IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1302/3/3/19

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 November 2019

Before:

THE HONOURABLE MRS JUSTICE FALK
(Chairman)
EAMONN DORAN
SIMON HOLMES

(Sitting as a Tribunal in England and Wales)

BETWEEN:

VIRGIN MEDIA LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

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A P P E A R AN C E S

Mr Robert Palmer QC and Mr Stefan Kuppen (instructed by Ashurst LLP) appeared on behalf of the Appellant

Mr Javan Herberg QC and Mr Tom Coates (instructed by Ofcom) appeared on behalf of the Respondent

Wednesday, 20 November 2019

(10.30 am)

Opening submissions by MR HERBERG

MR HERBERG: My Lady, members of the Tribunal, what I propose to do is to adopt in broad structure the same order of submissions as I took in our skeleton argument.

CHAIRMAN: Right.

MR HERBERG: So I will start by taking you back to the essential findings of Ofcom in the Decision itself, which underpin the Decision. I accept that that is mostly relevant to ground 3, it has possibly got some implications for ground 2 as well. I think it is helpful for the Tribunal to have in its mind from the outset some sort of points of emphasis. I will try not to duplicate too much, but I will take that as quickly as I can. Then I will shortly go to the decision-making process, the notification of the decision itself. I will then shortly deal with the legal framework and in particular the question for which I may have used the word "arid" but it has some significance for the burden of proof and standard of proof and the proper approach on this sort of appeal and then I will turn to the grounds and address them in turn, breaking down ground 1 into all the subsets.

Having seen yesterday how much my learned friend had to get through and how he had to compress it, I anticipate I am going to have the same issues and therefore at times I will move quickly or leave my skeleton argument as taken where I think I can do so having regard of what my learned friend concentrated on.

But the starting point really then is the essential findings in the Decision itself.

I address those in our skeleton at paragraphs 10 and following. Effectively, everything, a considerable amount at least, turns on Virgin's terms and conditions and in particular clause M13, that we don't need to go back to. For your note, you have the original, you were taken to it in the Decision. You have the original, if you wish to see it at any point, at the case bundles, the second case bundle, tab 68, page 868, but I am not going to go back to it now because the essential wording has been shown to you already.

Then what happened is that on 22 September 2016 Virgin reduced the duration of the initial commitment period from 18 to 12 months and at the same time changed its approach to pricing. Again, you have been shown how that worked and how those two interrelated. There is a helpful illustration of it, but again, just for your note, I will not go to it now, but there is a helpful table in the Decision itself. It is table 3.1 just under paragraph 3.14 of the Decision, which is page 86 of tab 3. That just gives illustrative examples of how the combination of the period being compressed and the pricing change taking place meant that effectively there should have been a reduction in early termination charges but there was not. That is common ground. It is just really a helpful of undertaking of how the problem arose, as it were.

The result is that customers were charged more than they should have been and in its analysis, I've broken that down into three categories of overcharge, more just for ease of analysis, more than the remaining charges, that is obviously the worst category on its own, more than the charges themselves, more than the remaining charges less VAT, and that was also wrong because VAT was not charged on early termination charges. So that also gave over-recovery compared to the contractual term. Or more than the remaining charges less VAT and less the cost savings, which Virgin was obliged to deduct, gained by

virtue of its contractual term in M13. That was the issue.

Now, the extent of the overcharging and the financial harm to consumers Ofcom found was significant and indeed found it was material, Decision 5.25 second sentence. I think it will be just helpful to take you back to the passages of the Decision which you no doubt have read and some of which you have been taken to, which really sets out in sum Ofcom's findings as to effects.

The first point, and this is Decision paragraph 5.25, page 107 of tab 3. This is the finding that the contravention was serious, and then there is a note in tab A that the consequence was that Virgin overcharged 81,994 customers who terminated their fixed term contracts and the total overcharge was the sum of 2.79 million, Decision 5.25A.

Incidentally, that 81,994 customers can be seen to be significant by reference to the total of 146,000 customers who were charged ETCs at all. In other words, as one can see from the Decision at paragraph 3.28, going back into the previous section, you can see there:

"Data from VM's review reveals that 146,706 customers were charged an ETC during the Relevant Period. Of these ... "

And then there is a percentage which is not marked as confidential but the very same percentage is marked as confidential in the table that follows below, so for ease of caution I will not refer to the percentage, but you see the percentage, those were charged an amount higher than the amount calculated under the new methodology.

CHAIRMAN: So you think that percentage is thought -- yes, it is assumed to be ...

MR HERBERG: It was 50 to 60 per cent in the non-confidential version, was the figure given, as you will see in the right-hand side. So, I mean, there are quite a lot of stray ends to the confidentiality, but I'll adopt a prudent course.

Going back to 5.25/5.26, the impact of the error and of the overcharging, in each month of the relevant period an average of, and you will see the figure which I've given my skeleton at paragraph 13.2, an average of that many customers were subject to an erroneous ETC rate card and would have been subject to unduly high ETCs if they switched.

So that is the pool of potentially disadvantaged customers. Of course, many of them might not have thought of switching at all, so would not have been actually disadvantaged, but that was the pool of customers who were potentially subject if they switched or indeed if they even thought about switching and they consulted the website.

Overall, about -- in 13.3, that figure which you have seen many times before -- customers were on a fixed term contract and for at least one month of the period were subject to an erroneous rate card and would have been subject to an unduly high ETC if they had switched. That is again paragraph 5.26.

Then Ofcom also drew attention to and relied on the average size of the overcharge. So it is not the case, we will come later to submissions about harm and it was suggested that Ofcom had not really gone on to consider if people were subject to high ETCs how long it would have lasted for, the days or the length, but what they did find was that the average overcharge was 34 -- I am just pausing, that is not a confidential figure -- £34, which was more than the monthly price of Virgin's cheapest triple play package at the material time, so over a month worth of subscriptions, and over 23,500 customers were overcharged more than £50. And 6,508 were overcharged more than £100, see the Decision at 5.30, which sets out those numbers.

Now, as you have already heard, Virgin's own econometric analysis provided by Charles River Associates, CRA, accepted ultimately, once they corrected their

mistaken figures in the first place, that somewhere in the region of the number of customers I give in paragraph 14 of my skeleton, a figure you have seen before, were in fact deterred from switching during the relevant period by an erroneous ETC rate. That, of course, is an estimate but that is the estimate they came to. This is all noted in the Decision at 5.32 to 5.33, where Ofcom addresses this and considers that this a material impact for the affected customers at the end of that passage.

Now, Virgin, of course, sought, both in the Charles River report itself and in submissions made to Ofcom and indeed to this Tribunal, sought to suggest that that was a small number compared to their large customer base. It was roundly criticised by my learned friend but we say without any proper basis whatsoever. First of all, it should be noted that there is no suggestion that Ofcom misunderstood the CRA evidence or misapplied it, it is just that they attributed a different significance to it than what Virgin say it ought to have given. But, secondly, the significance is, we say, absolutely justified, or at the very least it was open the Ofcom to attribute the significance which it gave, which is all I need in terms of defending the Decision in this Tribunal. Because it was right, we say, to focus on the disincentive effect on those customers who would have actually switched. This point is made in paragraph 5.33, that is the precise reasoning which Ofcom is relying on:

" ... the percentage of customers in fixed term contracts ... who would have been expected to switch if VM had set ETC's correctly in accordance with its terms and conditions."

Why, we ask rhetorically, should Ofcom have compared that number of disincentivised switchers to a much larger number of Virgin customers who, for quite separate reasons, were not disposed to switch at all. There was

a much larger pool of customers who did not even contemplate switching.

So the CRA's efforts to downplay the significance of what they themselves had found by comparing that number of customers, of disincentivised switchers, to much larger customer pools, Ofcom was entirely entitled and I would submit was right to reject. And, likewise, you will recall, I am not going to go back, in the interests of time, to the Charles River report and the way it was set out, you were taken to it quite fairly yesterday, but you will recall also in those paragraphs following the giving of that number there was also a reference to harm and the fact that it only delayed switching by [number] days on average and that was said to be something which disappeared, was not taken into account by Ofcom.

Well, the first point is that what was being looked at here is whether the overcharge has materially disincentivised switching. The question of what harm was caused by the disincentive is a rather different point. How much harm was caused, in some ways that is more relevant to penalty, unless the harm is completely de minimis, but it obviously wasn't de minimis, a delay of [number] days to switching is over a month and Ofcom, of course, did look at the degree of harm, for example I took you to the average overcharge figure of £34, which was just over the monthly price of the cheapest triple play package.

Finally on this point, the reliance on Ofcom's own internal analysis at tab 14 is also, we say, unpersuasive, a lot of focus was placed on the word "modest", the modest impact. Of course, first of all, modest can be material, so the fact that it is modest does not in any sense undermine the reasoning and taking this point into account and finding it to be material, which is a crucial point. But, secondly, modest was obviously expressed in the context or the partial

context of the much wider figures, the wider subsection of customers which the CRA had referred to in its report in, as it were, seeking to minimise the impact of its figure, and it is important to remember that that was a discussion document for Ofcom before any decision had been reached and I do draw attention to one important part right at the end of that report. Can I just take you to it very shortly. If you could kindly take the case file bundles, tab 14, VM4-1, tab 14, that is the internal document assessment of the CRA report. It does talk right at the end, paragraph 28:

"At the same time, we should recognise that analysis takes a relatively narrow view of consumer harm ... that there are other sources of harm from excessive ETCs ... and just one of a number of factors motivating the penalty."

Then this:

"We should also recognise that the impact on the overall customer switching is modest, in part, because the underlying switching rate is low."

This is the important bit, they are saying: yes, it is modest, but it is modest in part because not many people switch. So if you are comparing it to a great big customer base, it is bound to be a very low percentage because most people are not going to be thinking about switching at all and therefore obviously are not going to be disincentivised from switching by incorrect figures on the website.

"The deterrent effect of excessive ETCs would have been greater on a more responsive customer base, and [these are the important words] we should consider whether, and to what extent, VM's penalty should be driven by the underlying responsiveness of its customer base."

Now, that last sentence is an invitation to think further about, effectively, where the constituents should be set. My learned friend talked in, if I can put it this way,

slightly derogatory terms of taking a subset of a subset to get a figure of a tenth, but it was absolutely right to be thinking about what is the appropriate and fair subset to take, and we say that having found that overall the figures looked modest, that was an invitation and the right invitation for the decision maker to be thinking further about the best way to think about how that figure for the actual number of customers disincentivised should be viewed and as to whether it was material.

The approach ultimately taken in the Decision, which was that in 5.33 was, we say, I would submit, absolutely right and the best way of viewing the materiality of the disincentivisation caused by the incorrect figures, which is all I need to submit, it would at least be a tenable and proper approach to take and the conclusion that there therefore was a material impact for affected customers was entirely proper and unimpeachable.

So we say that the Ofcom internal analysis does not take the challenge further forward in any way at all.

Now, turning to the reasons for the unduly high ETCs, the report, the Decision recognised that they were the result of an error rather than being deliberate. But what the decision maker found striking was that it was allowed to happen in the first place and that it continued for so long without correction. These are important parts of the Decision because they go very directly and significantly to seriousness and that impacts both on the penalty in its own terms, that it was appropriate to impose, and it would also impact in due course on the comparison with the EE case, which is a feature of the last part of my learned friend's submissions.

Now, Virgin itself noted that changes to the ETC rates formed part of an internal governance process which is undertaken when any changes are made to

subscription pricing and in the information request they set out in some detail how that internal governance process worked. It might be helpful just to see shortly what they themselves said. It is VM4, so the second case bundle, at tab 35 at page 732. One will see there at page 732, it is page 8 of the Virgin submission to Ofcom, you will see in the third paragraph down:

"Changes to EDF rates form part of the internal governance process which is undertaken any changes are made to subscription pricing. The relevant governance process is as follows."

I won't read those, but you will see the multi-layered process that the changes went through, and including members of Virgin's executive committee, and in particular the individuals whom I have set out in paragraph 15 of the skeleton, but whose positions I will not repeat.

Ofcom's position was that if that system had been functioning correctly, the changes should have been identified and rectified in the very first place before they were made.

Despite this multi-levelled governance process that you have seen, no-one spotted that changing the initial commitment period and the associated pricing would require corresponding changes to the rate card and, as Ofcom found, Decision paragraph 5.39 to 40, this would not have required any complicated analysis:

"A straightforward comparison of monthly subscription price with the applicable ETC would have flagged concerns sufficient to merit further investigation."

Just to anticipate, we will be saying that the obviousness of this overpricing was in some cases more serious than the EE case because EE, and this is a point that perhaps has not been explained to you so far, I will come back to it later, EE did not have any equivalent of M13, it did not have a contractual condition

saying, "We will not charge more than, effectively, revenue less costs". So the case against EE was not brought on the basis that they had not complied with their own contractual conditions; it was brought on the rather more general fairness disproportionality basis, which was an approach adopted in the notification but not, I will say, in the Decision in this case. So there was an important difference between the way the two penalties are set. But the relevance at this stage of the argument is simply that it would have been much more obvious, we say, to Virgin that they were not complying with their own contractual conditions than it potentially was to EE, who were simply charging what Ofcom found was a disproportionately high amount. I will come back to the detail of that later on.

Now, as you have already heard, Virgin's failure to spot the need to reduce to ETCs back in September 2016 was compounded by its missing three further opportunities to correct the error, and these are all important for seriousness, I cannot go through the full detail as set out in the Decision, but I do propose to show you the paragraphs and make a few comments on them.

The first is addressed in the Decision at paragraphs 5.47 to 5.50 in the Decision at tab 3. This occurred because Virgin reviewed and indeed changed its prices in November 2016, so some two months after the error had begun, at which point Ofcom found the overcharging could and should have been identified and rectified since those changes went through Virgin's multi-staged governance process. Instead, as those paragraphs set out, despite the fact that Virgin reduced the prices of -- there is an error here in my skeleton at paragraph 17, it should say reduced the prices of 41 per cent of its headline packages, not it reduced the prices of its headline packages by 41 per cent. It is the number of packages rather than the degree of reduction which is what

is found by Ofcom. So despite the fact that Virgin reduced the prices of 41 per cent of its headline packages, so that one would expect a reduction in headline package to potentially translate or at least to look about whether that -- you want to look at whether that translated through to a reduction in ETCs, but despite that it either increased ETC rates or kept them at the same level, and the divergences between prices and ETC rates were not identified.

Then, secondly, members of Virgin's pricing team realised that Virgin was overcharging customers by charging erroneous prices in February 2017. This is addressed in paragraphs 5.51 to 5.56 of the Decision. They also realised that this potentially contravened Ofcom's regulatory rules.

Now, I am not going to take you back to the original emails. All the references are given in paragraph 17.2 of the skeleton. I think we invited the Tribunal to read them, I would certainly do so. But they realised that there was a concern they might be charging more than the bundle price, breaks Ofcom regulation, does not make much sense but did not take any action. This is all accepted and common ground because they realised that consumers would be unlikely to complain and the error could be resolved, of course only prospectively, it could not compensate those people who had already suffered, but it could be resolved, prospectively only, by virtue of a forthcoming price review project which was going to be considering price changes for implementation eight months later in November 2017.

That was going to be the matter on review and then pricing changes.

