanced, it reached provisional conclusions by 4th December, it obtained responses by - I think there was an extension and it was something like 4th January, but I will be corrected if I am wrong. By 7th March, as it stated to the parties, it had completed its analyses from our Final Determination.

In the meantime, on 13th February, the petition to appeal was allowed. At that stage, of course, careful consideration was given to a stay, because there was an obvious danger in terms of finality. These matters are to some extent in the Final Determination at paras.2.62 to 2.64 (bundle 3, tab 11).

The essential point is that the Decision was at that stage effectively ready to go. There was not a lot more work to be done.

The second point is that the Supreme Court on 27th March listed the case for a year later, February 2014. So there was going to be at least another year's delay - over a year by the time the Supreme Court gave its decision.

In addition, at the forefront of BT's submissions at that stage was a request for a reference to the Court of Justice of the European Union. So there was at least a possibility of a considerable further delay - years.

An important factor also to consider was that there was a determination ready to go, but it was in danger of becoming a moving feast. BT was already ventilating a concern about wanting to put in further evidence to update, and so there was a concern that if the decision was not issued at that stage, even if BT lost in the Supreme Court, and the Court of Appeal was upheld, there was a danger that the provisional decision would be out of date by the time all that was resolved. So further work, further investigation would have to be done, even if there was absolutely no change in the law at all.

In those circumstances, what was decided was that it was appropriate to promulgate the decision that was ready to go, on which work had been done, so all the parties knew Ofcom's decision, and it could then await the Supreme Court and see whether that made a difference or not. If it did not, time would have been saved and it would have been determined; if, as it happened, it did make a difference then obviously there was the potential for an appeal. It was not simply an inconsistent decision, now we will stop,. now we will ----

THE CHAIRMAN: No, I understand.

MR. HERBERG: There was a considered and carefully worked out decision as to competing interests which it was decided spoke in favour at that point of, as it were, releasing the determination. It is fair to say that BT argued against that. BT thought it would be better to hold back the determination and wait for their appeal.

I cannot enlighten you, I am afraid, sir, as to precisely the position of the two MNOs, and it may be that they are in a better position to do so. You asked that question of Mr. Beard earlier, and I see the relevance of that potentially for your exercise of discretion, but it is certainly the case that had Ofcom decided to adopt a different course and to have held it back it would almost inevitably have had to allow in new evidence. Whether it would have had to allow in all new arguments or grounds is another matter. There would clearly have been an opportunity at least for updating evidence, if not more, even if the Supreme Court had not changed its decision. Perhaps that was one of the considerations that led to the decision that was taken.

So, in terms of your discretion, yes, that may be a relevant factor for you to take into account. I am afraid I do not have with me the full exchanges of all the parties and the extent to which Telefonica in particular may or may not have argued that the decision should be released ----

THE CHAIRMAN: I am sure they can enlighten me when they stand up to reply this afternoon. Thank you, Mr. Herberg.

MR. HERBERG: Those are my submissions unless I can assist the Tribunal further.

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

(Adjourned for a short time)

MR. BEARD: Sir, in the order that had been agreed, it was considered sensible if we had any particular points to pick up on Ofcom's submissions we should do it before the MNOs replied, so unless the Tribunal objects it should only take a couple of minutes.

Mr. Herberg identified two things that he said had been elided, grounds and evidence. I do hope that that is not what we were doing, because we are focused on the Principle 2 issue and the Principle 3 issue, and the admission of new evidence; that is the key issue as he rightly said. In relation to the contractual matters and, in particular, the specification of pricing, that is a ground, we entirely accept that, albeit we are very cautious about the use of the term "ground", because, of course, in s.195 and in other material, "ground" is a ground of appeal, it is not any old ground because you are focused on a decision. So it is slightly dangerous to start using the word "ground" when you are talking about what an intervener is seeking to put forward in support of the Decision that is under appeal.

What you are actually considering here is whether or not it is legitimate for an intervener to put forward a new basis for the Decision. As you know, our case is that if Ofcom could put forward a new basis for the Decision then there may be scope for an intervener to do so; that is our primary line, and if Ofcom could not then an intervener cannot.

Our secondary line is even if there is some sort of broader exceptional circumstances test, or some slightly wider ambit for interveners to come forward with other bases, it is nonetheless extraordinarily narrow, because otherwise you do circumvent the institutional structure that I have emphasised. So that is how we put our case, and we do not consider that one needs to get into many of the most interesting theoretical points about protective appeals and so on because actually with that structure you deal with most of these problems.

Now, that is the structure that one deals with the "grounds", as it is referred to, but the alternative bases for the Decision and, in particular, that specified pricing contractual dispute and we say, for the reasons we have already given, a narrow compass, Ofcom's rights to raise these matters, on neither basis could it possibly be said that that should be admitted and, frankly, even if you widely expanded the basis on which you could admit such things, this is not the sort of matter that should be admitted. But, if one were to stretch these matters, and decide that interveners could raise them, we would emphasise they should not be remitted.

When it comes to evidence, again our argument is evidence as an intervener you are putting forward in support of the decision, or putatively if there were other grounds or bases for the Decision admitted. Again, if Ofcom cannot put in that sort of material you should not be, that is the first line we put forward. The alternative is even if it is wider, it is not much wider in relation to the interveners and, we say, plainly in relation to Principle 2, neither of those tests is met.

In relation to Principle 3 we also say those tests are not met, but matters should be dealt with more quickly.

The only other matter – just going back to the contractual point that I picked up – is Mr. Herberg does like the 'sauce for the goose, sauce for the gander' argument in relation to the contractual ground. As I say, first of all 'sauce for the goose, sauce for the gander' is not a good basis for admitting that ground, and Mr. Herberg quite fairly accepts that even if new contractual issues were being raised by BT on the appeal they were entirely different from the ones that are now being mooted, so that does not work.

In any event, he handed up an extract from the Notice of Appeal – we have the full version – but it is worth noting what is said in footnote 30 in that, because this is the bit in the footnote to the appeal where it is said we are not getting into the details of the contractual issues. What is said:

> "For the avoidance of doubt the errors committed by the Court of Appeal as set out are fundamental, and are relevant where any bilateral negotiation leads to a dispute resolution before the Regulator. They do not exist only because of the particular provisions of the SIA, which are referred to in the judgment, giving BT certain contractual rights to alter its prices . . ."

So what was being said there is the argument is a broader one, but the terms of the SIA do give BT contractual rights to alter its prices. Now, it is entirely right that Lord Sumption then comes along and engages in a consideration of these matters and, in particular, considers whether Article 8 of the Framework Directive governs the way that the contract works, which is the part of the judgment I took you to, but to suggest that this is a wholly new contract ground is not right, because essentially what is being put in the NoA as I have already explained, was the outcome of the Supreme Court judgment in circumstances where that judgment was driven by the terms of the appeal which you see, which are not focused on the details of the contractual points.

Unless I can assist further in relation to any matters raised by Ofcom. I checked with Mr. Herberg, and the NGCS timing that I specified is correct.

THE CHAIRMAN: Right.

MR. BEARD: I am grateful.

THE CHAIRMAN: And is it Mr. Ward and then Mr. Turner.

MR. TURNER: The other way around.

THE CHAIRMAN: Mr. Turner.

MR. TURNER: Sir, I am grateful. I will start by covering the points that were made by Mr. Beard yesterday, and then try to sweep up the points made by various counsel today.

His first point yesterday was a general one that you should take into account when you are deciding what to do. These disputes date from a long time ago. The Tribunal, therefore, I suppose it is suggested, should not allow further argument and evidence from the MNOs about the validity of BT's charges to achieve finality. These disputes date from a long time ago.

Two responses, the first is the mobile companies are not responsible for these delays. This is not a matter that should be held against them; a basic point for any decision that you reach. I would say this: if anything, it is the other way around. BT, as the Tribunal may know, tried to stop the early resolution of the 1046 dispute when that was opened in 2010, and BT blocked progress being made in it for over half a year. This is a matter of public record because it was a Tribunal decision I will mention in a moment; I think Mr. Harrison was involved in that case.

When the dispute was raised in 2010, BT appealed to this Tribunal. It challenged Ofcom for having accepted the dispute. BT argued the dispute resolution on the matter now before you should await the outcome of the appeal in the *08* case, and it argued that the prospect of there being further negotiations after a judgment in the *08* appeal meant that no disputes had technically happened, had arisen within the meaning of the statute. The mobile company said that that was wrong, and BT's attempt to stop dispute resolution from going ahead promptly was then ruled against by the Tribunal in May 2011 in a Tribunal chaired by now Mrs. Justice Rose. We have copies of the judgment, should you wish to see it, but perhaps it is not necessary. That is what happened. I will give you the reference in case, sir, you wish to look at it. It is [2011] CAT 50. So, rather than the MNOs blocking progress, if anything for that one, it is the other way round for over half a year, perhaps half a year.

The second point is it would be the wrong response of this Tribunal now to these past delays to prevent the Industry Regulator from now reaching a correct new decision on the remittal in which Ofcom properly addresses the problem, and it which it might find, in particular, that BT's charges here cause real consumer detriment. Again, I mention that the

practicability consideration is conceived of as also relevant to the public policy objectives. So the interests of finality certainly are a factor, as I said in opening, but nonetheless, there are other factors at play and, in terms of shutting out the mobile companies from being able to allow the matter to be fairly considered by somebody, is not the right solution.

The second point is Mr. Beard said that Three had a full opportunity to put in evidence to Ofcom to show Ofcom that this particular NCCN, 1101, is likely to cause consumer harm in the market. The dispute over 1101 was raised and accepted by Ofcom in March/April 2012, and he says "That was when the Tribunal's judgment, your judgment, was still the prevailing authority for the next few months." So, putting those two points together, we had a full opportunity to come out with everything that we had on consumer detriment and, therefore, we should not be allowed to raise these points now.

There are two responses to this, to develop what I said at the end of submissions yesterday. The first is likely consumer detriment, the test. It is not a fact about which Three had evidence which it has withheld. Likely consumer detriment is an estimate. It is a judgment based on an expert examination of information drawn from across the industry. It is something that is investigated by the expert Regulator, Ofcom, which has a special vantage point into information gathering powers, once the dispute has been accepted and the process is underway.

Ofcom collects information from the industry in its process and it builds up its analysis, and it asks individual companies for the information to feed into its thinking. What Ofcom asks for and the shape of the analysis that the Regulator builds up, based on the material it gets from everybody, are essentially in Ofcom's hands. It is altogether different in that way from litigation or arbitration, where party control is the framework.

So, if you take this case, I draw to your attention the following points, and I can say this because, sir, the Tribunal ordered disclosure to be given of the submissions that were made, you will recall, at the occasion of the last case management conference, and the position is as follows as to the process in this investigation.

As far as we can see, the companies were not copied in or informed of all the developments as Ofcom's investigation proceeded, and that would not be expected either, so the mobile companies did not see the developments as they took place. Secondly, there is nothing on the file that suggests that Three or any of the mobile companies were ever shown any of BT's evidence or submissions to Ofcom. Third, there is no indication that Three or any of the mobile companies were told that Ofcom was planning to use in its expert assessment the Dobbs 3 model. Three finds out about this in December 2012 when it gets the provisional

determination, which proceeds, as you know, on the basis that the right legal test is uncertainty, and which asks for comments to be given by the companies within a few weeks at the end of that year.

From those points I draw the following conclusions. First, in summary, it is wrong to say that Three either withheld material on detriment which it should have produced or otherwise failed to engage properly with Ofcom's process. It did. Second, it is particularly wrong to say that Three should have taken the Dobbs 3 model during the Ofcom process. I am reminded that, in the 08 appeal, Ofcom had criticised the Dobbs 3 model. But it is wrong to say that Three should have taken the Dobbs 3 model during that Ofcom process here, and used it as part of its own mini analysis of prices from Three to show likely consumer detriment, because we did not know that that was the way that the Ofcom approach was taking shape.

Now, when you come to what we have before you, the Hunt report, the Hunt report uses the Dobbs 3 model, not because it is the unique appropriate way to assess consumer detriment. He uses it because you can see from Ofcom's determination that Ofcom used it, we are not reinventing the wheel, and Hunt combines pricing data from each of the main MNOs who are joined together in this appeal after the Supreme Court judgment clarifying the legal test. Therefore, in short, the suggestions that you heard yesterday that Three behaves in a fashion that leads it to be criticised about how it behaved earlier are not well founded. They are not a good reason for ----

THE CHAIRMAN: You do accept though, Mr. Turner, that Three, the MNOs generally, were the parties who referred this original dispute to Ofcom for it to determine?

MR. TURNER: Yes, I do. As I said yesterday, while they referred it to be determined and they make their initial submissions about it as a point that required to be investigated, alone from their vantage point and without the industry information gathering powers that Ofcom has, they cannot be expected to put forward the full case. The process that is undertaken is one whereby the expert Regulator proceeds to examine that over the course of the weeks and months of the investigations.

THE CHAIRMAN: Up to a point, Mr. Turner, but is that not rather subverting the reason of Lord Sumption in the Supreme Court, where actually his take on the dispute resolution process is that one has got to be very careful about how one treats the regulatory aspect, which everyone accepts exists in that process, and someone is saying the starting point is the nature of the dispute between the parties in which you were effectively the plaintiff.

MR. TURNER: It is certainly saying that it is a dispute between the parties, that sets the initial framework. However, in resolving the issue of consumer detriment, that particular issue is not simply a *lis* between two parties where they bring forward the information that they respectively have about it, BT against one or other company on the other side. It is an expert investigation that leads to its decision.

THE CHAIRMAN: You are not saying, or I do not think you are saying, that you were precluded from putting in evidence on the issue which, as I discussed with Mr. Herberg earlier, was what is the effect in terms of consumer benefit/detriment of the particular NCCNs that were being referenced?

MR. TURNER: Certainly not. We are saying that what we put forward, if it could not be the complete evidence, cannot be criticised, and that Ofcom is in a position to gather the complete evidence, directing itself to the legal test it knows about, the prevailing state of the law, from all of the parties in the industry. That is the first point.

The second point is that in so far as it was suggested as a specific objection to us, you should have taken the Dobbs 3 model and put your own pricing data into it and come out with some answer on consumer detriment. It is not a well-founded argument in a number of ways: the first of which is that we did not know that the Dobbs 3 approach was going to be picked up and taken by Ofcom as its way of assessing likely consumer detriment; nor did we have the ability to get the pricing information from everybody relevant in order to build up the best case.

What Ofcom ended up doing was using that, as we found out in December 2012. At that point it is considering only the question of uncertainty, whether or not what it did was sufficient, more broadly, to look at likely consumer detriment. That was how it approached it. It took only information from Everything Everywhere and said, "We find that the position is uncertain".

That is by way of responding to the suggestion that we in some way did not put our best foot forward before Ofcom, and therefore must not be allowed to say anything further now at this stage on consumer detriment.

The third point which follows on from that was the remark that the mobile company submitted "swathes of evidence" to Ofcom. The companies did not submit swathes of evidence. That is not how the process works, as I have sought to explain. You have an investigation controlled by the expert regulator, Ofcom. Everything Everywhere put in submissions amounting to, we have counted, less than 100 pages, apart from what it was required to provide in response to the formal information requests. The others - Three,

Vodafone, Telefonica - also put in submissions at the outset explaining what their thinking was, and what their case was, and then again in response to the provisional determination in December 2012, that being written by Ofcom on the basis that the test is uncertainty and that BT had not overcome it.

So, again, we are looking at a process that is controlled by Ofcom. If the criticism is, contrary to what the earlier point was, you put in so much evidence before you are now getting a second bite of the cherry, our response is that you do need to understand the process that Ofcom undertook. Ultimately, yes, it is trying to decide whether certain charge schedules that were being applied should be upheld or rejected. In doing that, one of the regulatory considerations it looks at is consumer detriment in the market. It goes about its process and the mobile companies respond to the investigation as it develops.