You will see the offending email quoted later in that paragraph, again:

I think it is unlikely to create an immediate issue (a customer is unlikely to complain as they would be looking at the inc. VAT price) but we should resolve this through the ..."

The word "next" has crept into my quote, which when I looked back it's not in the Decision, so if you, in my skeleton, delete the word next:

" ... through the price rise project."

Now, Ofcom in paragraph 5.55, after addressing this, regarded with particular seriousness the evidence that the team within Virgin that is responsible for proposing pricing in ETC changes, was aware but took no action for those reasons: customers would not complain and it could be addressed months later.

I will just flag as we go past that there is an example of Ofcom flagging and indicating the weight which it has given to a particular factor. It is saying this factor is one of particular seriousness. That will go into my submissions as to the extent to which Ofcom did in fact in practice give some sort of flag of indications of which factors it attributed particular weight to. I am obviously anticipating submissions I will need to make later on today on that issue.

Then the third opportunity, a third failed opportunity is Project Matterhorn, the internal review of prices in May to June 2017, and that is addressed in the Decision in some detail between paragraphs 5.57 and 5.63. That was a pricing project overseen into high level by the person specified in my skeleton in paragraph 17.3, but despite the involvement of individuals from the pricing team who knew about the February events, indeed it's the same people, and that some ETCs were set too high, Virgin did not on that occasion correct its ETCs as part of the process, but appears to have relied on price rises which were planned for November 2017, ie some five or six months later to resolve the issue. Again, Ofcom flagged this in paragraph 5.63 as a serious matter, for the reasons set out in 5.55 in relation to the February opportunity. So they again flagged this as something they placed particular

weight on.

Now, there was then a claim from Virgin that: well, okay, we did not spot it, we did not take opportunities to spot this, but once we of our own volition, once Virgin of its own initiative, as it were, became aware of the issue in early May 2017, we did take immediate action of our own initiative to rectify the problem.

Now, Ofcom considered that claim very carefully in the Decision between paragraphs 5.64 all the way through to 5.74. They gave detailed consideration to it, in particular they considered an email which Virgin relied on, which is referred to at paragraph 5.65, which referred to the initial steps that needed to be taken to identify the extent to which ETCs were being overcharged, but it then went very carefully through the contemporaneous evidence which Virgin had produced in response to an information request and found that it did not support Virgin's assertion that it took immediate clear action to rectify the issue. The material did not acknowledge that Virgin was charging ETCs in excess of monthly subscription prices nor suggest that reductions might be required, see the Decision 5.67 to 5.68. Contrary to what Virgin had claimed, Ofcom concluded that Virgin had not taken timely or effective action until after Ofcom had opened its own investigation on 27 June 2017. It looks at what happened on that day and it points to the marked difference between Virgin's internal correspondence before and after that point, see the Decision particularly at paragraph 5.70, really, all the way through to 5.73, and we give references in our skeleton to the actual correspondence, which you have in the bundle, which underlies those findings of Ofcom.

So this was a significant point. Ofcom found, and we say it cannot seriously be challenged now, that even after Virgin had launched its investigation and

Virgin was then making submissions, Virgin was still wrongly claiming that it had identified the issue and had adequately dealt with it immediately after that and Ofcom found that simply was not right, that effectively they had sat back until Ofcom opened an investigation, at which point they sprung into action.

Now, that is all I wanted to say about the facts themselves at this stage.

Can I then come to the process leading to Ofcom's Decision. Again, you have been taken quite extensively to that process and I hope I can be forgiven for keeping it short on that front.

Now, the notification was issued on 21 October 2018 and it provisionally decided that Virgin had breached both GC 9.3 and 9.2(j). If I can just shortly -- well, I do not think I do need to turn to that. I think paragraphs 21 and 22 of my skeleton effectively set out the findings and you have already been taken to the relevant paragraphs, so I am not going to take up time by repeating them. But you see that we submit that it is clear that the primary breach which Ofcom had provisionally found unoccupied in the first place and contained the great majority of its analysis is the breach of 9.3, which is what turned into the final breach of 9.3. We give all the references to the paragraphs dealing with that section in paragraph 21 of our skeleton.

Then there was the home movers allegation, which we say occupied second place and in a smaller amount of Ofcom's analysis. I will come back in my submissions on ground 3 to what one can glean apart from simply the size and positioning and amount of time spent as to the seriousness of the home movers allegation at that stage, but we say that merely from the way that the case is presented in the notification it is quite clear what is the headline issue, what is the primary issue as far as Ofcom is concerned, but there are more specific points than that, that I will come to later.

Ofcom also provisionally found that Virgin had breached 9.2(j). That is my skeleton paragraph 23. Then in section 5, it set out its views on penalty, in great detail, in great granularity, and we summarise that in paragraph 24 of our skeleton and I am not going to go back over the paragraphs but the relevant paragraphs in section 5 set out in great detail Ofcom's thinking as to the penalty it was minded to impose and of course the total is the figure given at the end of paragraph 24 of my skeleton, which is significantly higher than the final figure which finds its way into the Decision, the figure of 7 million.

Now, then one comes to the Decision itself, which was issued on 16 November 2018, following Virgin's written and oral representations in considerable detail.

Now, the high level summary of the Decision is set out at paragraph 27 of our skeleton argument. I am not going to repeat that there, you have already been taken through the structure very fairly by my learned friend and it is there in any event. I had been going to leave the reasoning of the Decision to my argument on the various subheads of ground 1, but I think in the light of yesterday's submissions I do need to make a small number of points about what was and was not part of the Decision itself, because with respect to my learned friend I do submit there was a degree of confusion about the Decision in his submissions and in particular as to the basis on which Ofcom in the Decision found that the early termination charges were not justified. Because on the one hand my learned friend pointed to paragraphs 4.5 to 4.14 of the notifiction, you will remember those paragraphs, and he suggested that Ofcom had maintained that reasoning in the Decision. That was the reasoning, you will recall, that despite the carve-out of GC 9.3, ETCs which are disproportionate to legitimate recoveries of prices less cost are potentially

illegitimate. I think that was labelled at one point in the argument the fairness ground. It is a combination, perhaps, of fairness and proportionality, but if one is putting it crudely and attaching a label to it, which it is quite convenient to, that was described as, I think by my Lady, as the fairness ground. That is embodied in the reasoning at paragraphs 4.5 to 4.14 of the notification. At one point my learned friend made the submission that that was effectively continued in and embodied in the Decision itself. But on the other hand he also repeatedly made the point that Ofcom had abandoned an attempt to run any argument other than a narrow contractual argument, relying on Virgin's breach of its M13 condition, which he criticised as purely duplicate of contractual remedies.

Those submissions seem to me to be contradictory but whether they are or not, the true position, we submit, is as follows: firstly, the reasoning in paragraphs 4.5 to 4.14 of the notification was not maintained in the Decision. So the fairness reasoning formed no part of the ultimate Decision. When my learned friend was asked where it appeared, because of course those paragraphs themselves are conspicuously absent in the Decision, my learned friend pointed to paragraphs 3.19 to 3.20 of the Decision. Those paragraphs are under the heading "Assessment of Virgin's ETCs under GC 9.3". Those paragraphs are doing no more than assessing what Virgin had in fact charged by reference to the three thresholds, the three thresholds I have already mentioned of less total charges, less total charges minus VAT and less total charges minus VAT and costs. That analysis is relevant to gain, it is relevant to harm, because those are all quantum as to the amount by which Virgin exceeded the amount that it should have charged under condition M13. Those paragraphs simply don't address a finding on why there was a breach

of GC 9.3 at all. The Decision is rather squarely based on the fact that by reference to Virgin's clause M13 customers were charged more than they could legitimately expect to be charged. Although it is not based on that alone, I will come back to that in a moment, it is a not a pure contract reasoning, but it is obviously based on that, it's based on a contractual entitlement.

That is clear, we say, from the Decision at paragraphs 3.39 to 40. I am not going to go through the detail of all of these paragraphs. But for the Tribunal's note, the crucial paragraphs, these are the paragraphs after all under what is headed to be Ofcom's Decision, 3.39 to 3.40, 3.50 to 3.52, and 3.54 to 3.55. 3.55 is the "in any event" paragraph that was put to my learned friend by the Tribunal yesterday.

CHAIRMAN: Yes.

MR HERBERG: In any event is crucial because it is saying in any event what we are deciding here is not fairness, we are deciding it on the contractual basis.

Now, I said it decided on contract but not contract alone, because, as I will submit a little later when I get onto the grounds, integral to Ofcom's Decision was that there was a disincentive effect on switching resulting from the incorrect charges. That was found not merely at an abstract a priori level, there's a sort it's bleeding obvious that higher charges would disincentive some people, although I do note that my learned friend himself rightly said yesterday morning, it is on the transcript page 16, line 7, any charge for porting can be expected to disincentive switching. We respectfully agree. So there was an a priori position that there was highly likely to be a disincentivising effect. But that was not what was principally relied on; they relied at the level of specific findings based on an acceptance of the CRA analysis as to the one-tenth

impact on switching levels: see the Decision at paragraph at 3.67 making this specific point. It does not need to be a priori:

"In any event, analysis commissioned by VM shows that ... "

And then the familiar reasoning that we have already looked at.

So that is the basis of the Decision.

Can I emphasise one further point, particularly for clarity. The fact that the fairness reasoning, which had appeared in the notification, was not adopted or relied on in the Decision should not be taken to mean that Ofcom had abandoned it as bad or defective reasoning. That can be seen most obviously from the EE decision, which I am not going to go to at this stage, you will recall that the non-confidential version is in tab 21 of the first case bundle. But the EE decision, in that case there was no equivalent of the contractual term for Ofcom to hang the case on. There was no contractual equivalent of term M13. No provision which EE had therefore breached in making the ETC charges which it did. Instead, the finding in that case was that, taking into account the discounts which EE had in fact offered its customers, EE's ETCs had gone above the level of full recovery of revenues, less charges, and so they were not proportionate or fair. So that case did embody the fairness reasoning, which was not persisted on in this Decision.

The point is, effectively, there was no need to go down that route in the Virgin Decision because as the case was considered and decided by the decision maker, there was a much simpler route; it was contrary to customer's expectation based on their contractual entitlement and there was an material disincentive effect on switching, established on the evidence.

Now, as to penalty, we analyse the penalty part of the Decision. Obviously that is in section 5 of the Decision at paragraph 28 of our skeleton argument. Ofcom

said it was in principle appropriate to impose a penalty on the basis that they were serious breaches and that deterrents for both Virgin and the wider industry was important. The issue of deterrence raises an argument, just to highlight where I will be going on in that in due course, there was a submission made that deterrence cannot really have been relevant because Virgin's senior manager management were not knowingly deliberately setting too high initial charges, and so there is no need to deter them because it was not a deliberate decision.

That, we say, wholly misses the point of deterrence in most cases and indeed in this case. What was being deterred, both for Virgin for the future and for the wider industry, what was being incentivised by imposing a substantial penalty was, effectively, allowing a system to be in place which did not properly scrutinise and pick up such charges, despite it being, as Ofcom had found, a relatively obvious point, such overcharges. Ofcom found it was relatively obvious and what was needed was the incentivisation for, effectively, senior management to take it seriously and not to allow a system which would just allow these things to slip through the net.

Now, Ofcom, in relation to deciding on penalty there is a detailed and structured decision making in section 5 of the Decision. It considered relevant turnover, which was relevant for the purpose of gauging what penalty would act as a deterrent, and also, obviously, turnover also serves as the maximum which can be fined, so it can only be 10 per cent of turnover and that maximum is identified at the end of paragraph 5.22, a figure way, way higher, obviously many multiples higher than the sort of penalty that was being imposed, so far under the maximum.

Ofcom noted the seriousness and the consumer harm caused by the contraventions,

paragraph 5.35 of the Decision. Really, it's 5.24 all the way through to 5.34, I am not going to go over those matters again. At paragraph 35, it also noted the wider harm that could have resulted from the contravention by reason of, for example, customers' negative perceptions of the switching process, the wider harm point, paragraph 5.34. It considered in detail the evidence that Virgin had failed to prevent the contraventions and had missed the opportunities to correct them. 5.37 all the way through to 5.79. At 5.79, it gave credit for Virgin's remedy of the contraventions, the actions taken out to secure Virgin's ongoing compliance with GC 9, the Decision expressly says it gives weight to that.

It considered whether Virgin had made a gain from a contravention of GC 9.3, it noted had Virgin had overcharged customers, which would have resulted in a financial gain of nearly 2.8 million, but for the fact that Virgin had subsequently reimbursed nearly all the affected customers.

Now, again, there was a submission made that: well, we remedied practically all of the customers and therefore there was effectively no gain and Ofcom should not have considered it a gain. With respect, that is entirely wrong. They are quite separate issues as to what gain can be attributed to the misconduct, which is an important metric by which one assesses seriousness. Quite separate from that is the question of remediation and credit can be given by way of mitigation for having remedied all your customers so that there is ultimately no loss to the customers, but that does not in the least mean that you just pay your way, effectively, out of the seriousness of the breach at all. It is familiar for many regulators, I will make this submission in more detail later, I don't want to repeat, many regulators take as an important starting point in terms of assessing seriousness of contravention what flowed from it,

what loss to the customers, what gain to the institution?

There was also consideration of the breach of GC 9.2(j) at 5.81 to 91, and Virgin's representations on that issue, and there was a conclusion there that that breach was also serious and harmful to consumers, paragraph 5.91, notwithstanding Virgin's representations to the contrary. But credit was given for Virgin having remedied that contravention within a reasonable time frame, see paragraph 5.93.

Ofcom also took into account that Virgin had no history of contraventions. 5.94, considered three precedent penalty decisions as providing some assistance. It lists them, I will not go through the detail, 5.96 to 5.97. It distinguished them on the basis that in Virgin's case the level of financial harm and the number of customers affected were much greater than all those previous three cases.

It did not address the EE case. I will have to come on to that. Although the decisions were published on the same day, I will be taking you to Mr Leathley's evidence, which makes it clear that at the time he was finalising his decision, that decision had not been finalised. But it does not follow from that that there was no cross-check between the two decisions, because one also needs to look at what happened to the EE decision. I will come on to that later.

Ofcom also considered the extent to which Virgin had cooperated with the investigation and although it concluded that it had in general provided timely responses, there were significant errors in its responses, which used up time and resource in the investigation. That is 5.98 to 5.99. I will come back to that in due course, because specific criticism is made of that reasoning as part of the challenge to penalty. But Ofcom then concluded at 5.100 that:

"Considering all of the above factors in the round, we have decided to impose on VM

a penalty of £7m in respect [and then you do get some weighting] principally of its contravention of GC 9.3 but also incorporating its contravention of 9.2(j)."

So you've got some weight between the two different heads of charge, but you have a combined penalty in respect of both breaches.

I will in due course be making submissions that that was perfectly legitimate and lawful for Ofcom to adopt that approach.