The short point is, to the extent that it is now said in a fresh determination, because the matter having been set aside, it does need to be re-determined, the mobile companies should not be allowed to put in material, even after the misdirection and the wrong turn taken by Ofcom, that would not be fair, and it would not be appropriate for the reasons I gave yesterday.

The fourth point, he said that Three could have gone - and this is perhaps a small point - to Professor Valletti to get new material from him before it was published in 2013 to support a finding of likely consumer detriment. This, with respect, is certainly a bad argument. It is not sensible to suggest that we should have gone to Professor Valletti to ask if he had anything recent to give on mobile termination rates. It is Ofcom's own expert assessment of the question that is in issue. Ofcom may share, for example, Professor Reid's initial view, expressed yesterday, that the recent literature on mobile termination rates and how it is used is of limited help in this context if it is not focused on the United Kingdom. The point is that the mobile companies, and Three again in particular, have held nothing back, and they cannot be criticised. It would be wrong to block Ofcom from doing a proper public interest assessment now quickly and with all of the benefit of the information and submissions they already have, but reaching a further decision where they direct themselves properly as to what they need to look for.

The material from Mr. Hunt in fact should be a very helpful input into Ofcom's process at the start. It would speed it up enormously. It would be very strange to say that Ofcom should be deprived of that, because it builds on Ofcom's own analytical framework and it uses a wider spread of data. It will help achieve finality and an answer quickly. That is why it should be admitted now.

The fifth point: it is said that the MNOs should not be allowed by you to uphold the 2013 determination using new or different material, and this is a point, sir, that you canvassed with Mr. Beard at the beginning of this hearing again, that what we are really trying to do is uphold that 2013 decision on a new and different basis. The great thrust of BT's submissions in this hearing is directed to that proposition. It mixes up two separate things. We are not trying to uphold the 2013 determination. We think it should be set aside by you now, and then the matter of these disputes ultimately has to be remitted to Ofcom where the substantive points are decided so that a new decision is made.

The only question is what should be the terms of the remittal? No one wants to see delay. We want to see an answer that favours us. So directions can be given by this Tribunal that do help to ensure that the process is fairly and expeditiously dealt with. We think it can be done effectively without contravening the principles that were laid down by the Court of Appeal in *Floe Telecom* in the different context of the Competition Act. Sir, you are almost certainly aware of that.

We are happy for you, for example, to include in your decision setting aside the 2013 determination that we have undertaken that we will not file voluntary material beyond the Hunt report and its supporting evidence and the Sareen witness statement unless there is a good reason to do so, and something specific may be asked for by Ofcom.

We have shown the material that we wish to rely on before Ofcom. We would be happy for you to include any initial views - and we think that this also should be done - which the Tribunal has formed about this material for questions that the Tribunal consider it appropriate for Ofcom to address. We believe that Three can also undertake to deal with information requests from Ofcom as a matter of urgency and as soon as possible. All of these things can be done and the Tribunal can record that the Statute requires disputes to be determined ordinarily within four months, save in exceptional circumstances, and itself urge Ofcom to reach the Determination very promptly.

We do think that the statutory regime here is somewhat different from the Competition Act, I should say, in terms of what the remittal directions can include, but that it is best not to try to impose an express time limit on Ofcom, but you can leave it to Ofcom's evident good faith.

If you put all of those points together you are not looking at an extended process, and nor are you looking at an open-ended process, you are looking at a process which will be rapid, and in which an appropriate decision-maker can deal with matters that are outstanding and reach a correct determination. Those were the main points that were raised yesterday.

Today, you began by asking Mr Beard the following: you pointed out to him that he had urged on the Tribunal that there was an asymmetric approach to the provision of evidence in an appeal to the Tribunal. It is being said by BT that the appellant can bring forward fresh evidence, no such luxury should be given to those on the other side of the dispute. You put to him: assume that that is agreed, is our situation different because there is no dispute that the 2013 Decision should be set aside, and add to it a second stage.

So far as that was concerned, we did not hear a clear answer other than the suggestion that the Supreme Court may have settled in some way Principle 2, consumer detriment, or even Principle 3, practicability, as a knock-on consequence. It is certainly true that it has said what needs to be shown is something which distinctly is in conflict with the regulatory objectives, and we accept that.

However, whether the NCCNs here, NCCN 1011 on the detriments side, and these others in terms of practicability, particularly with their different nature with what was before the Tribunal in the 08 appeal, conflict with the regulatory objectives, has not been decided. When that is decided there would be no reason to say that parties other than BT should not be able to put in evidence or points about that. That should be done on an equivalent basis with BT. That is the first point.

The second was a suggestion that Three should be held responsible for the decision by Ofcom not to await the Supreme Court Decision. You recall this was also covered by Mr. Herberg, briefly, at the end of his submissions.

MR. BEARD: We are not holding Three responsible.

THE CHAIRMAN: No, I do not think that is how I put it to Mr. Beard. I put it rather more neutrally. I simply asked whether the Decision of Ofcom, which Mr. Herberg has fleshed out now, to press on to a final Determination between the decision of the Court of Appeal and the decision of the Supreme Court made any difference, and I have heard Mr. Beard's response and Mr. Herberg's input on that. I would be grateful to hear yours, but I do not think anyone is making any point about Three's role in that.

MR. TURNER: The only reason I believe why he is making a point and looking across the room was to try to suggest that in your decision about what to do somehow we should be disadvantaged. I cannot think that otherwise it was a stray comment.

MR. BEARD: Of course we want Three to be disadvantaged, that is the predicate of our case. (Laughter) It goes without saying! That is not the point; the point was a minor one – well, minor or not it was a short one which was that Three had pressed Ofcom to take a final

Determination. Of course, Ofcom then took that into account in relation to a range of matters, as Mr. Herberg has said, but Three was actually asking for the final Determination.

THE CHAIRMAN: Thank you, Mr. Beard. I think wherever it goes, or however it goes I would be very grateful to know what Three said at that point.

MR. TURNER: What Three said at that point was that the Regulator should proceed to make a decision, it is right about that, and it took into account the same considerations that affected Ofcom when it decided to do precisely that. You will see from – I do not ask you to turn it up unless it is straightforward, and I do not have the right numbering – the final Determination itself at para. 2.64.

THE CHAIRMAN: Yes, Mr. Herberg gave us that reference. It is tab 11 of whatever the relevant bundle is.

MR. TURNER: Ofcom briefly says why it decided to do what it did. Mr. Herberg has very helpfully amplified it to read:

> "As noted above, the Supreme Court has granted BT leave to apply the CoA judgment. That case has been listed to be heard in February 2014."

Pause there, yes, therefore a long way away from this point in time, 2013.

> "We also note that BT is asking the Supreme Court to refer certain questions to the European Court of Justice if it considers there is any doubt as to the correct interpretation of the relevant underlying … law."

It took into account that there could therefore be not just a year to a year and half of delay but potentially three or four years of delay.

These considerations were points that also influenced Three it is true.

THE CHAIRMAN: So Three concurred in 2.64.

MR. TURNER: It has not seen that paragraph at the time, but yes, the point is made.

THE CHAIRMAN: Just to cut to the chase, was that also the position for Telefónica, Mr. Ward?

MR. WARD: I am sorry, sir, I did not catch that?

THE CHAIRMAN: Was that also Telefónica's position on 2.64 that Ofcom should proceed to a decision notwithstanding that the case was going to the Supreme Court.

MR. WARD: In fact, my instructions are that we have no correspondence with Ofcom at all about this.

THE CHAIRMAN: No position at all.

MR. WARD: Not that we have been able to find anyway in the course of these proceedings.

THE CHAIRMAN: I am grateful.

MR. TURNER: The short point is the Tribunal now has a clearer idea of how this came to take so long and again, we say insofar as anyone might be in any faint way suggesting that Three had any role in that, that would not be a fair basis for criticism, certainly not a reason preventing it from putting forward any material now.

The next point was the point that Professor Reid raises in relation to Mr. Hunt's evidence. It may be helpful to take up that file. It is our file 6 at tab 1. What was pointed out was that one sees in 3.36 in the report a number of "may"s expressed in that paragraph, and that may suggest that 3.1.9, which refers forward to that paragraph, is expressing a form of contingent conclusion. This was taken, as I understand it, as a sort of example as to the extent the Tribunal can probe these sorts of matters, the witnesses here.

THE CHAIRMAN: Yes, probe matters in advance of a hearing on the merits.

MR. TURNER: Yes, absolutely. We would say this in relation to that question ourselves. The first is the preliminary remark that the Hunt report is, of course, not about detriment of all ladder pricing generally. It is restricted to a consideration of the effects of one of these NCCNs, 1101. 3.1.9, I should say, on p.10, is not the central part of the analysis. It needs to be read in the context of the earlier paragraphs, which have to be read together. If you start at 3.1.4 on p.9, you see that he says that:

> "The ladder charges are likely to lead to harm for consumers. This is for the following three key reasons".

At 3.1.5 to 3.1.10, you then have the first reason. At 3.1.8, you see him reaching a conclusion there. That 3.1.6 to 3.1.8 sets out the conclusions of the technical modelling, which shows that that NCCN gives rise to only slight incentives to reduce prices. 3.1.9 is then making another point, that there are practical reasons too why, given the small incentive, prices are not likely to be reduced. So it is an additional point. If you go forward again to 3.3.6, it is expressed in that way. 3.3.6 says:

> "Various additional factors may affect the incentives of the MNOs to alter their retail prices".

The point is that this is precisely the sort of detailed issue, therefore, that does need to be looked at and understood more generally, sir, as you rightly apprehend with the witness there. But these points can be put by the Tribunal to Ofcom, having considered this material, and it is a precise example of the way in which, where the remittal is made with appropriate directions to Ofcom, the Tribunal can raise points itself that Ofcom, it considers, should look into. That, and I will come to it in a moment, is an example of the way in which, outside the Tribunal deciding the matter for itself, if it considers that the

appropriate body to deal with it is the Industry Regulator, it is perfectly able to raise points itself that it thinks the Industry Regulator should look at, and a good example, therefore, of how the process would work well and efficiently.

That takes us onto practicability, Principle 3. The first point made against us there was the remark that the Tribunal has already said in the 08x case that operators can resolve these sorts of problems by agreement. I need not spend much time on that. These NCCNs are very different from the ones being considered in that case, much more complex, and Ofcom has moreover considered that point. I took you yesterday to the part of Ofcom's determination where they thought about that point, and where they said "We have reflected and we do have real doubts as to whether there may not be a practicability difficulty here, but we will not reach a final conclusion on it because of our decision on Principle 2". So it is not a decisive point, and it is something that still needs to be looked into.

Then Mr. Beard said that practicability is something that can be quickly dealt with. We agree. It can. The issue is which is the right forum for the decision on this point. Our position is that Ofcom is plainly the right forum for it. We are not going to put in voluminous further evidence. They have the advantage of having been steeped in a discussion and consideration of this matter before. Perhaps of some relevance is they have information gathering powers and, rather than be faced with a slew of witness statements presented to you by the parties before you in the Tribunal, they are very well placed to gather evidence and ask for information from a wide group of affected parties in order to take a view of the undecided issue of practicability.

In that connection, a remark was made about the recent settlements of Everything Everywhere and Vodafone. Those are confidential. It is not suggested, I believe -- I do not think it was asserted that those settlements can be assumed to be on the terms of these NCCNs. But, in any event, it is the sort of matter that Ofcom, as part of its investigation into practicability, can look into. Therefore, when you are looking at this issue, quite apart from the fact that it is something that the Regulator did not decide in the decision, it is best placed to look into this, and it can be done effectively and quickly.

From that, Mr. Beard went to the contract ground. The first contract ground is the point that, under the Standard Interconnection Agreement, prices have to be properly specified so that they can take effect, and that, with these, with all the uncertainty, that condition is not met. It is something that depends on a consideration also of the practicability point.

We do not shrink from the point that, if there is a contract issue there, it could have been raised at an earlier stage. We accept that. We do say, however, to take up what I said

yesterday and what Mr. Herberg has also referred to, that, on BT's side, there was no contract point before. Their original Notice of Appeal did not even append the Standard Interconnect Agreement as a relevant document. But it was introduced, their reference to reliance on their rights under para.12 of the contract, specifically by amendment in October, at which time and for the first time they now append the Standard Interconnect Agreement as one of the documents on which they rely.

In those circumstances, where, as a result of the Supreme Court judgment before which they themselves were not relying on the contractual terms, they now wish to introduce reliance on them, it is fair to say that the MNO should be able also to rely on the contract to say that the document does not allow these charges validly to be introduced.

In terms of consideration of the point, it is difficult, were it to be examined separately from practicability, to see that that could be fairly done, I would suggest, because, in considering the legal point, one would want to have the factual context there to understand how it is applied in order to reach a fair decision. So it is something that, if it is to be considered, should go with the practicability consideration. If it is to be excluded, it should be excluded only on the basis that it is too late to raise it now in all the circumstances, now that you have heard both sides of the argument. It should not affect the need to consider the practicability point which lies behind it.

Turning to the second contract argument, I will call it the 1046 point, that BT should not be allowed and the terms of the contract do not allow it to ride two horses at the same time, it both appeals to try to uphold the earlier Network Charge Notice for 080 numbers and, at the same time, it introduces a new one. The ambit of dispute here has become very narrow. I should just say that the reference by Mr. Beard to the Tribunal's order does not take matters any further, because that order refers to a question as to what is a valid successor to NCCN of 956, as agreed by the parties, or as determined by Ofcom.

What is determined by Ofcom, which the Tribunal referred to in the order, is precisely what is the subject of these proceedings. It is something, therefore, that is live in this case. It was not addressed by Ofcom in its decision. It is not part of BT's appeal against the 2013 determination, but there is an unresolved matter that should be considered by Ofcom on a remittal in this case, something that was before it, but it has not dealt with. Again, as part of directions that this Tribunal can give to Ofcom, there should be a direction that it considers that issue.

With that, I turn to Miss Love's submissions. The first point was the question of whether you can appeal against the reasoning in an order even if you win - the order is in your

favour. It was pointed out that this is what happened in the case of Everything Everywhere in the 08 appeal. Regardless of what happened in that appeal, which at least one understands in pragmatic terms, because Everything Everywhere was challenging the fundamental approach being taken to ladder charges, therefore it was practically an extremely important point. We do persist in saying that it is the wrong approach and we support Mr. Herberg's submissions on that.

It did occur to me as he was speaking that there has been another judicial pronouncement on this that I regret I have not been able to produce over the short adjournment, but I will read it to you because I can find the quotation on the iPhone. Sir, you may recall the *Floe Telecom* case which went to the Court of Appeal in 2009. Lord Justice Mummery considered the appeal against the Tribunal's judgment there. The reference is [2009] EWCA Civ 47. The Tribunal had purported to set aside certain parts of Ofcom's reasoning, and that point was considered by the Court of Appeal. In its judgment the court said - this is Lord Justice Mummery:

> "It is neither necessary nor appropriate for the court to set aside passages in the Tribunal's judgment or clarify the legal position on the main point raised on the appeal by Ofcom and T-Mobile. These suggestions are, in effect, inviting this court to do what this court considers the Tribunal should not have done, namely to set aside reasons in the decision of the lower court, rather than set aside or vary the order that it made."

It is a short point, but we, therefore, support the idea that in this context, as in other contexts in the law, one appeals against the outcome, against the order, rather than against the reasons.