My Lady, can I then come on to the legal framework in relation to the Decision. Now, the regulatory framework has been set out in our defence at paragraphs 6 to 23 and my learned friend took you very helpfully yesterday morning through almost all of that material, I am not going to traverse that ground again. So I am not going to address the regulatory framework. I will obviously come back to it in the context of my submissions on the grounds but, with a little reluctance, it is appropriate to make short submissions on the standard of review. I was not suggesting that it was irrelevant; it is clearly relevant to some extent at least to ground 3. I accept my learned friend's point to that effect. I think if I described it as arid, it was more because lawyers in this field are perhaps addicted to making submissions as to the precise standard of review. I have yet to see a case where it actually seemed to translate through to any difference in the finding at the end of the day. Nevertheless, it is an important matter for Ofcom, the standard is rightly set out. In response to my learned friend's submissions, I need to make short response submission in relation to what he said.

My learned friend took you to Article 4 of the Framework Directive, applicable in this case, it is accepted, the merits of the case must be duly taken into account, you will recall that wording. I don't need to go back to that. He also took you

to the current domestic incarnation of the standard of review applicable to the Tribunal in section 194A of the Act, and again I don't need to go back to that. You will recall that it directed that you must decide the appeal by applying the same principles as on judicial review, effectively.

Now, what he did not take you to was the provision which section 194A replaced. That is relevant because it was the provision that was applicable in various of the cases that he took you to. That is section 195 of the Competition Act, which is, I trust, in the authorities bundle. No, it may not be, it may be that the old version has been replaced in the authorities bundle, I am just going to read it to you but, for reference, for example, it in the BT v Ofcom CAT decision, which is at authorities bundle two, second authorities bundle at tab 34, paragraph 62 on page 27.

But, in short, it is said the Tribunal shall decide the appeal, this is any appeal under section 192, on the merits, and by reference to the grounds of appeal set out in the Notice of Appeal.

So the old version said in terms the Tribunal shall decide the appeal on the merits. That was the instruction to the Tribunal. That's been now replaced by an instruction that the Tribunal should apply judicial review principles.

Now, we, of course, fully accept that the instruction to apply it by judicial review principles has to be read in a way that is compliant with Article 4 of the Framework Directive, so the merits of the case must be duly taken into account. Duly taken into account. In other words, taken into account so far as appropriate.

Now, my learned friend, I think, suggested that the change of framework is really one of form rather than substance, but our submission is that these changes do mean that the Tribunal should start by applying judicial review principles,

which are of themselves, as has been held, flexible enough to incorporate a statutory instruction to take due account of the merits, where appropriate.

So, in effect, what the Tribunal should now do is exactly what the High Court has always done in judicial reviews, in telecoms judicial reviews, which were governed by Article 4 of the Framework Directive, for example challenging Ofcom decisions which fell outside the scope of 192. Those were judicial reviews, so obviously one applied judicial review principles, but Article 4 of the Framework Directive applied in telecoms cases and therefore the merits always had to be duly taken into account even before the law changed, and that is the approach which was encapsulated by Mr Justice Green in the Hutchison decision that we do commend as a recent and detailed exposition of the correct approach.

Can I shortly take you to that case. It is the third authorities bundle, if you kindly take up the third authorities bundle, tab 37. Detailed decision, it is a decision of 20 December 2017. I am not going to take you to detail, can I take you straight to paragraph 45 of the decision in the first place:

"Mr Fordham QC (for Vodafone) and Ms Rose QC (for Ofcom) submitted that modern principles of judicial review (and in particular the test of proportionality) were increasingly flexible and capable of incorporating any statutory instruction to take account of merits. There was hence no need to create a hybrid category of judicial supervision. In large measure I agree. The statutory instruction to take into account the merits can be factored into the traditional approach. It can for instance be used as a sanity check on the end result of the analysis ..."

So that is one use of it.

" ... and/or it can feed into the assessment of the materiality of any breach of public

law principles which is, prima facie, found. If necessary, it can lead the court simply to apply a somewhat heightened intensity of review. In BSB the CAT queried whether it was proper, in a merits appeal, to talk in terms of the decision maker's margin of appreciation (see paragraph [37] above). In my view it is a relevant consideration, but the Court's supervisory task includes modulating the intensity of the review in line with all surrounding factors, such as those described above."

We say that is a helpful general indication of the same position that the Tribunal finds itself in in CAT appeals under section 192.

My learned friend took the Tribunal to Lord Sumption's comment in the Supreme Court in the 08 case. I am not going to go back to that at tab 32. All Lord Sumption said there was that Article 4 meant that an appeal was something more than a JR, meaning a traditional JR. That is uncontroversial. It's a JR plus the statutory instruction the take due account of the merits.

Now, as to the features which should modulate that intensity of the review, Mr Justice Green in the Hutchison case, again I am not going to go through all of the detail of it, but it has a very helpful analysis, a whole number of points, the conclusions that he adopts as to how to approach the claims, starting at paragraph 40 of his decision. They include the nature of the decision, the ground of challenge, and the nature of the evidence tendered. You will see in relation to the first factor, at paragraph 42, the nature of the decision, he referred to a decision which:

" ... might require the decision maker to take into account a very wide range of facts or predictions about facts which may themselves be characterised by uncertainty leading to the exercise of a judgment call involving the balancing of many conflicting and possibly ephemeral considerations."

Now, I hasten to say, because I am sure my learned friend will make this point, that we do not say that the Decision in this case, the case under challenge, is analogous in all ways to the decision made in the Hutchison case. We agree with my learned friend that that was a decision which was about the design of auction rules and the challenge involved many predictions of what might happened in the future, and it sat, if one can put it this way, at the extreme end of the uncertainty scale. So that was a case which was at the extreme end, taking into account the nature of the decision, the grounds of challenge, the nature of the evidence tendered, for having a modulatedly low assessment of the merits, if I can put it that way. A wider margin of discretion, the widest possible margin of discretion to Ofcom's decision maker in that case. I am not suggesting that precisely the same approach applies here but nevertheless we do say that two elements of our Decision, which my learned friend challenges on the merits here, in other words the decision on penalty, and indeed apparently the impact on switching was material, from its submissions, both of those were ultimately judgment calls and discretionary matters.

A penalty decision, in particular, involves the weighing of many competing factors and such a kind of decision does call for a less intense review, and I will later take the Tribunal, in the context of ground 3, to some of the decisions expressly addressing how to look at penalty, how to look at proportionality. They all do stress very much you look at it in the round and not with an intense form of merit review. So we certainly disagree with Virgin to the extent that they suggest that there is a particularly high intensity of review in this case.

As to the specific principles which we say apply, we set out at paragraph 3.1 of our

skeleton argument a number of propositions at 3.1, 1 to 4, which I am not going to go to in detail. The fact it is not a duplicate regulator, should only intervene if there is something materially wrong, that may be difficult where all that is impugned is a value judgment and due weight must be given to Ofcom's status as a specialist regulator. None of these points are going to decide this case but they are, we say, the framework and background by which you should approach it.

In particular, we would encourage the court to be cautious in the reference to the 08 preliminary issues case in the Court of Appeal. I will not go back to it, but it is tab 22 of the second volume of authorities and the comments of Lord Justice Toulson, to which you were taken yesterday. That was, of course, a case under the old statutory language, but it was also, most importantly, a case concerned with whether or not BT was entitled to adduce fresh evidence at the appeal stage and Toulson LJ was effectively saying: well, the appeal's on the merits, the CAT must be entitled to consider fresh evidence, but obviously that issue is not live here and we say that there is not too much that can be taken from that decision.

Finally on this issue, it may be helpful at this stage to show you a very recent decision of the Competition Appeal Tribunal of last week, a decision of 12 November, which is potentially helpful, particularly in the penalty context, but it is also relevant for approach. It involves the Tribunal upholding a penalty on Royal Mail which was imposed for infringement of the Chapter II prohibition: abuse of a dominant position. That is in the bundle in bundle 3 of the authorities at tab 37A, I hope. I think that is one that was switched around yesterday by the Tribunal to find its correct home.

CHAIRMAN: Yes.

MR HERBERG: You have only got extracts from it, if I can describe it, it is rather a monster decision in terms of its overall length and there's only extracts in relation to penalty, which starts on page 218, internal numbering. Now, this was a case which was, of course, I should say, subject to separate penalty guidelines, which I will come on to, they were not subject to the same guidelines as were applicable in this case, it is a staged approach, but it has some relevance; if anything, the approach in Competition Act penalty cases is generally more stringent, more intense review than in section 192 statutory appeals. But if one can go to page 806, which is entitled "Our overall view of penalty". This follows, I should say, an analysis of the stepped penalty approach which is mandated in competition cases, which I will come on to, but this is then, as it were, stepping back, and at 806 the Tribunal, chaired by Mr Freeman, said this:

"As established by the jurisprudence of the Tribunal, the other part of our task having assessed the steps taken by Ofcom to compute the penalty, is to look at the matter 'in the round' ..."

And I do emphasise the words "look at it in the round" because that is precisely what Ofcom said they were doing in this case, as you have already seen, and what we say is the correct approach which you should be looking at it in.

"... look at in the matter 'in the round' and to see whether we think the penalty is appropriate in all the circumstances of the case. Many of the factors that bear on the consideration of a proportionality reduction are equally relevant here."

Proportionality reduction was one of the stages before one gets to this in the round stage.

"We have to bear in mind that Royal Mail, although it is a large and substantial group, has not always enjoyed a strong financial position. Nevertheless, the

penalty does not look disproportionate to its current revenues and profitability. We have not accepted Royal Mail's view that the infringement was novel ... "

"808. In the circumstances we also take the view that a substantial penalty is justified. We have no reason to think that this is a case where the figure decided on by Ofcom is wrong and we see no reason to alter it.

"809. We note, however, that if we did, we would in effect be substituting our own reduction for proportionality for that of Ofcom. Given that we have not been inclined to disagree with the way in which Ofcom has applied the Penalty Guidance in relation to Steps 1-3, the only scope for adjustment would be the very substantial reduction over 80%, made by Ofcom under Step 4. As proportionality assessments are by their nature subjective and discretionary, we would consider this an area better reserved for the regulator's margin of discretion, and not one in which we would interfere unless we were clear, as we are not, that the decision on the amount of penalty was wrong."

Now, every case depends on its merits, and this is a case where there had been a stepped approach before you get to this stage but the important point is that there is no stepped approach in a case such as this and that approach to the overall view of the penalty is one which we say is in line with an approach which this court should adopt. But that is not the only exercise in relation to penalty. I am not saying that the Tribunal has to be entirely abstentionist in relation to penalty. I will develop this a little later on but my submission will be that the Tribunal, effectively, looks at this in two-ways, looks at a penalty in two-ways. Firstly, it looks at whether any of the specific factors to which Ofcom has placed weight seem to it to be improper, wrong, possibly even wrong on the merits, and also whether Ofcom has omitted any factors, not referred to any factors which seem to the Tribunal to be relevant as a matter

of law or as a matter of even material fact if it is obvious.

Obviously, if Ofcom has committed an error of that sort, then the Tribunal may, I emphasise may because it may decide that overall the penalty is nevertheless right, but it may then feel it is necessary to, effectively, quash and remit on the basis that there is a material factor that Ofcom either did or did not wrongly take into account and needs to be reconsidered. That is a possible approach in that eventuality. Although the Tribunal will also, of course, carefully consider whether that figure, that correction of that error would actually make a significant difference potentially to the overall result.

So the first stage is looking at all the factors and assessing whether something is wrong with a penalty for that reason. Then the second part of the approach, we would suggest, is very much like the overall view of penalty adopted by the Tribunal in the Royal Mail case last week, which is the overall look at whether there seems to be something wrong with it, either from a proportionality aspect or otherwise, in terms of the total amount.

CHAIRMAN: The first part of that exercise that you have described is very similar to what you might think is a classic judicial review approach: did the decision maker take into account all the relevant factors?

MR HERBERG: It is.

CHAIRMAN: Did he have regard to something that he shouldn't in fact have had regard to? Is it an oversimplification to say that it is the second part of your process that introduces the merits?

MR HERBERG: I think it may be an oversimplification, with respect, my Lady, because at the first stage, when the court is considering relevant considerations, in a straight JR case, a non-modulated judicial review case, the court would only consider whether the considerations are required by law

to be taken into account. I would accept that in a modulated approach, it would be open to the Tribunal to say, "We just think Ofcom got this wrong as a matter of judgment in not taking this factor into account or in taking this factor into account". So it can go a little further, a little further into deciding what is a relevant or not a relevant consideration if it thinks it is really clear than the court might in traditional judicial review terms, in other words it can at least put its foot into merits issues even within the judicial review formulation when it is deciding what is and what is not a relevant consideration.

We don't say that in doing that, we hasten to add, before someone tells me off behind me, we don't say that the Tribunal should be simply substituting its view as to what is relevant or irrelevant of Ofcom's. It should only adopt that approach if it really thinks it is something which is materially or obviously wrong. But there is that.

CHAIRMAN: Yes, getting something material wrong, I think is the language, the circumstances when we should intervene. I don't think that is disputed.

MR HERBERG: No. I think that is right. So I think that that is the approach. Then obviously at stage two, then it is the overall scrutiny and can bring into account something which derives from the merits. But at both those stages, what is clear is that there is a margin of discretion, and that the Tribunal will be slow, absent something really being clearly wrong, either out of line at the second stage or wrong as a factor at the first stage, before it intervenes.

Madam, I am then coming on to ground 1. I don't know if that is a convenient moment --

CHAIRMAN: I think it is.

MR HERBERG: -- for our break?

(11.45 am)

(A short break)

(12.00 pm)

MR HERBERG: Madam, can I then turn to ground 1A of the Notice of Appeal. That is obviously principally concerned with the submission that general condition 9.3 does not regulate the level of ETCs at all, because of the carve-out in GC 9.3, the carve-out without prejudice to any commitment period. But we have also dealt under that same heading, as we explain in paragraph 32 of our skeleton, with other related submissions which are made in my learned friend's skeleton in relation to ground 1A. That includes the point that an erroneously calculated ETC does not per se act as a disincentive and also the point that GC 9.3 only applies to conditions and procedures for termination and not, it is said, of failure to follow a procedural condition.

So I will address each of those arguments in turn underground 1A.

But first we say on the first point, Virgin is simply wrong to suggest that ETCs fall outside the scope of 9.3 by virtue of the carve-out. The proper interpretation of the carve-out is not that it refers to the initial commitment period and any conditions and procedures relating thereto; rather, the effect of the carve-out is limited to permitting CPs to impose an initial commitment period at all on end users, which would otherwise be prohibited by GC 9.3 as a self-evident disincentive to switching. In other words, the carve-out is effectively saying it is without prejudice to the ability to have a minimum contractual period. Subject to that, the Directive said Member States must ensure the conditions and procedures don't disincentivise switching and GC 9.3 carries out that task.

So it follows, in our submission, from this that an ETC is in principle permissible because of the carve-out, in so far as an initial commitment period is in

principle permissible, but it does not follow that any ETC, any ETC which might be dreamed up by a provider, or other condition indeed, is permissible, or that GC 9.3 has no application to any such ETCs.

Now, we say there are a number of different matters, a number of different considerations which support that interpretation which I have just set out to the Tribunal. The first point is that recital 47 to the Citizens' Rights Directive amending the Universal Service Directive is helpful to that conclusion, it is not determinative but it is expressed in helpful terms to our argument, we say.

We can most easily take that, perhaps, from paragraph 3.46 of the Decision, if the Tribunal still has to hand, it is quoted in full there:

"In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can make informed choices without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable, minimum contractual periods in consumer contracts."