Second point, an issue that, sir, you raised yesterday was also canvassed with Miss Love: the question was whether we could have appealed in this case against the non-decision of Ofcom on practicability where they said we do not need to reach a final conclusion on this. We say, no, first for the reason I have just given, that an appeal should be against an order; and secondly, that in any event one asks how we could have appealed on that basis. It would ultimately have been a complaint that Ofcom's discretionary choice not to go any further after making a finding on the basis, Principle 2, was wrong. That would have been a very difficult and rather tortuous for the mobile company which was happy with the order to have proceeded. Therefore, we do say that a suggestion that the mobile company's evidence or grounds can be suppressed because they could have brought appeals is not a well-founded submission.

Finally, Miss Love says, uncertainty remains now after the Supreme Court. It is undesirable and it will be aggravated if Ofcom has to consider anything substantive on the remittal which will take time. To an extent, that appeared to boil down to the submission that the issue should be decided summarily now and we should not be kept out of our money. There are issues to consider before it can be said that that point is right rather than wrong: the issues of practicability, the issue of consumer detriment, have not been properly decided and they need to be.

Secondly, it also continues to suggest that Gamma follows automatically from the decision in relation to these BT charges. It does not. We have set out in our witness evidence - for example, Mr. Sareen's statement, para.23 in bundle 5 - why Gamma's ladder charges are even more complex and even more difficult to apply than those of BT in this case.

Turning to Mr. Herberg, he appeared to suggest, and I take this also from the position in the skeleton, that the Tribunal should approach the question of what the mobile companies can introduce either here or before Ofcom on a remittal by asking itself what you would allow in in an appeal. We say that that is not the right approach. You should not consider the admissibility of material in an appeal before you as controlling what material could be included or taken into account by Ofcom should the matter go back to it and should it wish to re-examine the question. As a matter of principle, we disagree.

Professor Reid asked two questions: would remittal to Ofcom undesirably soak up resources and how would it assist in relation to the objective of achieving finality? As to resources, that will be a matter for Ofcom to decide rather than this Tribunal. It has accepted this dispute. It has made a flawed decision. It must be directed to reconsider the decision, but we are certainly not saying that it must deploy or squander resources unnecessarily on this problem. It can decide what resources to deploy, and obviously it must be the master of that choice. It can do so in a way which is efficient. It can build on the material it already has. It can take into account guidance or points made by the Tribunal in the directions that the statute tells the Tribunal it should be giving, and thereby achieve an efficient process.

The same point essentially applies to the interests of finality. It is appropriate for Ofcom to deal with this, and Ofcom can achieve finality by prompt and effective action. Therefore, we do not see this, a remittal of these points to Ofcom, being an open-ended process, or something that need cause concern and which the Tribunal should strive to avoid.

There was then a question which Mr. Beard helpfully addressed just after lunch as to what is a new ground. We would agree with Mr. Beard about this. We also had the same

concern, that one must distinguish two questions: first, the question which the Tribunal I think is primarily interested in the general sense, what was before Ofcom before? What did you say before, that we say that it is fair or appropriate to raise anything again?

Secondly, the separate question, what falls within BT's grounds of appeal in this Tribunal? To take our 1046 contracts point, the riding two horses at once issue, that was something that was before Ofcom, but it is not in any sense within BT's appeal in its grounds of appeal against the 2013 determination.

One then comes to the question that was canvassed with Mr. Herberg about whether we are saying that the powers that the Tribunal has on a remittal are wider than the powers it has to decide matters for itself in the appeal. I hope it follows from what I have been saying so far that we do say that the Tribunal can address points that you do not decide for yourself – take the 1046 issue as an example. You can direct Ofcom that that is a matter that must be reconsidered. Practicability or consumer detriment, while you are not deciding those matters for yourself you can, nonetheless, express questions or give directions which refer to how the Tribunal considers those matters might be efficiently addressed, and that is why there is a difference between deciding matters for yourself in terms of grounds of appeal in BT's notice of appeal and matters such as the 1046 point such as the wider point of practicability that was not even finally decided upon by Ofcom, which must now be resolved.

Next, we agree with Mr. Herberg ----

THE CHAIRMAN: Just to be clear, Mr. Turner, I think you are saying that there are matters that we can remit, albeit with perhaps directions or guidance to Ofcom, however you want to frame it, which we cannot decide ourselves on the appeal. Is that right?

MR. TURNER: Yes. I say two things: first, if you take 1046 that is not a matter which, on any view, we would say should be decided by ----

THE CHAIRMAN: Not 'should be' but 'can be', I am starting with the point of jurisdiction.

MR. TURNER: Or can be, yes. Secondly, where it is a question of, perhaps, a discretion that the Tribunal might feel that it has. Take the question of consumer detriment, or the question of practicability but focus on consumer detriment, if the Tribunal were to say: "We consider that that is sufficiently within BT's grounds of appeal in the notice of appeal, that it is something that is before the Tribunal on this occasion, you might still take the view that it is something that should be considered by Ofcom rather than the Tribunal. If that is the case then you can give directions to Ofcom without having adjudicated on it.

THE CHAIRMAN: No, of course, I completely understand that. That, in a sense, is a question of our discretion at this stage and I understand the varying submissions that have been made by the parties on that point, how, as a matter of discretion we take the matter forward. I am more interested for present purposes in just understanding the jurisdictional point, as it were, whether you are saying as your primary position that there are certain matters which we cannot, for ourselves decide on this appeal, but which we can, if we are minded to do so, remit for Ofcom's further consideration and decision.

MR. TURNER: I take 1046, the contract point, as a good example of that. I have not heard submissions from anybody so far, at 3 o'clock on day two, which suggest that this is something that falls within BT's grounds of appeal because it is not in BT's grounds of appeal, but, at the same time, it is generally accepted by everybody that it is something that was before Ofcom, which Ofcom did not deal with, and which should be dealt with.

THE CHAIRMAN: And, to be clear, you are saying that the only way we can deal with it is not by deciding ourselves but by pushing it down to Ofcom for them to deal with?

MR. TURNER: The Tribunal decides issues that are in the grounds of appeal, in the notice of appeal. If it is not there then the question is how, or whether at all, it can be addressed by the Tribunal, and we say "yes", that the powers under sections195(3) and (4) include a power to direct Ofcom to consider something that was not previously considered in the 2013 determination.

THE CHAIRMAN: So what you are saying, I think, is that sections 195(3) and (4) can relate to matters which are wider than matters falling within 195(2)?

MR. TURNER: Yes, and specifically even where they fall within 195(2). If you choose not to ----

THE CHAIRMAN: No, that I understand. I do not have a problem with that. I confess I have some difficulty in seeing how sections (3) and (4) can be wider than (2), but I understand your case now.

MR. TURNER: The reason is that 195(3), which I do not have immediately in front of me, refers to a power to refer. 195(3) – "must include a decision as to what is the appropriate action for the decision-maker to take in relation to the subject matter of the decision under appeal." It is wider than merely the points raised in the grounds of appeal, which you consider under s.195(2), so that is how on the wording, it gives you that hook.

THE CHAIRMAN: I am grateful, thank you.

MR. TURNER: Next, we agree with Mr. Herberg that if BT's case is right in this Tribunal, that bringing an appeal gives it the ability to back up its new grounds, fresh evidence, not others.

Moreover, that opposing parties are also to be prevented from raising other points even on a remittal subsequently to Ofcom. That raises very serious questions as to fairness in any civilised system of justice. That is why one comes to the question which was then debated at some length with him about the extent to which s.195(2) means that this Tribunal can or cannot consider matters which are not in the notice of appeal of BT, but which are raised by other parties in the appeal. All I would say about that is that if I am wrong about sections195(2) and (3), then there will be a real difficulty in terms of fairness. What I am saying is that where matters are not raised specifically for the Tribunal which fall within BT's grounds of appeal, a view is then taken about the sustainability of the decision under appeal, a remittal takes place under the terms of this statute, and then, as a matter of fairness at least, the opposing parties can raise those points if they are not within BT's grounds of appeal, in the remittal for the re-determination. That provides the opportunity when they can be considered.

BT's case is that even at that second stage we should be prevented from doing so, and that cannot be correct.

On practicability, we stress that the issue before the Tribunal, and before Ofcom, relates to these ladder charges. Mr. Herberg says that the decision-maker, when they are looking at this now, and reaching a final decision, the decision-maker – I use neutrally – must take account of relevant available information. We agree with that, and that is why we say that the thrust or implication of his submissions, despite him formally saying that he takes no position on it, is that Ofcom can most flexibly and efficiently reach the decision on practicability rather than the Tribunal, where you will be faced with a series of witness statements from the parties before you and where you do not have the same flexibility as Ofcom does to grapple with this. It is true, sir, that you have considered issues of practicability in a general sense before in relation to the 08 appeal, insofar as it arose there as a point, that is not the same as the vantage point that Ofcom has and its ability to grapple with and reach a reasoned decision about this. If I may, Mr. Herberg referred you to the *Cable & Wireless* case. If the Tribunal could take that up, in out bundle 9 at tab 1? It is instructive to look at the points that were made by the Tribunal President there. This is on p.3 of the judgment. It was considering quite a specific issue. It was one which, at first sight, one might have thought the Tribunal could proceed to grapple with. He says at 9(a) first:

> "The Tribunal is not regulator but under the 2003 Act operates as an appellate body. This question raises issues of principle and possibly of regulatory policy.

> It is appropriate that Ofcom should take such a reasoned decision at first instance [the essential institutional point]".

Then at (c):

> "Even if an appeal may be likely [the point that, if Ofcom takes a decision, it will then lead to an appeal] (and we doubt it can ever be said that an appeal is inevitable), the conduct of the proceedings before the Tribunal will be much more efficient if they are by way of appeal against a reasoned decision and not seeking what would effectively be a for instance determination".

We say that those same points arise here in relation to the matters which we say should be decided by Ofcom.

So, in conclusion, sir, we reject the submissions of BT, so far as they seek to shut us out from making these further points or introducing new evidence. What we do say is that, on each of these areas, there are good reasons why Ofcom should consider them and why it is efficient, if it is considering, in particular, practicability and if it has already done the work on consumer detriment to the extent that it has, and where the interveners are merely putting forward material which builds on the existing model, that it can consider that together, because, to some extent, there are synergies between the two.

Therefore, it makes good sense for those matters to be considered on remittal, and it is not the case that Three, or I apprehend Telefonica, in any way seeks to cause delay. This can be done quickly. Perhaps it can be done as quickly, or perhaps even more so, than even in the Tribunal, with the formal process of witness statements and decision. Sir, those are the three submissions.

THE CHAIRMAN: Thank you very much, Mr. Turner. Yes, Mr. Ward?

MR. WARD: Sir, it is 3.15, it is Friday, and I am last. I will be brief. I want to start with Principle 2. Mr. Beard's complaint is that the MNOs cannot rely on Mr. Hunt's report because it has been introduced at the judicial stage of these proceedings rather than the administrative and, if it had been produced at the administrative stage, that is before Ofcom, there would have been no objection. Indeed, you asked him, sir, whether he accepted that it could be considered if the matter was remitted to Ofcom, and he certainly did not say it could not.

So where we are then is that, if Ofcom had decided to wait until the Supreme Court judgment had been given before determining the dispute, if it had stayed matters until then, there would have been no difficulty. The report would have gone in, because you can see

what the counterfactual is. How did the MNOs' respond to the Supreme Court judgment? The answer is they responded by obtaining Mr. Hunt's report.

I make no criticism of Ofcom's decision to do what it did. BT had threatened a reference. One can see why it was concerned that this might go on for three or four years. But the fact is the reason we are in front of you today having his argument is, in truth, an accident in timing, due to the way Ofcom managed the cases. In our respectful submission, that is a powerful reason why the report should be considered, whether in the Tribunal or by remittal. As you are aware, we are neutral on that question.

But I do also want to say a little bit more about timing. Mr. Herberg gave you some of the key dates. Mr. Hunt's report is, of course, only concerned with NCCN 1101. I think Mr. Herberg told you that that dispute was started by EE in March 2012, and my instructions are that it was accepted by Ofcom in April. The appeal in 08x was heard by the Court of Appeal on the 1st to 3rd May. In June, Ofcom decided to put a halt to things awaiting the outcome. For your note and for the transcript, that is para.2.61 of the Determination.

But, at that stage, not very much had actually happened. In fact, again, the decision records that there had been information requests. But, as far as I understand, and these are my instructions, that is all that had happened from Telefonica's side.

Then what happens, of course, is the Court of Appeal gives judgment in July 2012. We now know it was wrong, but it gave judgment in the terms that it did. Ofcom wrote its provisional findings, which set out its case, and published them to the parties in December 2012. Of course, as we discussed yesterday, those provisional findings were premised on the Court of Appeal's judgment. In essence, Ofcom said "The welfare effects are uncertain and, therefore, we do not uphold the ladder charges". Telefonica's response, as you saw yesterday, was "We agree". On the law, as it then was, that was all entirely apposite.

So this dispute, the one that is critical for the purposes of Mr. Hunt's report, all took place or substantially took place under the shadow of the Court of Appeal's judgment. So, in our respectful submission, that is why the subsequent reversal of the position, or as it was understood by the Supreme Court, is so powerful, at least in respect of Telefonica and 1101.

But, in any event, as I have just submitted, there is no dispute that, if you remit this matter to Ofcom, it could in principle consider, Mr. Hunt's report.

Mr. Herberg accepted that Telefonica's submission was right, that ordinarily Ofcom would have to consider the matter in all the relevant circumstances, including whatever was submitted to it. But he did raise one possibility that we respectfully do not agree with. He raised the possibility that somehow, if it goes back, matters could be cut down by use of the

power in s.186(2) of the Act. Perhaps it is convenient to turn it up. I think it is probably in your bundle 4 under tab 2, which is the first authorities bundle.

THE CHAIRMAN: I think what Mr. Herberg was saying was that, were we to make a general and broad brush remittal back without any kind of additional stipulation, Mr. Herberg was floating the notion that 186(2) might apply in that context.

MR. WARD: Yes. That is what I understood him to say.

THE CHAIRMAN: I confess I have some doubts about that.

MR. WARD: I go a little further, sir. We think that is just wrong.

THE CHAIRMAN: But I think we may be able to take it more shortly, in that it is almost inconceivable that, even if we remit it to Ofcom, we are going to do so without any kind of bells and whistles attached, if I could put it that way.

MR. WARD: Sir, I am obliged for that indication. May I just make the point briefly? Section 186(2) allows Ofcom to decide whether it is appropriate to handle a dispute, having regard to its resources. Here, the dispute was accepted a long time ago.

THE CHAIRMAN: Yes, it is to do with an initial referral by the parties in the dispute, rather than by the Tribunal back to Ofcom.

MR. WARD: Sir, you already have the point. We agree that, if you decide to remit, some directions would be useful, but, in particular, one that makes it clear to Ofcom that, unpalatable though it may be, it cannot actually duck out of deciding the issues that are remitted.

THE CHAIRMAN: I think, Mr. Ward, you can take this as read; that, were we to remit, we would make very sure that we would tell Ofcom that they would have to resolve it, but I have absolutely no doubt that they would do so.

MR. WARD: That is expected, but still comforting, sir. We had a little bit of debate about the content of Mr. Hunt's report. At your invitation, Mr. Beard did a little bit of quiet moaning about it, as opposed to a head-on attack. But, of course, it has not yet been the subject of any kind of challenge. BT has not really had the opportunity yet in these proceedings to say what it thinks about Mr. Hunt. No doubt when the time comes, if it comes ----

THE CHAIRMAN: All I can say is I gave you every opportunity!

MR. WARD: We know which way the wind is blowing. Our point is really a simple one. What we are seeking is the opportunity to put it forward and have it tested, but that obviously is not the issue for today.