Now, it does not say in relation to that last sentence, what it does not say is words to the effect of "none of this has any application to minimum contractual periods, still less to ETCs", the wording is much more nuanced and cautious than that; it says it does not preclude, and we agree on our reasoning that GC 9.3 and the interests in the recital do not preclude having reasonable minimum contractual periods. Preclude is not the same as has no application to. What you can have are reasonable minimum contractual periods.

Secondly, if one goes back to GC 9.3 itself, it is important to read it in combination with GC 9.4, to which my learned friend did take you but perhaps hasn't had

sufficient consideration in this case more generally. Can I can you to go back to GC 9.3, 9.4 which are in authorities bundle 3 at tab 46, if you would kindly take up bundle 3, tab 46.

You will recall in 9.3 on its own simply requires, subject to the carve-out, that the CPs shall ensure that the conditions or procedures don't act as disincentives, and 9.4 actually does the significant piece of work, you see footnote 12 to 9.3 says:

"The term 'initial commitment period' is defined in General Condition 9.4. A Consumer or Small Business Customer will not be in an 'initial commitment period' where they are able to terminate a contract with a CP without paying a charge."

9.4 says:

"Communications Providers shall not include a term in any contract with a Consumer for the provision of Electronic Communications Services concluded after 25 May 2011 preventing the Consumer from terminating the contract before the end of the agreed contractual period without compensating the Communications Provider for so doing unless such compensation relates to no more than the initial commitment period ..."

Now, it is significant, perhaps that the word used there is compensation: unless a compensation relates to no more than the ICP. Compensation, of course, is not the same as payment of whatever is specified by the provider. We say that built into 9.4 is an assumption that the payment in 9.3 is not whatever may be specified in charges, whatever penal provision might be specified because of the carve-out. It is limited to those charges which are justified by way of compensation for revenue foregone. That immediately shows that the carve-out in 9.3 cannot be understood as being absolute. We would say if it is

suggested, well compensation could be relying on consumer protection legislation, or some other basis for limiting what can be paid, we would say not so. What we are doing here is construing 9.3 and 9.4 together as a regulatory framework.

Madam, the third point is it is helpful to see what Ofcom said at the time of introduction of new GC 9.3. While, of course, this is not determinative of its wording, it is, we say, highly relevant that Ofcom made it clear that it considers that the Rule against disincentivisation of switching applied during the initial commitment period. Completely contrary to Virgin's case on carve-out. At the time no-one pushed back on it or challenged it.

Now, Ofcom's decision at the time of introducing GC 9.3 is in the case file, the files for the hearing, the second file, tab 33. Ofcom document, Changes to General Conditions and Universal Service Conditions dated 25 May 2011. If I could ask you kindly to turn to page 714 of this document, you will see the heading "Contract termination conditions and procedures not to act as disincentives for end-users against switching their providers.

"This proposal attracted fewer responses but some stakeholders - Sky and EE questioned the need for such a provision and FCS asked for some further clarification about the meaning of disincentives.

"SSE and BT both welcomed this provision. FCS has sought further clarification on the meaning of disincentives.

"As we explained in the consultation document, disincentives can be both contractual (early termination charges, automatically renewable contracts) or can be industry processes."

So this is absolutely clear. This is talking about disincentives during the early termination period. That is the basis of which Ofcom has proceeded since

and, indeed, of course is the basis on which EE has been sanctioned and has accepted and not challenged its notice. There is no carve-out. No carve-out in relation to early termination charges from GC 9.3.

I fully accept that that does not determine the issue which is an issue of law for this Tribunal, but it is certainly something which we invite you to take into account in considering my learned friend's submissions.

CHAIRMAN: If it is not determinative, what status do you say it has?

MR HERBERG: We do say that it is an aid to construction; that this was part of a formal consultation process at the time when GC 9.3, which is after all a term which Ofcom was itself drafting and consulting on, was making. So Ofcom -- it shows Ofcom's intention in drafting the clause. It also shows, to the extent that it refers to industry consultees, that no-one was taking the point, "hey, this is improper, this is unlawful, this is contrary to the Directive" or any other way wrong. It does not do anything about what Virgin thought, but it is a more general point in those terms. Quite a separate point, a further point, fourth point is we have already made in paragraph 36 of our skeleton argument, and you already have seen it, we say that were Virgin's interpretation of GC 9.3 correct, a provider could impose an ETC amounting to a penalty out of all proportion to the outstanding charges without the same falling foul of GC 9.3 and we elaborate that point in that paragraph.

Now, my learned friend responded to that in his submissions and said, "ha, ha but that ignores the Consumers Right Act 2015 and previously the unfair Contract Terms Act and that can step in to fill that gap". So, therefore, that is not a point against their construction.

Now, we say that is not anything like a complete answer. The major problem with it is that the Consumer Rights Legislation only applies to contractual provisions.

This case is an example of a charge, an ETC which was not based on a contractual provision. Legislation simply has no application here. Our case is based on disincentivisation which is illegitimate from whatever perspective it comes. In some cases, like this case, it could result from contractual terms. In other cases, like in EE, it could be unfair and disproportionate for a different reason. The question is, is disincentivisation and the illegitimacy of what is done? In at least some of those cases -- and there may be an overlap in some of cases -- consumer protection legislation has no place at all. My learned friend then tries to say, well it would be caught by some form of implied term or something like that. I have to say it is extremely dubious, we would submit, to say there is an implied term not to charge other than in accordance with the contract, not to make any additional charges or anything, and it certainly would depend on the particular facts of the case, it would not necessarily cover everything. There might be some form of misrepresentation claim based on website representation, but that is not a contract claim, and there are other ingredients of such a claim.

But, in any event, quite apart from all those difficulties with my learned friend's response to the argument that this leaves a yawning gap in consumer protection, if he is right, in any event there are further examples which the Tribunal put to my learned friend which we say cause insuperable difficulty. What if Virgin made it extremely difficult and burdensome to claim through their procedures, for example only one telephone line to switch if you had to ring up to switch during the ICP, impossible to get through, or a slow website or something.

Now, my learned friend appeared to concede, as I understood it, that those procedures would not be exempted by the carve-out. But we would say that

on his logical reasoning they would be but cannot be carved out. He said in fallback: well, these are different because they are not a necessary part of the initial commitment period. So he appeared to exempt from the carve-out anything which is part and parcel, which is not a necessary part of the initial commitment period, only something which is part and parcel of the ICP is caught. Apart from there being no warrant for such a distinction, if that is his distinction then he fails his own test, because the illegitimate and excessive charges which Virgin imposed, disincentivising switching, were likewise not a necessary part of the ICP, they should never have been levied. They were not part of the ICP. They are no different in status from a customer being given the run around, as the Tribunal put it, on procedures and conditions. A non-contractual excessive charge charged in relation to the ICP but not a part and parcel of it.

So we say that my learned friend does not have any response to the submission that his interpretation, which is certainly not a necessary one, is one which would leave serious consumer protection gaps.

Now, my Lady, the second point made under ground 1A is the argument which we deal with at paragraph 37 and following of our skeleton, Virgin's argument is it cannot be said that an erroneously calculated ETC per se acts as a disincentive to switch. My Lady, the short answer to that is that we don't say that. The Decision, for example paragraph 3.52, I will not go back to, certainly reflected in parts the common sense position that where ETCs made switching more expensive for its customers than they were entitled to expect, then it was pretty self-evident, subject to considerations and materiality, that charging customers higher prices for switching than they were promised they would be charged under their terms and conditions will act as a disincentive

for switching because the economic costs of switching would be materially higher than it should have been. Indeed my learned friend made that same point himself.

But that is not to say that disincentivisation was simply presumed in the Decision. I have already taken you to the specific findings that there was a material impact on switching on the uncontested evidence and we say that is unimpeachable. So the second point he makes simply does not arise.

In those circumstances, I have to confess that I was a little puzzled by the star billing given in his submissions to the Polska case, I am going to take you back to it just very shortly, I hope. If I could ask you to take up the authorities bundle 3 and turn to tab 42. It seemed to us that there was nothing that my learned friend drew out of that decision which was in any way inconsistent with Ofcom's Decision in this case.

Two points in particular can be extracted from that decision in paragraph 25 after the analysis. The first point, the first potential requirement is that to the extent that the costs of interconnection are relevant to assessing the direct charge made to the subscriber, the costs must be cost oriented. One sees that from the first part of 25:

"It is therefore clear from the scheme of the Universal Service Directive that the NRA has the task, using an objective and reliable method, of determining the costs incurred by operators in providing the number portability service."

Just pausing there, I will come on to the second part of that sentence in a moment. One could have a detailed argument about the extent to which that is relevant at all in a case under Article 30(6) of the Directive, because cost orientation comes from Article 30(2), interconnection, and it is not directly relevant here, but I will let that pass because there is an obvious answer and because there

could be a complicated argument about the extent to which the one influences the other.

The reason I can just let it pass is because the short answer is that there was obviously no problem with cost oriented charges here, because Virgin was entitled, and was allowed on Ofcom's Decision, to recover all its charges for the rest of the initial commitment period less its costs saved. In other words, it was recovering more than its cost oriented price, it was recovering all its ongoing profits over and above its costs. So the issue of cost orientation simply did not arise in this case. There was no suggestion that what Ofcom's Decision was doing was unfairly not allowing Virgin to recover cost oriented pricing. So that is just an irrelevancy.

The second point of the Decision is that the NRA must assess, using an objective and reliable method, the level of direct charge beyond which subscribers are liable not to use that service. That is the rest of paragraph 25. And that, we say, was satisfied because Ofcom found that the excessive charges imposed did have a material impact on switching rates, ie the charges were liable to deter because there was a material impact on switching. That was found on the basis of uncontested evidence, the CRA evidence, the one-tenth figure. I did not hear any basis on which my learned friend argued that if Ofcom was right, or was entitled to find a material impact on switching, on that basis, if it was, obviously he says he was not entitled and it got it wrong, but if it was entitled he did not seem to argue that that would not meet that requirement. It obviously would. So we say Polska really takes the position no further forward.

Finally on this point, Virgin submitted in its skeleton at paragraph 43 that Ofcom would not have penalised Virgin if it had not included clause M13, the

commitment not to exceed contract price less savings, in its terms and conditions, and it characterises this position as perverse. We say that this simply misunderstands Ofcom's position. Ofcom did not accept or reject the proposition that any ETC would be permissible provided that it was charged in accordance with the contract at any ECT whatever it was. It did not accept that. Accordingly, it does not follow that Ofcom would have determined that Virgin's ETCs fell outside the scope of 9.3 if clause M13 was not there. It simply did not have to address that question because it did not arise.

Self-evidently, in some cases, charging in accordance with contractual entitlement will not exempt the communications provider from the operation of 9.3. See the EE case as an example. It was in accordance with the contract but that did not save EE.

But Virgin's case may be different if it was not for M -- it may be that their charges would have been -- sorry, let me put that again. Virgin's case may be different if it charged in accordance with recovery of revenue less costs only. Maybe that would be legitimate. But we say in any event there is nothing objectionable, let alone perverse, about legitimate customer expectations being relevant to the question of whether it is appropriate to penalise a charge which materially disincentivises switching.

Now, the last point under ground 1A, the third of the three, we addressed at paragraphs 43 to 44 of our skeleton. This is the point that Virgin was wrong to say that GC 9.3 does not apply to a failure to follow a condition or procedure. We address that in paragraphs 9.3 to 9.4. The point was not seriously argued in oral argument. So, if I may, I will rely on what is there set out in our skeleton in those two paragraphs.

We say that Ofcom was absolutely right to determine that Virgin's incorrect rate

cards and their practice of overcharging over a considerable period of time was a procedure. And my learned friend accepted yesterday that procedures are not carved out from 9.3. Transcript page 77, line 8. We say it falls into that category.

Can I then turn to ground 1B, duplication of national law. Here, Virgin argues that Ofcom erred in interpreting 9.3 in a manner which duplicates rules already applicable to communications providers by virtue of other provisions of national law and which are not specific to the communications sector. We deal with this in some length in our skeleton at paragraphs 45 to 52. Again, I am not going to go over the detail of our submissions there. My learned friend dealt with this relatively rapidly too in his submissions. And much of this has in any event been covered by what I have said about the inadequacy of national law to cover the field. Can I just make brief points supplementary to my skeleton argument.

CHAIRMAN: Yes.

MR HERBERG: The first point is that Article 6(3) of the Authorisation Directive, you will recall that is the provision saying that you can only have conditions, can only contain conditions which are sector specific and shall not duplicate conditions which are applicable to undertaking by virtue of other national legislation, so it's got be sector specific and shall not duplicate conditions which are applicable, that requirement does not rule out an overlap in the methodology or the analysis to be applied in answering what is a quite separate condition.

We say that the proper interpretation of Article 6(3) is as follows: first of all, its purpose is to prevent NRAs from imposing on communication providers rules which are not specific to the sector and do not more than duplicate national

rules which are otherwise applicable. In terms it prohibits duplication of the condition, condition which is applicable to undertakings, ie it must be the condition itself which is duplicative, not some reliance on elements of the test imposed by that condition. So we accept, for example, that Article 6(3) would prevent Ofcom from imposing a general condition prohibiting providers from imposing terms on customers which were unfair under the Consumer Rights Act 2015. So that sort of requirement would not be a sector specific provision, because it would not be specific to the telecoms sector, for example, and it would be duplicating a law which providers are required to comply with in any event.

But general condition 9.3 can be seen on its face not to be such a prohibited provision. What it prohibits is disincentives to switching, which is a fundamental element of the telecommunications market and therefore reflects the intention of recital 47. It applies only to communications providers. It clearly is sector specific. The prohibition on disincentives to switch does not itself duplicate any other provision of national law; instead, it complements general consumer protection rules. But we say Article 6(3) does not rule out that the analysis done or the steps taken towards answering the question of whether a termination provision deters switching may overlap with those relevant but separate legal questions.

So a disincentive to switching may arise either, as in this case, because it disappoints the reasonable expectations; or, if one puts it another way, the contractual expectations of customers; or, as in the EE case, because it is unfair or disproportionate given the size of the charge whatever the contract says. There is an overlap with contract law in the first case, although you already have my submissions it's not a total overlap, and there is an overlap

with consumer protection legislation in the other case, but it is not contrary to Article 6(3) in either case, it is the only first that's relevant in this case.

MR HOLMES: Can I ask a question in relation to your point on customer expectations.

MR HERBERG: Sir, yes.

MR HOLMES: Maybe this is in the CRA report but I don't recall it specifically. Did Ofcom have any evidence in relation to customers' legitimate expectations in terms of customer awareness of what the ETC should have been and therefore would notice a difference between what it should have been and what it was in fact due to the error?

MR HERBERG: I don't believe so. I will be corrected if I am wrong, but certainly it was no part of the reasoning that customers were disincentivised because they thought that they had a charge which was the charge in the contract and instead they discovered that they had a different larger charge on the website. So the disincentive was not created by the disappointment of expectation: help, it is more than I thought; the disincentive was simply created by the economic effect of there being a greater charge than there would otherwise be. That really does come out of the CRA report. The derivation of the two figures which lead to the 10 per cent differential don't rely on customers, don't rely on some analysis of customers saying: help, it is worse than I thought, a disappointment at the time; they rely on it is an econometric analysis based on, effectively, the higher price being charged.