Can I move on then to what Mr. Beard said about the role of interveners in this case. This is territory I traversed in my opening submissions and I will be brief. He has tried to convince

you that the role of an intervener in this case can be equated to that of a regulator in a competition penalty case. This is not a penalty case, and Telefonica is not a regulator. Three times yesterday he said that the MNOs are standing in the shoes of the regulator. They are not. They are defending this appeal, or seeking to, in their own right. What this appeal is about now is a bilateral dispute - bilateral in the case of each MNO - about whether BT can vary prices in a contract. It is not about prosecution of a criminal charge. Not even Ofcom is acting as a prosecutor. As you, yourself, put it, sir, at the last CMC, it is really acting more akin to a third party arbitrator.

Telefonica is not acting as a prosecutor, regulator or arbitrator, it is just a commercial party seeking to pursue its commercial interest. Ofcom rightly put it in its skeleton argument - I will just give you the reference, p.6 of its skeleton argument, bundle 8, tab 6 - these proceedings are essentially commercial disputes. We respectfully agree, even if, of course, the Common Regulatory Framework is one of the ways in which the disputes must be adjudicated.

The reality is that the rules on intervention before the Tribunal are much broader and more flexible than Mr. Beard would have you believe. There is no reason to read them as narrowly as he says. Plainly an intervention cannot be used to mount some wholly new or unconnected set of issues. This intervention engages directly with the real issues. What is the welfare outcome? Are the charges practicable? In my respectful submission, it is perfectly plain that the fair thing is to allow those issues to be litigated in an even handed way for both sides.

Instead, Mr. Beard has argued for a very striking asymmetry between appellants and others. I made my submissions on this yesterday. There is not a shred of authority for the approach he advances.

I do want to take up the point that you made in argument, sir, earlier today, that even if there were some asymmetry, even if there were in an ordinary kind of appeal where one is seeking to defend a decision, that is not really this case. We are all agreed there is no decision to be defended here. In fact, in respect of Telefonica's three points, there is no decision on any of them. There is no lawful decision on the welfare analysis. Ofcom decided not to decide on Principle 3, practicability. The point that Telefonica made about validity of NCCN 1046 essentially got lost in the course of the determination.

That is also why the reliance upon finality that we have heard about a lot is, in fact, misconceived, because it is all very well to have finality, but one cannot have finality where, in fact, there has not yet been a valid decision.

We do accept, of course, that these proceedings have gone a long time, but like Mr. Turner we would say the MNOs are not really to blame. Ofcom has managed these cases in a particular way - again we make no criticism. Unfortunately, the Court of Appeal took a wrong turn, as it now turns out. That, of course, cost us all a very long time. None of that is a reason for now saying that we cannot actually have a fair adjudication on all of the evidence.

That takes me to Principle 3 where, as I have already submitted, Mr. Beard really wants to leave the Tribunal in a highly unsatisfactory position. He accepts there is going to be a determination, Ofcom accepts there is going to be a determination, Telefonica wants there to be a determination, but Mr. Beard does not want it to proceed on the best available evidence.

I made submissions yesterday about the fact that the approach to practicability by Ofcom obviously reflected its understanding of the law, and of course it has become much more important now. One can run precisely the same counterfactual as I mentioned a moment ago in respect of Mr. Hunt: what would the MNOs have done if this case was still in front of Ofcom when the Supreme Court judgment come out? Well, you can see the results here in the files. They would have come forward with evidence on practicability in the way they have in these proceedings.

That takes me to the argument we have had over Mr. Beard's table. What did or did not Telefonica say? I took you through a few examples where we would challenge the description in those tables, not exhaustively, but I also frankly accepted that I could not challenge every single one of those boxes.

The real issue is: does any of that honestly help or assist in the just disposal of this case? What is clear is that Telefonica said some things that go to the issue of practicability. Is the Tribunal going to have to decide exactly what it said and how much it can fairly expand upon it? Of course it was in short form, and of course the witness statement relied on now for Miss Gregson is in longer form. Even on a very narrow view of the potential scope for intervention and supporting evidence, surely we are allowed to expand upon points we have made before. In our respectful submission, that is just an absurd exercise. It leads to the exclusion of relevant material and the proper approach is simply to allow it on all sides, all the parties who wish to put material in, and allow the issue to be properly litigated.

Under this topic, the other thing Mr. Beard alluded to was the fact that there has been settlement between BT and two MNOs. One of those MNOs is being purchased by BT, the

other one is now the owner of a very large TCP, Cable & Wireless, who, of course, appeared on the other side of the fence in 08x.

The most important thing is that none of us, apart from BT, know what was in those settlement agreements, so it is of no assistance at all in trying to decide whether or not this is a real issue on practicability. It is important to note that Ofcom's defence - I will read it, you need not look it up - in para.7 makes a denial that is relevant to this point. It says:

> "Ofcom denies that practicality issues can invariably be resolved through co-operation, as BT alleges."

In my respectful submission, the fact of the settlements just does not tell us anything useful about this case.

Just touching briefly on the validity of 1007 1046, in its skeleton argument BT said that that issue should be dealt with in these proceedings. For your note, that is para.100. There was a bit of a detour where the argument was that it should, in fact, be dealt with in the 08x proceedings, but I think Mr. Beard eventually settled on the position that he did not mind which it was.

Our position is that it is appropriate and sensible to deal with it in these proceedings, but of course, as you will anticipate, as long as it is dealt with somewhere we will not object too strenuously.

THE CHAIRMAN: You are not that far from Mr. Beard's position.

MR. WARD: Actually, I think uniquely in these proceedings, that might be right! Our overarching submission is that it would be simply extraordinary if it could not be raised in the form of an intervention, given the point was live before Ofcom and not dealt with.

That takes me very, very briefly into the terrain of Miss Love's submissions about what should go in an intervention and what is the proper content or protective application for permission to appeal. The obvious point is that the more tightly you draw the boundaries of permissible intervention, the more protective appeals you are going to get. One reason why I think all of us at the Bar on this side of the room are often asked to advise about possible protective appeals is that, of course, it is in the culture in the Tribunal for people to file appeals on the last day, as I am sure you are aware. Of course, that means that one is often worrying about what it is the enemy might or might not be up to. In my respectful submission, it is much more sensible to use the flexible regime under Rule 16 and Rule 22 to respond, if necessary, than everybody rushing in with a protective appeal just because an appeal might come the other way and there might be something you do not like or there might be some change in the law in this or in some other case or some case that is in

Luxembourg, who knows. From the point of view of procedural economy and efficiency, allowing the parties to respond when an appeal actually materialises is vastly more sensible, in my respectful submission.

Sir, unless I can assist further, those are our submissions.

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

MR. TURNER: Sir, I hesitate to rise again. There is one point that you put to me that, on reflection, if I can give you reference for it, I will just deal with very quickly.

THE CHAIRMAN: Of course.

MR. TURNER: What I was saying about Ofcom's process, I was pointing out that it was acting, and I used the phrase, as an "expert regulator" in what it was doing. You said to me, is that consistent with what Lord Sumption said about what Ofcom is doing in the Supreme Court where he refers to the adjudicatory function? May I just give you a paragraph reference. It would perhaps be convenient if you just look at it. It is in the second BT notice of appeal bundle, which may be your second, it is tab 20.

THE CHAIRMAN: Yes, Mr. Turner.

MR. TURNER: He summarises it very neatly on p.19, para. 34 of the opinion. It is tab 20:

> "When Ofcom is resolving a dispute about a proposed variation of charges under an existing agreement, it is performing a mixture of adjudicatory and regulatory functions. The terms of the interconnection agreement are the necessary starting point for this process. If there is no contractual right to vary the charges , it is difficult to see how Ofcom can approve a variation . . ."

And so if our contract invalidity point goes that is a pure adjudicatory issue. He then goes on:

> "If there is a contractual right to a variation, but the proposed variation is not consistent with the Article 8 objectives, Ofcom may reject the variation."

At that point in what it is doing that is a regulatory component of its task. The issue of consumer detriment was raised, and the way it goes about that is not just as an arbitrator or as an adjudicator there, there is where it is exercising a regulatory function as a component.

THE CHAIRMAN: Yes, I think it was para. 31 of Lord Sumption's opinion that I had in mind when I made the points to you, when Lord Sumption was discussing the approach of the Court of Appeal as dispute resolution being a form of regulation in its own right, and he has clearly refocused.

MR. TURNER: He absolutely refocuses it. The whole gist of this is to say, as he does in 34, the starting point is the terms of this contract. That is our point.

THE CHAIRMAN: Thank you very much, Mr. Turner. Miss Love?

MISS LOVE: Sir, it is now 3.30 on Friday, and Mr. Ward, it turns out, was not last. I intend to be very, very brief on a couple of points raised by Mr. Herberg, if I may?

THE CHAIRMAN: Very well.

MISS LOVE: Sir, one thing that troubled us slightly from Mr. Herberg's submissions was in relation to Principle 3 where he said basically both Gamma and TalkTalk are already putting in some fresh evidence on this and it all seems to come down to evidence.

I just want to be quite clear about this. Obviously our evidence is rather different to that from the MNOs, partly in that it was put in with permission and also in that it is classic intervener evidence that goes to supporting part of BT's pleaded case. In any event, to be very clear about this, as you can see from para. 18 of our statement of intervention, which I will read out but will not turn up. We said:

> "In the circumstances, [we] agree with the submission in para. 80 of BT's ANoA that the issues raised in this case are materially identical to those raised in the 08X and hence that there was no reason for Ofcom to depart, in the 2013 Determination, from the approach of the Tribunal in the 08X . . ."

THE CHAIRMAN: Your primary submission is to side with Mr. Beard.

MISS LOVE: It is not analogous to the evidence coming from the other side, it is in the alternative. Insofar as Mr. Herberg talked about para. 3 of our statement of intervention and further evidence, to be quite clear, like BT that would be responsive evidence to the anticipated overtures from the other side.

Also, I agree with Mr. Beard that you do not need to go here on this question of cross-appeals, protective appeals, the simple start and end is Ofcom could not do it, the interveners cannot do it. I hope I was quite clear that we are not saying genuinely responsive material should be shut out, and we are merely just saying that this goes to his point that there is a process.

I do have a brief observation on Mr. Herberg's views as to why s.195(2) has to extend to interveners being allowed to raise new points and that these are somehow to be treated like grounds of appeal.

Other than his construction argument in favour of it, which seemed to come down to having to read in something from the absence of the word "solely" or anything telling you you cannot look at other things, it is the reverse of Mr. Ward's argument in that it is a fairness one saying that if you cannot have the protective appeals then people like EE will be shut out. That, in turn, seems to depend on his interpretation of Lord Justice Moses' speech, and

the insistence that 'decision' is synonymous with 'outcome' as in a judicial determination with the judgment and the order which, of course, was what was under consideration in *Floe*.

What is strikingly absent from Mr. Herberg's discussion of fairness and, indeed, from Mr. Turner's and Mr. Ward's, is obviously the question of fairness to other people and the position of the appellant and those who support them. BT took the Determination at face value and said: "Here is our notice of appeal against it". We looked at the position and we said: "Fine, we are intervening for BT." I am told that our ladder pricing equivalent, our tiered charges were effective, or should have been, from late 2010. Although we are told actually they do not follow automatically from BT's, there has been no challenge to them; they are due to expire on 1st July 2015. As Mr. Beard said, the regime will be changing and from our perspective it would be jolly nice if at some point in the intervening four and a half years we could actually be paid the money that so far we are owed under them, and that is rather absent from Mr. Herberg's vision of fairness.

Thank you, sir.

THE CHAIRMAN: Thank you, Miss Love. Thank you all very much. Before we rise, and I do not want anyone to read anything into this, particularly BT and, on the other side, Three, but we think it would be very helpful if, in the first instance, BT, with the interveners, could work up a timetable on the assumption that the Tribunal will be determining matters rather than remitting matters to Ofcom. I say obviously "in the first instance BT" because BT on that basis would have to respond to the material that has been put in by the MNOs, and I would be grateful Mr. Beard if you could do so on three bases. First, that we choose only to hear the contractual points, which we anticipate to be the quickest. Secondly, that we choose to hear both the contractual points and the points in relation to Principle 3, practicability, which is the next biggest area; and thirdly, on the basis that we choose to admit essentially everything, that is to say contractual points, Principle 3 and Principle 2. I ask you to do that now purely and simply because if we decide that the matter should be dealt with, in whatever width, by this Tribunal I want it to get off to a running start. I do not want there to be any kind of delay between our handing down of the Determination and this matter, and proceedings, if they take place, in front of this Tribunal.

I do not want you to read anything into that. We are obviously anxiously going to consider the various courses that have been put before us over the last two days, and similarly, Mr. Turner, I do not want you to read anything into the fact that we are inviting Mr. Beard to formulate directions for the future conduct on the basis that we hear matters. We obviously

will consider whether remittal to Ofcom is not the appropriate course. So Mr. Herberg should not read what I have said as music to his ears because it really need not be.

MR. BEARD: We quite understand. Mr. Herberg is not safe, but we should get on in the meantime.

THE CHAIRMAN: Absolutely, because we are very aware from previous matters that the logistics of getting a hearing on, particularly with a number of parties, takes a great deal of time, and were we to take on the merits hearing of this dispute we would really want to get cracking.

MR. BEARD: Understood.

THE CHAIRMAN: And when I ask you to think about future directions I am thinking not merely your own response but also what would have to be said in reply and when a hearing could be put on at its soonest. So, I am asking you really to consider the whole course to a final determination of the matters, but entirely without prejudice to whatever we may say in our Ruling on this matter.

MR. BEARD: Yes.

THE CHAIRMAN: Anything else?

MR. TURNER: Just to clarify, you have given a series of possibilities. If it was the contract point alone, as I said in opening yesterday, we would obviously want BT's position to be clarified, and therefore the timetable should include necessary steps leading to a final hearing, and that is an example of how, on that scenario, we would build that in as one step. I assume that is what you, sir, had in mind going from here, from a decision that you make, ultimately to a final hearing on any of these bases.

Secondly, therefore, for the other bases you took a more limited approach to the contract and the Principle 3 practicability point, and third, the wider point including consumer detriment, to do it that way round. There, I am assuming that we will take it for the purpose of our discussion that the evidence and grounds that we have put forward should be thought of as part of the discussion.

THE CHAIRMAN: The assumption I would ask Mr. Beard to work from is that everything you are wanting to get in comes in.

MR. TURNER: Yes.

THE CHAIRMAN: Therefore, the reason I passed the baton onto Mr. Beard is because, in the first instance, it seems to me it is British Telecom that needs to do the hard thinking about how it responds.

MR. TURNER: Yes.

THE CHAIRMAN: Obviously, the amount of response depends upon the point. If it is simply the contractual points, these are relatively short legal points. But, at the other extreme, were we to say all of your points on Ground 2, Principle 2 were to come in, then Mr. Beard will have to consider to what extent he wanted to draw his Monte Carlo analysis or not, and that, I imagine is ----

MR. BEARD: I think I have probably already given the answer in relation to that. There would be comments on directions in relation to that, yes.

THE CHAIRMAN: You gave a very clear hint. I do not intend to hold you to it.

MR. BEARD: No, I am most grateful.

THE CHAIRMAN: But what I want the parties to do is to be proactive about that. Clearly, we may adopt an entirely different course in terms of what we admit. We may admit parts of what you say and not other parts, and that will, of course, affect the process. But I am asking Mr. Beard to assume work on those three bases.

MR. TURNER: Yes.

THE CHAIRMAN: If you could get an indicative timeframe to us in the course of the next week or so, that would be very helpful.

MR. TURNER: We will do that.

THE CHAIRMAN: But obviously, there will need to be some form of exchange with the other parties, because I recognise this is the proper course.

MR. TURNER: If they cannot reach agreement, we will just put in ----

THE CHAIRMAN: Put in all of what ----

MR. TURNER: We will pull it together and make sure different people's views are reflected in different colours/lines/fonts, or whatever.

THE CHAIRMAN: That is most helpful. I am very grateful to you all. We will obviously try and hand down a judgment as soon as we possibly can. Thank you all very much