MR HOLMES: Would it not be more accurate to say that that is an economic effect rather than the defeat of a legitimate customer expectation?

MR HERBERG: Yes, it would. It would. I have to accept that. But the reason I use that term is because the economic effect does result in fact from the

customers' expectations not being respected and from their expectations or from their contractual expectations not being fulfilled but I agree it does not work through a conscious -- I did not mean to suggest that it worked through a conscious operation on the mind of the customer; it works because their expectations have been -- because their entitlement --

MR HOLMES: Their entitlement, exactly.

MR HERBERG: Maybe the word entitlement is a better word. I apologise if it has caused any confusion. Certainly I don't think there is any confusion in the Decision. It is the entitlement which has been disappointed.

MR HOLMES: Yes, that I understand.

MR HERBERG: Now, in addition to that, I believe I have already made the points in my skeleton at paragraphs 48 and 49. This was the suggestion that Ofcom adopted a methodology explicitly designed to test the fairness of ECTs, not their disincentive effect. That is aiming at the wrong target; that is the notification, not the final Decision.

At paragraph 50 we have the contract overlap point. VM is also wrong that Ofcom did no more than apply a breach of contract restitution test. It is not it is a disincentive-based test.

One crucial point that should be perhaps underlined is that at paragraph 50.2. The general condition 9.3 protects, among others, customers who decide not to switch, ie they are disincentivised, and those customers may well have no remedy in contract because they were not overcharged, or indeed in restitution, they took a look at the website and thought, based on those charges: I am not going to switch.

CHAIRMAN: Based on the CRA report that number was the [figure].

MR HERBERG: Indeed.

CHAIRMAN: Sorry, is that supposed to be a confidential number?

MR PALMER: Can that number not appear in the transcript and it not be reported. That is one of the confidential numbers, I am very grateful, but yes, madam.

MR HERBERG: I am sure I am going to do the same at some point. That number is particularly one that sticks. But indeed that is right. So that cohort of customers were customers who quite plainly a breach of contract analysis would not apply to at all. Here is my learned friend saying that Ofcom didn't --

CHAIRMAN: Well, yes, I think the argument was put that they could possibly claim for some sort of loss.

MR HERBERG: Yes, that is a point I addressed a moment ago. There was a slightly vague suggestion of an implied term. I don't accept that implied term will be obvious or would be natural in that situation. I can certainly hypothesise a misrepresentation claim based on their website but that would not be directly a contract claim. I do question whether an implied term would be required for business efficacy or otherwise. The point is, we say, that what this is not is simply applying a breach of contract test.

So that is really ground 1B.

Ground 1C is legal certainty. This is addressed in some detail in our Decision at paragraphs 53 to 57. Once again, my Lady, my learned friend dealt pretty shortly in his submissions with the argument that Ofcom's approach to 9.3 was incompatible with the principle of legal certainty, and I will follow suit.

As we note in paragraph 54 of our skeleton, the principle of legal certainty does not require a public authority to issue guidance on how a legal rule will apply in every situation. It is enough if the rules are sufficiently clear when construed in accordance with the ordinary principles of interpretation, including purposive interpretation, and that is quite significant because even where you

only got to the meaning of a rule through some sort of purposive interpretation approach based on requirements of European law, that still does not mean that you have a problem from a legal certainty perspective.

We cite in that regard the case of Amicus. It might be helpful to look at that just very briefly. Amicus v Secretary of State for International Trade. That is in the authorities bundle, first bundle of three, tab 18. (Pause). The facts of that case are not really important. The claimants were seeking an annulment of certain exceptions to the prohibition of discrimination on grounds of sexual orientation in the fields of employment and vocational trading. What is helpful to see is the analysis which of Mr Justice Richards at paragraphs 59 through 60. Starting at paragraph 46, there is a heading "implementation of directives: general principles". If I can perhaps pick it up in paragraph 58 at the bottom after the long quotations from various cases, including Commission v Netherlands. They say that those judgments:

"Far from supporting Mr O'Neill's [for the claimant] submissions, that judgment plainly contemplates that the normal interpretative obligation can be relied on as ensuring adequate implementation even in a case where no implementing legislative measure has been adopted. The point should apply with even greater force in relation to the interpretation of detailed implementing measures such as the Regulations at issue in the present case.

"I take the view that Mr O'Neill has produced nothing capable of displacing the approach laid down by the House of Lords in Pickstone and Litster. It would moreover be extraordinary if, in considering the challenge to the lawfulness of implementation, this court were precluded from interpreting the Regulations in accordance with the normal principles applicable to a national measure adopted for the purpose of implementing a directive. The Regulations, as

Miss Carss-Frisk submitted, can have only one true construction. Their meaning cannot vary according to whether they are being considered in the context of a challenge to their validity or in the context of a claim by an individual that he or she has been subject to unlawful discrimination. Accordingly I take the view that I should construe the Regulations purposively so as to conform so far as possible with the Directive, and that the present challenge should be resolved in the light of what I consider to be the true construction of the relevant provisions.

"None of this removes the need for compliance with the requirement of legal certainty. It does mean, however, that the normal principles of interpretation can be considered and applied in determining whether the provisions of the Regulations are sufficiently precise and clear to comply with that requirement."

So, in other words, when you are looking at whether the legislation is sufficiently precise and clear for legal certainty, you take as the Regulations not just the wording as it appears but after you have done the purposive interpretation exercise to work out what the section actually means.

My Lady, we say that Ofcom's core reasoning here, was straightforward. GC 9.3 is engaged where a disincentive to switching results from a provider promising to charge a customer one level of ETC only to advertise and imply a higher level of ETC to switching. There is nothing unpredictable or surprising about the conclusion or which rendered it uncertain as to how Virgin would regulate its conduct, which is often a test used in relation to legal certainty. After all, the reasoning was based in part of the illegitimacy of Virgin's overcharge, Virgin cannot possibly say, and have not said, that they could not realise that this was something they should not do.

To the extent that Virgin contends that the decision that early termination charges themselves fell within the scope of 9.3, that that was unpredictable, I have already made my submissions on that but I do remind the Tribunal of Ofcom's own document introducing GC 9.3 which made clear its view that it could to apply ETCs, 9.3 could apply to ETCs, that is the changes to the general conditions and universal service conditions document to which I have already take you, it is only a small reference in that document. My learned friend will no doubt say: well, you cannot be expected to pick up one line, but it made the position clear in a consultation with a relatively small group of industry specialists, so it was not as if this was buried somewhere or something which the industry would not be aware of Ofcom's view on it, that can't credibly be said.

That, of course, is highly relevant to legal certainty. We certainly say that no more detailed guidance was necessary or appropriate.

Ground 1D is the finding of a material impact on switching. I have effectively already addressed this in the course of my submissions. It is set out in our skeleton argument at 58, 59 and through to 61. We effectively say that there was a material impact, it was a finding of a material impact on switching and that that was an unimpeachable finding, so the point goes nowhere.

Finally on the grounds, we come to ground 1E, which is the effect on competition. For the reasons set out in paragraph 62 of our skeleton, there were simply no requirement to establish an effect on competition, it was absolutely no part of the test contained in GC 9.3, it had no warrant in importing that as a separate substantive requirement to establish before breach of 9.3 can be established. That is not to say that it is not highly likely just applying the a fortiori reasoning basis to think that there would be an effect on competition subject only to

materiality if you are disincentivising people from switching to your competitors, but that is not the basis of the Decision. Again, I am content to leave that submission there to my submissions in writing because the point was not seriously addressed in oral argument.

So, my Lady, I then move to ground 2 of the appeal, which is the alleged unfairness, or irrationality, as it is put in one point, in the penalty decision, before coming on to ground 3 and proportionality, and under ground 2 we understand Virgin, in essence, to argue that Ofcom's Decision was unlawful because it did not adopt a staged and quantified approach to setting the penalty of 7 million, but instead it exercised its regulatory judgment and considered various factors in the round.

A number of additional points were made under that, as it were, general proposition with which I must deal. Can I start off by addressing the relationship between the notification and the final Decision and the relevance of the statutory cap, all of that which was made in submission, which was not previously, I don't think, unless I am wrong, found in my learned friend's skeleton. I make no complaint about that. I will deal with that first. I will then deal with the argument that Ofcom should have set out in more granular detail than it in fact did the weight to be attributed to the various factors which it took into account in its Decision. In that context, I will submit there is a marked difference between cases which are required to follow a stepped process required by the regulatory framework, such as the CMA or the Financial Conduct Authority, a marked difference between those type of cases and cases where a policy choice has been taken not to follow that route in the regulatory framework, such as this case.

In that context, I will address Ofcom's penalty guidelines and the requirements of

transparency which flow from them, which we accept flow from them, and indeed flow from section 3 of the Communications Act.

Then lastly I will deal with the Decision itself, coming back to the Decision and look at how in our submission the Decision amply met the requirements of the regulatory framework.

So I will start with the relationship between the notification and the final Decision. Well, in fact, before doing so, at the outset it is perhaps worth recall thing this ground is not an abstract complaint about the form of notification or the Decision, it is a complaint about that unfairness has been caused to Virgin as a result. We say that, stepping back, whatever the detailed requirements of transparency may be in the abstract, and of course I'll submit that we satisfied them, but, whatever they may be, no unfairness or prejudice was caused to Virgin in making fully effective submissions, its ability to make fully effective submissions existed both at the stage of making representations on the notification, where Virgin had a clear indication of all points that Ofcom was minded to include in the final Decision, it deployed very detailed and comprehensive submissions, both written and then oral on all of them, there are no points on which it can be said to have been taken by surprise, nor does it claim that. Likewise, before this Tribunal, we say that Virgin is able to make fully informed submissions on all points in the Decision with which it disagrees and the Tribunal can exercise its jurisdiction in relation to scrutinising and testing the penalty without any material hindrance at all and, as I have already anticipated in my submissions, we do say that the Tribunal's exercise in assessing the penalty, it effectively does breakdown into two parts. The first part is considering all the factors that Ofcom took into account considering their lawfulness and rationality on an enhanced basis in a case where the

merits must be duly taken into account. And then ultimately the Tribunal will look at the penalty in the round and come to a view on its overall proportionality. And under ground 3, I will show you a number of authorities which show the courts doing that, looking at it in the round, even on a stepped penalty case, and you have already seen one example in Royal Mail.

What we say that Virgin has no entitlement to is to have, as it were, a priced-up notification decision such that it could see how much of the penalty was attributable to each charge to the 9.3 and the 9.2(j) charge. Or, still more the granularity, even within the GC 9.3 charge, how much was priced on home movers, for example, against other parts of the Decision, let alone a more granular pricing of the starting point for consideration, if there was one, and then the price of the various aggravating factors, for example the failure to discover the violation or end it, end the violation, or to price the mitigating factors, for example Virgin's remediation.

Now, on one level Virgin cannot have that, because, as Mr Leathley has explained, and I will take you to his written statement, they don't exist, that is not the way the decision maker operated, they don't exist, he did not consider the decision according to such a priced-up framework, and nor was the notification decision made on that basis, and we say that neither decision was required to adopt such an approach. In a non-stepped penalty framework, the decision maker does not have to operate in that way and indeed in the 90-odd penalty decisions which have been made under this penalty guidance, Ofcom has never operated in that way.

We say that that does not, with respect, give Virgin and does not give this Tribunal any difficulty, you are fully able to consider both the factors going to the Decision, which are set out in great detail in the Decision, and the overall

level of penalty according to the appropriate standard of review as laid down in the Communications Act and Virgin in its turn can make fully effective submissions as to all the points it wishes to make.

Furthermore, there is simply no necessary relationship between, for example, the dropping of the home movers allegation after the notification decision and the specific discount from the notification penalty. That is simply not how penalty decisions work. It is simply not the case that Mr Leathley, picking up the baton as an independent final decision maker, had to say, "Right, I start with the notification decision, I need to know what that decision says is the price of home movers, we deduct that because I work in that mechanistic." That is simply not an approach which was mandated and it is certainly not the practice and was not required.

Can I deal first with the notification decision and the cap, the points made in relation to that. We say that the only relevant statutory provisions associated with the notification decision are as follows: first of all, and you have already seen it, I don't think I need to take the Tribunal back to it, section 96A, subsection (3)(a), requires that a notification may be given in respect of more than one contravention, and it's the same for final decisions, 96B, subsection (2).

Obviously, therefore, even at the highest level of granularity, at the highest level of what could be pricing up, there is a specific discretion on Ofcom to give one penalty for everything for more than one contravention. And the associated cap in relation to penalty, the cap in section 96C(4)(d), which you were taken to, applies to the penalty specified in the notification decision, the cap being that the final decision cannot go above that level. It applies to the penalty specified in the notification. So that if there is only one penalty for multiple contraventions then there is a single cap. That is the clear statutory scheme.

At one point I think my learned friend suggested that given the existence of the cap on penalty at the level of the notification decision, the discretion to give one penalty in respect of more than one contravention did not exist, despite it being in the statute, or that it could only be exercised one way in a case such as this.

CHAIRMAN: Yes, he suggested that a discretion amounted to a duty --

MR HERBERG: A duty.

CHAIRMAN: -- in this case.

MR HERBERG: We say that that simply cannot be right. And at least one reason he gave for that supposed entitlement was simply wrong. He said that one might want to plead guilty to one contravention and not another contravention and that one would lose this if there was a joint penalty. But that is simply not how the system works. It is not possible to settle an Ofcom case for some contraventions and not others. Ofcom will only entertain settlement if liability is accepted for all contraventions. So there is no equivalent of the FCA's pretty recent partly contested cases procedure, for example. So that simply does not arise in any event.

But, in any event, we say even if it were the case that contraventions are entirely distinct, Ofcom plainly retains a discretion under the statute to decide that it is appropriate to give one penalty, which of course it must exercise that discretion lawfully and rationally and procedurally fairly. It's perfectly entitled to exercise it.

CHAIRMAN: Yes, you said procedurally fairly and I think it was on this point that I asked for clarification.

MR HERBERG: Yes, and the answer you got was substantively fairly.

CHAIRMAN: I did. Could you address us on that?

MR HERBERG: Well, the starting point is I am not entirely what substantively fairly means.

CHAIRMAN: I was trying to find the bit of the statute or even the Directive that ...

MR HERBERG: Yes. Well, in our respectful submission, it does not exist. Ofcom has a discretion to give a penalty in relation to more than one contravention. Well, it will obviously consider matters such as overlap. What is the material advantage? To what extent is it helpful to combine the wrongdoings into one penalty? That will obviously be a highly material factor which you will take into account. But I hesitate to come up with a complete list of relevant factors. It may be that even though the offences are completely separate, for example, the mitigation is in some way shared between them. It may be for all sorts of reasons that it is more appropriate to have a headline penalty. Ofcom will no doubt take into account the interests in going the other way in imposing more than one penalty.

CHAIRMAN: Can I just sort of go back a stage. I think what you are saying there is that there is an exercise of discretion, which there clearly is, by Ofcom --

MR HERBERG: Yes.

CHAIRMAN: -- in making the initial decision as to whether to issue a single notification.

MR HERBERG: Or one notification with two penalties, or in fact possibly two.

CHAIRMAN: Yes, or separate penalties.

MR HERBERG: Yes.

CHAIRMAN: And presumably there might be some means of challenge to that decision to do that, but I think you are saying once that decision is taken, and let us assume for working purposes it was a legitimate thing for Ofcom to do, to name one penalty figure in one notification, I think you are saying that is the

end of it at this point.

MR HERBERG: Madam, I am, certainly. That is the penalty that translates into the cap. And, thereafter, when Ofcom is issuing its final decision, it must not go ahead above that penalty for the entire case.

CHAIRMAN: But to which Virgin Media says: well, that is jolly unfair because by the time you get to the decision stage, you have lost what they claim is a significant plank of the original notification that led to the original higher number and that even if that might have been -- I am suggesting their argument, they really actually put it like that -- even though it might have been a legitimate decision to take --

MR HERBERG: Yes.

CHAIRMAN: -- before the notification and as things have turned out it is all unfair.

MR HERBERG: Yes, it is an odd submission to make in this case when the final penalty was significantly below the penalty in the notification in any event, but even as a matter of principle, we say that it cannot be unfair merely because Virgin has lost that entitlement. It will lose that entitlement in every single case where Ofcom exercises the discretion, which it undoubtedly has, to issue one penalty in respect of more than one contravention. That must be a logical consequence of simply exercising its discretion, which it clearly has. So it cannot say that that unfairness is sufficient to deprive it of anything. There would have to be something far more than that. All that show is that Ofcom have exercised the discretion one way, with that consequence. It would have to be something to do with a specific unfairness in a particular case.

CHAIRMAN: I think you are saying that it is not -- are you saying that it wasn't a fact -- that it was not one of the factors that the final decision maker needed to take into account. He obviously knew about the higher number, he knew it

was a cap.

MR HERBERG: Yes.

CHAIRMAN: But are you saying it stops there? He does not have to go a further step of saying: well, I know the original number was not divided up, but in my head I better do that?

MR HERBERG: I am certainly saying that. I am saying that there was certainly no need to do that, that the decision has been taken at the provisional stage to combine penalties. I will come on to the facts and say that was an absolutely appropriate decision even in this case. But I am also saying that by the time the final decision maker came to approach the matter, he had had no way of knowing because there was one penalty what the division would have been. He cannot exercise a retrospective decision in respect of a decision that was not his as to where the division would have been. And, in any event, there was absolutely no reason for him to do so.

MR DORAN: Are you suggesting as part of this, Mr Herberg, that the notification does not in fact consult on penalty, it merely sets a cap for the penalty, and actually what it consults on and gives people the entitlement to do is to respond factually to other elements that are set out in the notification, but without actually commenting on the penalty amount because the mechanism for deriving the penalty is not part of that, it is merely an in the round figure which sets a cap?

MR HERBERG: My submission is that the purpose of the notification decision was to enable fully informed submissions to be made by Virgin in relation to penalty, and that they got that opportunity to make fully informed penalty submissions because there was detailed reasoning set out in the notification decision about the total amount of the penalty combined and all of the factors

that led to that decision and you only have to look at Virgin's representations to see that it made page after page of extremely impassioned submissions about the penalty being wildly over the top, being disproportionate. I am not going to go through the detail. You will have in the written submissions, for example, at paragraph 8.4, tab 11, page 450, the penalty as a whole was manifestly and wildly disproportionate; it went so far as to say that no penalty was necessary or proportionate at all. Paragraph 8.11.

It then went on to engage in detail with Ofcom's reasoning on seriousness, deterrence, harm in the notification and also made the overall point that the breach was less serious than Ofcom though. Paragraph 8.80. So it made very full and informed and detailed submissions on penalty, as was absolutely its right to do. What I am submitting it did not have any entitlement to do was to respond to a more granular breakdown of how Ofcom's penalty, as set out in the notification, had been reached.

MR DORAN: Or to expect such a set of subtractions or additions from the consulted penalty in the final decision.

MR HERBERG: Indeed. It is a crucial fact, it was Mr Leathley, the final decision maker, was entitled to look at -- he obviously had to take into account the provisional decision and look at it and consider it, but he was entitled to consider the penalty in the light of what was in the provisional decision and all Virgin's responses to it afresh. He did not have to start, as he said he did not: the starting line is the figure in the provisional penalty made by the provisional decision maker, do I go up, do I go down from there, obviously you cannot go up, or should I go down for the various reasons? He was entitled to say: well, I actually think, having considered Virgin's representation, that, contrary to what they say, this was a really serious case, my starting point would be

wherever it was.

MR DORAN: It is not a question of deductions and additions, it is a question of assessing the new contours of the case in the light of the representations.

MR HERBERG: Yes, indeed.

MR DORAN: All right, thank you.

MR HERBERG: Obviously in a case where you are dropping a significant part of the findings, if you are dropping a significant part, then obviously there would be an expectation that if you are agreeing with it overall, if you have the same sort of similar view, that that will translate through to a reduction, as indeed occurred in this case, a significant reduction. But it does not follow that there has to be some mathematical pricing effect to: this is home movers, this in my view is worth X million, therefore I must make a reduction from that level or X million and then whatever other factors. Simply there is no warrant for imposing such a straitjacket on a decision maker.

MR HOLMES: Thank you.

CHAIRMAN: So just to pick up one point there, you are saying: well, there was in fact a significant reduction?

MR HERBERG: Yes.

CHAIRMAN: Are you saying that addresses any point that might be made about the removal of a plank?

MR HERBERG: Well, I will come on under ground 3 to make quite detailed submissions as to the substance and my learned friend is quite entitled to say home movers was so important and it should strike the Tribunal as so important that there should be a much bigger reduction, but you would have to combine that with: and overall the level of penalty should not have been any higher because you also in considering the penalty in the round are not

confined by the previous straitjacket of either the Decision itself let alone the notification.

CHAIRMAN: Yes.

MR HERBERG: You look at the penalty in the round and decide, obviously, without the home movers allegation, which is not there, whether you think the ultimate number reached was appropriate or not. Some of the factors which you can take into account was: well, the initial decision maker though the penalty should be X, the final decision maker though the penalty should be Y, home movers disappeared in the interim, these are all factors which are perfectly legitimate to take into account, but what I do resist was my learned friend's attempt to take what are legitimate considerations and factors and turn them into a straitjacket, either a straitjacket for the final decision maker or indeed a straitjacket for this Tribunal.

CHAIRMAN: Right. We probably ought to stop there.

MR HERBERG: That might be a convenient moment. I have a few more points on where we just reached but it might be safer ...

CHAIRMAN: Thank you, 2.00.

(1.05 pm)

(The short break)

(2.00 pm)

MR HERBERG: My Lady, I was dealing before the short adjournment with the topic of notification decision and caps and the interrelationship and I made my submissions at the level of principle.

CHAIRMAN: Yes.

MR HERBERG: There is also a more practical point to be made, which we say in itself completely undermines Virgin Media's submissions on this point.

Because while I, like my Lady, understood my learned friend to submit that in this case there was effectively a duty to decide a statutory discretion in favour of giving separate penalties for breach of general condition 9.3 and 9.2(j), he did accept that that was not the case in every case and he gave the example of he said in other cases where there was a degree of interconnection between different charges, as it were, then it might be justified in amalgamating the charges under one penalty. He gave the example of billing cases, I think, Vodafone billing cases, of which I have some recollection.

Now, you already have any submissions as to why in principle that is the wrong approach and, even if there was a complete degree of separation, it cannot be said that Ofcom acted in any way contrary to a duty on it in not providing more than one penalty. But, in any event, the factual assumption on which it is based, that there is an entire degree of separation between the two limbs of the case, is not right, and if, for example, one looks at the Decision at paragraph 5.84, the Decision in tab 3, the final Decision -- let me, before going to that, to the wording there, madam, I should perhaps just remind the Tribunal that the 9.2(j) charge had two limbs. The bigger limb, which I think is probably the only limb that this hearing has referred to, is the T-shirt issue, the description of the --

CHAIRMAN: Yes.

MR HERBERG: -- various options of T-shirt sizes, which was not clear. But there was a second 9.2(j) issue, which was that they had not put their changed, early termination charges on the website when they were made, they delayed several months in putting them up onto the website.

I am just looking to where I can show you that contravention. That will be in section 4. Yes, so 4.8, paragraph 4.8, just to make good that point:

"We also obtained from VM evidence that it changed its prices for some of its fixed term contracts in November 2016. At the same time, it also changed the ETCs that it charged for its phone and broadband services. However, these changes were not published on its website until 20 March 2017, more than four months later. As a result, some of the ETCs that VM set and charged for its fixed term contracts were not easily accessible because the ETC rate card that VM published on its website between 1 November 2016 and 20 March 2017 contained out-of-date-information."

So this was the second limb of the 9.2(j) submission. Of course, it is complicated because some of those out-of-date information was actually incorrect anyway.

So the short point I am making is that there was an interrelationship between the two issues. They failed to publish information on their website. Had they published it, it would have been inaccurate information anyway because they were making incorrect calculation over ECT charges at that point.

You can see that Ofcom appreciated the interrelationship between those two charges at paragraph 5.84 of its final Decision. You can see it towards the end of that paragraph, the bottom of page 120, if I can pick it up:

" By failing to publish clear comprehensive and up-to-date information about its ETCs, customers subject to such charges would have found it difficult to understand the amounts they had to pay, how VM had calculated them and to assess whether switching was in their interests. By undermining their customers' legal certainty and their ability to calculate their liabilities when switching providers in this way, VM aggravated the impact of its overcharging. We therefore regard the contravention as serious."

You will see the same point again in 5.87, I will not take up time, but again they go through some more of the detail and say that Virgin's failure had the potential

here to aggravate the harm resulting from its overcharging.

So the impact, the seriousness and the harm were not entirely separate. There is a degree of overlap anyway.

Therefore, the sharp bright-line distinction which my learned friend tries to make from cases where he concedes that there is a discretion to be exercised where there is an overlap and this case cannot be made.

But that is perhaps a footnote. It is an important point in its own right, but our primary submission is that one should not go down the line anyway of conceiving that Ofcom is in some way obliged in certain cases to separate out different penalties.

Can I then come to the slightly different suggestion, as I understand it, that the Decision, or indeed the notification, ought to have set out in more detail pricing or indications of weight in relation to the various factors which it considered were relevant as to going to penalty.

Our first submission is that there is absolutely nothing in the general principles governing the duty to provide reasons, or duty to consult, which says this. Nor has my learned friend cited any cases that suggest that that is the general position in law. For your note, paragraph 64.1 of our skeleton makes that point and refers to a number of cases which are in our defence at paragraphs 49 to 50, which set out that position in a little more detail. I am not going to take time by going to our defence now, there are a number of cases listed there. If the Tribunal were looking at only one, I would commend the HMRC v Proctor & Gamble decision.

CHAIRMAN: Sorry. Which paragraph in your skeleton?

MR HERBERG: 64.1 of the skeleton. Sorry, this is two removes. It says the principles governing the duty to give reasons as set out at defence

paragraphs 49 to 50. So there is a cross-reference there. Then in the defence at paragraphs 49 to 50 there are a number of cases which are set out and to some extent -- well, at least quotes are given from those. If your Ladyship would like to just see it briefly, it is at tab 5 of the first core bundle.

MR HOLMES: Are we in the defence now?

MR HERBERG: Yes.

CHAIRMAN: Thank you.

MR HERBERG: So it is paragraph --

CHAIRMAN: Which case in particular? You referred to one case just now.

MR HERBERG: Yes. Yes, so it is the case in paragraph 50, HMRC v Proctor & Gamble, and the reference, for your note, to that case is authorities bundle two, tab 20.

CHAIRMAN: Thank you.

MR HERBERG: Now, we say that that general position in law is not any different if one considers Ofcom's penalty guidelines. Indeed, we say that the guidelines reveal that there is a stark difference between what Ofcom had to do where the guidelines are applicable in cases such as this, as opposed to what has to happen in a staged penalty case, such as under the CMA guidelines, to which I will come in a few minutes.

Before I come to the guidelines, can I first go to the empowering sections, so one can just see under what power the guidelines are made. That is section 392 of the Communications Act. So it is the first tab of the first authorities bundle.

CHAIRMAN: Yes, we looked at this, did we not, I think?

MR HERBERG: Maybe, I apologise if I am retaking you it, yes.

CHAIRMAN: We did look at it yesterday, I think.

MR HERBERG: Yes, sorry, my learned friend was comprehensive. So, anyway,

what one sees from that section is under subsection (1). There is a very wide discretion in terms of preparing guidelines. It's the duty of Ofcom to prepare and publish a statement containing the guidelines they propose to follow. They must consult the Secretary of State in relation to those guidelines and other persons as appropriate in subsection (4). And subsection (6):

"It shall be the duty of OFCOM, in determining the amount of any penalty ... to have regard to the guidelines contained in the statement for the time being in force under this section."

So it has to have regard to them, it's not a slavish follow, but it's a have regard obligation.

So the ambit of the power to issue guidelines is very wide and the guidelines in fact apply not only to breaches of the general conditions, but for a wide range of decision making by Ofcom apart from its competition remit. So, for example, breaches of conditions imposed on operators designated with SMP, significant market power, breaches of statutory information requests, breaches of the broadcasting code by broadcasters, breaches of regulatory conditions imposed on postal operators, we have recently seen an example of that in Royal Mail, although that in fact may be a competition case, so that's not an example of it, but there are also decisions in relation to postal operators under the Postal Services Act 2011. They have been in place, broadly in their current form, and I will take you to the different versions, since 2011, and have been applied in nearly 90 enforcement decisions. We don't believe that the approach of not adopting a stepped process has ever previously been challenged.

The current version of the guidelines is in the third authorities bundle, tab 49, if I could ask the Tribunal to turn it up. For your note, there are two earlier

versions of the guidelines in the bundle, the 2015 version is at tab 47, and the 2011 version is at tab 44, but I don't suggest that there are any particular material differences that makes it necessary to go to those earlier versions.

Now, the guidelines start off with an explanatory note which addresses the role at 1.3 -- I'm sorry, I've just got a bad reference -- yes, so at paragraph 1.3 it addresses the role of precedents as part of an indication that they may need to increase precedents in the future. At 1.4, the central objective is deterrence, I'm summarising briefly, I am not going to go through the detail of each paragraph. Central objective is deterrence. At paragraph 1.6, a relevant factor in securing the objective of deterrence is turnover, but there is not, see 1.9, a direct linear relationship between turnover of the regulated body and the size of the penalty. Paragraph 1.10 identifies again as being relevant but not to determine or limit the penalty. Then importantly at 1.11, "How Ofcom will determine the amount of the penalty":

"Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence ..."

Now, we do place some emphasis on that given the nature of the challenge in this case. It's actually built into the penalty guidelines that the approach of considering the penalty in the round is the right one. We say that is precisely in express terms what the decision maker has done. This may not be the only approach, this is only have regard to guidelines, but it is perfectly proper, and indeed specifically authorised, to consider all the factors in the round in order to determine the appropriate and proportionate amount to any penalty. It is very different, the antithesis of a stepped approach, stepped approach.

1.11, the central objective, again, is deterrence, as set out in the explanatory notes:

"The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement."

The relevant factors, 11.12, I will not go through the very long list, but they are all the sorts of point, we submit, that were considered in this case and there is absolutely nothing that has been excluded, indeed there is no doubt that the decision maker has gone down this as a checklist in analysing all the factors in this case because it is really quite a familiar list.

1.13:

"When considering the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention Ofcom may seek to quantify those amounts in appropriate cases but will not necessarily do so in all cases."

So a wide discretion as to the approach to harm and gain.

1.14:

"Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty."

That is the scope for increase and obviously Ofcom will have regard to any representations made to it, 115. Then 1.16:

"Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body."

And then obviously it must not exceed the maximum, 1.17.

Then 1.18:

"Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered."

Now, that is a provision that was referred to yesterday and I know that I was asked in particular to address you as to the relevance of that factor. Obviously it's only a have regard to provision but it reflects the general interest in transparency and indeed the duty of transparency in section 3(3) of the Communications Act, to which you would were also taken yesterday.

What it is not, we say, what it does not translate into, is a requirement for disclosure or all weights given to the various factors taken into account, let alone mathematical pricing of such factors. It is something Ofcom must always consider and what is required by it, or what is appropriate by virtue of it, will depend on the individual case. But we say it may be satisfied by an indication, where possible, of what was found to be a serious failing, or a very serious failing, and I will come on shortly to the Decision itself, to say that why in our submission we satisfied this obligation. So you should indicate, for example, what is a serious failing, give some sense of what is a primary ground. Ultimately the interest is in the person knowing what principally drove the decision and drove the penalty, and although my learned friend submits that it is not clear, we say it is sufficiently clear, it is absolutely sufficiently clear in this case what were the factors, plural, driving this Decision and, at least in broad terms, which were the more serious ones and which were the less serious ones. I will come on to that in a moment.

But can I contrast what is required under the penalty guidelines with what is required of Ofcom in a competition case under the CMA guidelines. Those are in the same bundle in the very next tab, the CMA guidelines. And you will just see from the preface on the second page, the CMA has the power to apply and

enforce the Competition Act and Articles 111 and 102 TFEU:

" ... in relation to the regulated sectors these provisions are applied and enforced, concurrently with the CMA, by the regulators listed below ..."

And the first of such regulators is Ofcom.

CHAIRMAN: Sorry, which tab?

MR HERBERG: Sorry, tab 50, the very next tab.

CHAIRMAN: I have gone too far, sorry.

MR HERBERG: So, tab 50, I just drew attention to the first paragraph of the preface and the fact that Ofcom is obviously, as you will be well aware, a regulator with current jurisdiction from the CMA within its area of remit. One sees in the introduction, paragraph 1.1.

"This guidance sets out the basis on which the CMA ..."

And references to the CMA are to be taken as including all the concurrent regulators:

" ... will calculate penalties for infringements of the CA98 or of the TFEU where it decides to exercise its discretion to impose a penalty under section 36(1) and 36(2) of the CA98."

Then policy objectives, 1.3:

" ... the twin objectives of the CMA's policy on financial penalties are:

• to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and

• to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anticompetitive activities from engaging in them."

Now, I think I can pass all the way over to section 2, which is "Steps for determining the level of the penalty". And here you see the prescriptive approach in such cases. There is a six-step approach. One, calculation of the starting point,

and even that has got multi-steps having regard to the seriousness of the infringement and the relevant turnover of the undertaking. Second, adjustment for duration. Third, adjustment for aggravating and mitigating factors. Fourth, adjustment for specific deterrence and proportionality. Fifth, adjustment if the maximum penalty of ten per cent of the worldwide turnover is exceeded and to avoid double jeopardy. Sixth, adjustment for leniency, settlement discounts and/or approval of a voluntary redress scheme.

I am not going to go through the detail of how those steps operate in practice but just, for example, one can see step one is quite a prescriptive approach to a settlement of seriousness at 2.4 all the way through to 2.10, with prescribed starting points for different levels of case, 21 to 30 per cent and 10 to 20 per cent or occasionally below 10 per cent in 2.7.

Then there is a detailed section under determination of relevant turnover and adjustment for deterrence and so on and so forth. And adjustments in step four for specific deterrents and proportionality, which can be a very significant step at paragraph 2.20 and following.

This is not an unfamiliar type of regulatory approach. So, for example, the Financial Conduct Authority, which deals with a wide range of financial discipline cases within its sector, has a similar five-stage approach. I think it even predated the CMA's. And it is a very similar exercise and there are very technical sections dealing with calculation of turnover, calculation of relevant business to assess seriousness by reference to the relevant revenue affected and then a mathematical process, at least on its face, at least at the starting point, in adjusting that. But the short point is that stepped processes are prescribed where regulators, or in some case legislators, decide that a detailed granularity of approach is needed, and it does not apply in cases

where that is not decided.

Secondly, even in such cases, even where that stepped approach does apply a high degree of discretion on the part of the regulator is inevitably baked into the system. Both, for example, in fixing seriousness and especially in adjusting for specific deterrence and proportionality. Indeed, it is a frequent complaint in relation, for example, to the FCA's five-step process, in which I'm involved on a regular basis, that here you have a purportedly mathematical approach but in the middle of it you can suddenly have the penalty completely reduced by 80 per cent or 90 per cent or increased because someone takes a view about proportionality or deterrence on a very, very intangible and unquantified basis. So what looks like a mathematical approach is suddenly blown out of the water or utterly changed by a huge degree of regulatory discretion: we need a bigger fine to deter or we need a much smaller fine because this fine comes out at some massive level based on a mathematical calculation which is wholly unjustified compared to the wrongdoing. That latter is a relatively common situation.

So even in a stepped process there is obviously a high degree of discretion but we make the point, and this is our skeleton at paragraph 64.3, that none of the authorities cited in the Virgin skeleton at paragraphs 92 to 95, none of them support the proposition that Ofcom was required to adopt an analysis comprising the stepped approach which appears to be advocated.

So, for example, Virgin cites the Napp Pharmaceuticals case, I won't go back to that, but obviously that concerned the proper standard of proof to be applied in respect of Competition Act infringements, and also the criminal standard did not apply, but it used the stepped process. Nothing in that judgment implies in any way that Ofcom should be undertaking a staged process when

determining a penalty.

And, again, Virgin suggests that it is in some way regulatory best practice to do so, skeleton 97 to 98. We say not so. The approach which other regulators adopt, or which may be mandated by other regulatory frameworks, with respect, are different infringements in different context, simply does not say anything about Ofcom's legal obligation. It is the opposite. The staged approach comes from situations where there has been a policy decision to adopt that approach.

We make the point in our skeleton at 64.7, we just give some examples of other regulators that have not adopted a staged approach and have a very general in the round approach. I am not going to go through them but there are four: Ofqual, Oil and Gas Authority, Office of Financial Sanctions Implementation and Information Commissioner, and the rules in each of those are in the bundle. They are all similarly accommodating in terms of regulated discretion to the penalty guidelines here.

Can I then come back to the approach in this case against that background? As a preface to that, we do say that both the notification decision and the final Decision effectively communicated to Virgin, and indeed to the Tribunal, both the factors which Ofcom took into account in reaching its decision on penalty, and what were the principle issues and the starting point and the seriousness of breach and harm, and what else was considered, and in some case highlighted their gravity and identified what was not accepted from Virgin's submissions and why it was not accepted. It was a detailed reasoned Decision. And we do say that it enables the Tribunal to consider the factors taken and not taken into account so as to assess whether they were legitimate to the appropriate standard and it also enables the Tribunal to look

at the penalty in the round and judge its proportionality.

In relation to the detailed approach to penalty, we set out at paragraph 65 of our submission, we atomise again the nature of the Decision and what it went through, and I am obviously not going to go back through the Decision again, but if I could just add a few comments to the various steps which are identified in paragraph 65. Firstly, it considered the primary objective: imposing penalty to deterrents. See the Decision at -- I am perhaps going to give the Tribunal some references which we say particularly make good the points there. 5.19. Noted the relevance of turnover, 5.22, and gain, 5.23. Then it assessed the seriousness of the breach and the consumer harm resulting, 5.24, and including the impact on switching, 5.31, and financial harm, 5.29. It considered whether the breach could have been avoided, or whether senior management should have noticed. As you have seen, it acknowledged that it was a mistake, not a deliberate conduct overall, 5.37. But at 5.40 it concluded that it was not justified, the failure to spot it was not justified by some complexity, it was easily identifiable and it was something which really should have been picked up relatively easily.

They then consider whether Virgin should have detected and corrected the breach sooner, and you will recall the long section from 5.43 to 5.79 analysing the three opportunities to detect or correct the breach. And it also rejected the plea that Virgin itself took the initiative in correcting the issue before Ofcom's investigation.

(Pause).

You will recall from when I took you through the detail of those sections that some of those sections looking at the opportunity to detect and correct the breach earlier identified and picked out those breaches that were seen as particularly

serious.

So at 5.55, there is the point that we regard with particular seriousness, the evidence in relation to the February 2017 breach, and then there is the similar highlighting of seriousness of the third failure of opportunity, which is at 5.63. That is not said, for example, in relation to the original error, or the first opportunity, so one can see that Ofcom is to some extent flagging, for transparency reasons, what it thought was a particular motivator of seriousness.

Then it considered financial gain, 5.80, and then it also considered the role, and this was left off my list in the skeleton, the role of the breach at 9.2(j). At 5.81 and following it addressed the argument that that was actually a de minimis breach, in other words that it was such a non-serious breach or immaterial breach that it should not sound in any penalty. It noted that submission was made at 5.82 and explained in some detail why that was not the case. It analysed the situation and then 5.84 concluded that:

"We therefore regard the contravention as serious." 5.84, bottom, and then also 5.91, end of that section:

"The contravention is seriousness and harmful to consumers."

But it did nevertheless, despite identifying the seriousness of the breach, it also made it plain in the final part of the Decision at 5.100 that it did rank the seriousness of the breaches, it said that the breach at 9.3 was the principal contravention, but that the penalty of 7 million also incorporated the contravention of the GC 9.2(j) breach. So it did a proper ranking in terms of the breaches.

Then it also looked at penalty precedence, 5.95. It did the best it could from penalties from cases which it said were not exact parallels and determined the

extent to which Virgin had cooperated at 5.98 to 5.99.

Now, we say that that reasoning was sufficient for Virgin to mount a detailed challenge to the penalty decision by way of ground 3. Its response is to say that, well, it is only able to maintain a top down challenge, as it puts it. In other words, as I take that, a challenge which is looking at the overall penalty and has the factors but cannot work bottom up as you might do of a stepped analysis at least to some degree. although you have my submission that even there its often not entirely clear, but we say Virgin nevertheless is able to make perfectly detailed submissions on all the points which go to the assessment of the proportionality of the penalty. It has not suffered any significant prejudice as a result of the way the Decision is worded and indeed that is the way that the Decision should be worded by reference to the penalty guidelines. The inability to mount a bottom up challenge is not a detriment because Virgin had no entitlement under this regulatory regime to participate in any such process.

Virgin has repeatedly suggested, and again suggested in submissions -- complain that Virgin's reasoning has not been shared or that Virgin has repeatedly refused to provide any explanation as to the penalty, and you were taken through correspondence to that effect yesterday. I have to say the relevance of that escapes me given that it is quite clear and we've made it absolutely clear repeatedly that there was no such material because that is not the way that the Decision was reasoned. Mr Leathley's evidence is absolutely clear on the point at paragraph 10 of his witness statement, which is actually set out in terms at paragraph 68 of our skeleton:

"In accordance with Ofcom's penalty guidelines, I set the penalty in the round in respect of the contraventions I had found based on my assessment of the

factors identified in the penalty guidelines having considered the materials and representations set out in paragraph 7 above. The factors I took into account in setting the penalty are set out in section 5 of the confirmation decision. I did not engage in any stepped process on, for example, determining an initial figure which was then adjusted by reference to aggravating and mitigating factors."

We say that is an unimpeachable approach to determining an alleged contravention at this time.

Then, finally, we address the point I have already, effectively, anticipated: Virgin argues that the approach was arbitrary because Mr Leathley did not have the notification proposed penalty in mind when he decided on the final penalty. That is not entirely, we say, an accurate description of his approach, and we set out what he actually said about that in paragraph 10 of his witness statement in paragraph 70 of our skeleton:

"In determining the penalty I was aware of the penalty proposed in the notification which acted as a cap on the amount of the penalty I could set but I did not use that figure as a starting point for any calculation."

So he is not saying he did not take it into account at all, he is saying he didn't use it as a starting point for any calculation. There's nothing, we say, arbitrary or irrational in that approach. He was entitled to consider the matter for himself.

I fully accept, and I should make this plain to the Tribunal, that if, in taking a different view of the material, he had come up with some different reason, some different criticism of Virgin that was not known to Virgin or some material line of argument that was not something which was embodied in the notification, then it might have been necessary to communicate that to Virgin to enable them to make any additional representations which they had. So I don't for

a minute suggest that the decision maker could go off on I will not call it a frolic of his own because it's suggested it might be a very sensible point, but it can't simply go off and develop new reasoning and not put it to Virgin and short circuit the importance of the notification procedure and the consultation procedure.

But no such thing has been done in this case. Each and every one of the factors in the final Decision are perfectly properly trailed or made in the notification, and indeed Virgin has not identified anything that could possibly fall into that category.

CHAIRMAN: The one thing that was discussed in that context was the information from the CRA report --

MR HERBERG: Yes.

CHAIRMAN: -- which obviously formed part of the representations and did not exist at the date of the notification --

MR HERBERG: Yes.

CHAIRMAN: -- of the numbers potentially or estimated to be deterred or delayed --

MR HERBERG: Yes.

CHAIRMAN: -- in switching. I got a sense that a point was being made that, well, that was not, of course, relied on in the notification decision, it was relied on very heavily in the final Decision.

MR HERBERG: Yes. The first point is obviously what was relied on was Virgin's actual material, it was not something that had come from a third party, so it was obviously something that was part of their representations.

Now, of course it is right that to some extent Mr Leathley accepted part of their findings and not all of their findings, but there is no point, it has not seriously been suggested here that there was any new point that took them by surprise,

and the submissions that have been made to this Tribunal as to why the materiality finding was not right, why the materiality findings should have been adjusted, should have been looked at through a wider metric of customers, are precisely the point with which Mr Leathley was grappling in that final Decision. And we do respectfully say that, even if there was anything in that point, which there is not, I mean one can map across and one can see there is absolutely nothing new that has been put to this Tribunal which is any different from the facts below, and, even if there was something different, the Tribunal would now take it into account in any event, but that is a slightly different point.

But one cannot in any way see that any injustice has been caused to Virgin by the final Decision having regard to and using some of the information which Virgin had itself submitted.

CHAIRMAN: But you said yourself that everything was trailed in the notification.

MR HERBERG: Yes.

CHAIRMAN: Clearly this piece of evidence was not trailed, but are you saying that the principle of people being put off switching was?

MR HERBERG: I certainly say that. This was a quantification of materiality which Virgin put forward which Mr Leathley accepted and relied upon in the Decision. So I think I accept my Lady is right to pull me up, as it were, in the width of the submission which I made at the outset and in the limited sense that this was something new that obviously could not be trailed in the notification because it had not been put at that stage, but that there was absolutely nothing unfair, or unreasonable, or which required Mr Leathley to go back to Virgin, this has not even been suggested as something he should have done, go back to Virgin and say: I am proposing to use your own

evidence to rely on it in this way and have a further round of consultation. That is not even a ground of appeal.

CHAIRMAN: The argument is perhaps more that it was used in the way that Virgin disagree with --

MR HERBERG: Yes.

CHAIRMAN: -- in terms of the assessment of it and, they would say, partial use of it.

MR HERBERG: Yes, and that is a substantive argument which you will consider and decide the matters of. If you are persuaded by Virgin that Mr Leathley was wrong to rely on that evidence to establish materiality, then that is a finding that you can make at this stage, but we say it is plainly wrong and Mr Leathley was fully entitled, or Ofcom were fully entitled, to take that approach. You heard the substantive arguments. I am not sure it goes anywhere in terms of unfairness to Virgin.

CHAIRMAN: You have addressed my question, thank you.

MR HERBERG: Can I then turn to ground 3. The argument that the penalty is disproportionate either in its own terms or by comparison to the similar penalty imposed on EE. Now, the principles which Ofcom should adopt in an appeal against a penalty decision are well established under the Competition Act. We have set out at paragraph 72 of our skeleton some of the cases. Those are cases under the Competition Act 1998 and those, in a sense, are more extreme cases because those are cases where there is a stepped approach to penalty and where the Tribunal tends to be more intrusive because those penalties are seen as quasi criminal generally.

So this is, really, we say, a fortiori with those cases. I am not going to go back through them all at this stage. The Argos v OFT case is perhaps particularly helpful, referred to at paragraph 72.2 and 72.3 of my skeleton, because it

shows that even in a stepped case, where there is much more granularity as to how individual factors were taken into account, the Tribunal will focus primarily on the appropriateness of the overall level of penalty, ie what we say the Tribunal should be doing in looking at penalty in this case. But I am not going to take up time by going to those authorities. We have cited what we say are particularly apposite passages.

Now, we say, on the facts, that this penalty decision was, in the first place, proportionate on its own terms and we respond in our skeleton to a variety of criticisms made by Ofcom. Some of these I have dealt with on the way, so I hope I can be forgiven for taking them relatively shortly.

The first factor to which Virgin say that Ofcom attached inappropriate weight is the factor of deterrence. They say that Ofcom wrongly approached it on the basis it was necessary highlight to Virgin's senior management that it shouldn't be more profitable for the business to break the law than not to. It says that is wrong because the error was accepted to be a simple mistaken oversight.

Now, we say that's simply misconceived. A penalty deterrence goes well beyond determining deliberate misconduct. Penalties are generally designed to deter errors, as well as deliberate contraventions. It was not necessary for Ofcom to find deliberate or wilful conduct in order for deterrence to play a role, deterrence is a central feature, as the guidelines, as you have just seen, stress in all cases.

And it is necessary in particular to incentivise the subject and in general deterrence terms other organisations to ensure that they take adequate steps to have proper systems and controls, culture, other measures to prevent a recurrence and prevent harm to consumers, and the application of all of that to this case is, If I may say so, very obvious. Because Virgin's characterisation of its

breach as a simple mistaken oversight was not accepted by Ofcom, and we set out, and I am not going to go through it all over again, you will be pleased to hear, under paragraph 77, many of the factors to which Ofcom relied in the Decision as to the seriousness of the process, in process terms of what was not picked up originally and then what was not picked up in the further opportunities that followed and that which was not pursued by Virgin before Ofcom intervened by way of its investigation, 77.1 to 77.6.

We say, in all of those circumstances, it was absolutely legitimate for Ofcom to take the view that it was important for the penalty to deter Virgin's senior management as well as other communications providers from having governance processes which allowed such errors to be made, errors that were found to be obvious errors and errors that should have been obviously picked up and to subsist for what was a substantial period of time.

The next point is that Virgin emphasises it made no financial gain as a result of its breaches. It repaid 98.2 per cent, I think is the figure, of the loss which was caused.

Well, Virgin's Decision plainly was not premised on any finding that Virgin had ultimately made a material gain, see the Decision at 5.80, it picked up, it cited in terms the remedial aspect and gave credit for that.

But Virgin's argument that it made no gain at all overstates the position, and we address it in paragraph 63 of our defence, I don't need to go back to that. The short point is that when you assess the seriousness of a contravention, it is a regular touchstone used by many regulators, including Ofcom, as you look at either the gain made by the body or the loss caused to customers to see the scale of the seriousness of the misconduct. And the fact that the firm has subsequently repaid it, so that there isn't ultimately any loss to consumers or

gain by the firm does not, as it were, wipe clean the record and mean that there is no seriousness, the matter was not serious at all because there was no loss or gain. It is, we respectfully say, a pretty obvious point: it would be to wipe out the regular touchstone of seriousness if you, effectively, say this is a victimless crime because we compensated everyone. That is not what a victimless crime is.

So we say that that was quite properly taken into account and was an important point and that is why there was so much concentration in the Decision on assessing exactly what the gain was to Virgin and indeed the loss to the customers.

Then there is the home movers point, which I need to deal with at a little length because it formed the subject of considerable submissions. The allegation in general terms was that the home movers allegation was a very serious and important one, that when it was dropped it should have sounded in a much bigger reduction in the penalty than in fact did occur between the notification and the final Decision.

Now, of course, there is an argument about the starting point, which I have already addressed, which is whether you do a read across from the initial decision to the final Decision in any event. We say the approach of Mr Leathley, and the better position for this Tribunal, is to look at what the allegations are that Ofcom found and if you're satisfied they were rightly made then look at the seriousness of that. But we don't say it is entirely irrelevant, we say it is certainly a matter the Tribunal can have regard to as to that an allegation was dropped in the intermediate stage. It certainly not something which you have to completely shut your face to.

We say, however, that the submission made by Virgin is premised on a misconstruction that the home movers allegation was the principal focus, or

the central plank of Ofcom's case, as it suggested in its skeleton at 136 to 137. Or even, as it was put in argument yesterday, I think, 50 per cent of the case.

My learned friend made submissions yesterday to the effect that the amount of the overcharge was much greater for home movers than it was for the customers affected by other general condition 9.3 breaches and that for that reason the home movers must have been taken as a very serious matter and he said in particular that Ofcom reasoned that the customers who had paid an ETC when they decided to move homes should not have been charged any ETC at all.

Now, we say that is simply wrong, that is not what Ofcom reasoned. Can I ask you therefore to go back to the notification in tab 10 of bundle 1 and in particular go to the passage that my learned friend did his mathematics upon.

CHAIRMAN: His silent mathematics.

MR HERBERG: His silent mathematics were particularly challenging for him and for me.

CHAIRMAN: Challenging for him, certainly challenging for the Tribunal.

MR HERBERG: I find it difficult enough when I can mention the figures without having to do it without the figures.

CHAIRMAN: Which paragraph again, sorry?

MR HERBERG: 4.40, really, although I am going to take a run up to that with 4.38 to 4.39. If one starts with 4.38, we can see what the general, the key reasoning was in relation to home movers:

"We have reasonable grounds to believe this condition in Virgin's contracts acted as a disincentive to switch. Customers moving house were faced with the choice of paying an ETC or signing up to a new fixed term contract with Virgin to

continue their services at the new address. For those customers that signed a new fixed term contract this had the effect of extending the period they were tied to Virgin. The overall effect of these provisions was to induce customers into a new fixed term contract with Virgin thereby disincentivising them from changing provider at the point in time at which their original initial minimum period would have elapsed."

So you will see that thus far the key reason is not addressing any additional ETCs that would be paid by anyone, it is addressing those people who are on the other side of the equation, as it were, those people who did accept the new fixed term contract.

Then they give an example in 4.39 and all of that is looking at the impact on a mover on someone who has accepted a new fixed term contract.

So Ofcom there was saying that people were faced with paying an ETC or signing up to a new Virgin contract, starting from scratch. For the people who chose the new contract, Virgin is saying in those paragraphs they were disincentivised because they could only switch for free at a later period in time than they would have been able to if they had not moved home and had remained on the original contract.

And Ofcom did not say, either in 4.38, 4.39 or in the mathematics paragraph at 4.40, that people who chose to pay an ETC should not have paid anything at all, which was the basis of the calculation that my learned friend, as I understood it, was seeking to do. There is simply no calculation in 4.40, which is the paragraph my learned friend was the figures from to try and do the calculation, there is no indication that Ofcom in the notification decision did any such exercise at all. When one looks at seriousness in section 5 of this notification, which starts at page 344, steps, and one sees seriousness and

culpability starting at 5.16 and at 5.17 is the paragraph where they seek to, effectively, assess it. All one sees is (a) the familiar overcharge that we all know about from GC 9.3 ending up with the 2.7 million figure; (b) is actual overcharge and is further information in relation to that, ending up with the numbers who were particularly disincentivised at the bottom of the paragraph; and then (c), which relates to home movers, is customers signed up to a new fixed term contract, so this again is not looking at anything to do with early termination charges, signed up to a new fixed term contract with Virgin following a home move rather than paying ETCs during the period. As a result these customers were disincentivised from switching to another provider when their original fixed commitment period came to an end. Then they go on to duration in (d).

But what is conspicuously absent from this is any sort of calculation such as my learned friend was trying to do to make some quantification of a large figure for customers paying excessive ETCs.

There was also a submission made, as I understood it, by my learned friend based on the numbers in paragraph 4.40, where he sought to derive the numbers who were in fact disincentivised from switching by the requirement to sign up for a new ETC period. For your note, transcript page 115 line 9 was where the submission was made.

CHAIRMAN: This relates to the people who do sign up to a new contract, I think.

MR HERBERG: I think that is right.

CHAIRMAN: What is the transcript reference?

MR HERBERG: Page 115, line 9: numbers who were in fact disincentivised from switching by the requirement to sign up to a new initial commitment period.

CHAIRMAN: I think there was a reference to what on a subscription package they

night have paid.

MR HERBERG: I am not entirely certain I accept the argument. Certainly Ofcom should not be taken to agree to the calculation that is made, but the very short point is that nothing like that was relied on in the notification in the degree of harm section from paragraph 5.18 onwards. There were obviously problems with the home movers allegations overall, which was no doubt why it was dropped. So there is a limit to how far one can push this, but when one is looking at the way the case was put by Ofcom, which is after all what this exercise is, because the underlying argument is that this should have been seen as the really serious allegation that was dropped. What my learned friend is seeking to rely on are arguments which were not in the notification, which was not the case that was being put or adopted by Ofcom as to the potential impact on early termination charges, which we would submit is an extremely complicated and not straightforward calculation, which was not even attempted.

CHAIRMAN: Okay. In the degree of harm section, in 5.18 onwards, is there any are reference to home movers? There is something, yes, 5.20.

MR HERBERG: Yes, it is the passage I just took you to, madam, at (c), in 5.17(c).

CHAIRMAN: And then in 5.20.

MR HERBERG: And 5.20, I think.

CHAIRMAN: Okay.

MR HERBERG: Those are the paragraphs. So I think I would invite you to consider what is said in 5.17(c), duration (d), is also home movers, and then 5.20, and compare that with the sort of submissions that were being made by my learned friend.

We do say that that supports the submission that the home movers were by no

means the central focus or central plank of the case. Rather, it was a second allegation, in my submission, and we maintain also the points that I have already made to the Tribunal, that just in analytical terms it occupied -- sorry, not in analytical terms, in presentational terms it occupied second place in the analysis, it was very much outweighed in terms of length of the analysis by the central 9.3 GC breach, it came second and so on. This supports that general level of reasoning. We say that is clear from the notification itself, this is not really ex post facto reasoning.

But ultimately we say that the centrally appropriate way that the Tribunal ought to assess proportionality is not by chasing an abandoned allegation and assessing its seriousness but by looking at the seriousness of the allegations which remain and considering whether they support, in looking at it all in the round, a proportionate approach to penalty and there is really very little assistance to be gained by considering that abandoned allegation.

There are then a series of allegations of what are said to be failure to take appropriate account of Virgin's representations. Virgin said that their representations made on receipt of the notification decision undermined a series of points which Ofcom had relied on and by implication had abandoned but this appears to have had only a limited effect on the final penalties, this is their skeleton paragraph 144.

We say they overstate the importance of these points, and, in any event, as we know, the penalty was significantly reduced. You are aware by what number.

So just running through those points very briefly, which are addressed at paragraph 82 of our skeleton argument. The first point was that Virgin did not identify any harm to competition in the Decision. Well, no, it did not, but even in the notification it was only capable of harming competition and that was

similar to what was said in the Decision, have the potential to harm competition, paragraph 5.24, so there was, effectively, no change there. Obviously there is a criticism about whether it should have done. But that is an entirely separate matter.

Secondly, there is a contention that Ofcom reversed its finding that the number of customers that I have set out in paragraph 82.2 may have been deterred from switching. I think reversal is not the right way of putting it. There was a reduction of that number to the number set out in my paragraph a little lower, but against the total that is not a massive reduction, that's a factor that there was a reduction between those two numbers.

Then at 82.3 there is reliance on the phrase that a particular express, which I cannot at this stage mention, but which my learned friend put, I think, as Ofcom's judgment on Virgin Media's culture, is the way he put it, appeared in the notification but not in the Decision.

Now, my Lady, this raises two points. One is, frustratingly at this stage in my submissions, an issue of procedure and, secondly, the issue of substance as to whether there is any substance in the complaint. The issue of procedure is that this is one point where we really don't accept that there is any basis on which this phrase can be said to be confidential information which should not be repeated in this Tribunal.

Now, what I was proposing to do is to explain shortly why we take that view. I am not bursting the say the words out loud today, and so I would be very happy for the Tribunal to consider that --

CHAIRMAN: The Tribunal is reading them anyway.

MR HERBERG: If the Tribunal is reading them anyway, then I am not sure there are other people in the room who need to hear. So I would be very happy if the

Tribunal were to determine this point as part of its decision overall and if it agrees with us that these words are not confidential then, if it feels the need, then it can mention them in its final decision but it doesn't have to. It is frustrating when these points arise but, from Ofcom's point of view, it has to deal with applications all the time for confidential information.

CHAIRMAN: Yes.

MR HERBERG: And there are situations where it does not feel it can simply roll over every time and say it does not really matter, we'll make it confidential.

CHAIRMAN: Are there submissions on this in your skeleton or do you need to make them orally.

MR HERBERG: There are not because the point only arose since. So I would need to spend a few minutes explaining what the -- I think I can do it in about five minutes just, but I will have to hand up the relevant requirement for confidential information and how it is measured.

CHAIRMAN: Yes.

MR HERBERG: But if I do that now then my learned friend can deal with it in his reply and then the Tribunal can deal with it.

CHAIRMAN: Yes.

MR HERBERG: Rule 101 of the CAT rules is the initial port of call. And I am going to ask for that to be handed up, along with a schedule to the 2002 Act to which it refers. (Handed). The Enterprise Act 2002. (Pause). So you will see, if I can ask you to turn to rule 101, request for confidential treatment. The first part of it is procedural, I don't need to go through all of that.

"(2) In the event of a dispute as to whether confidential treatment should be accorded, the Tribunal shall decide the matter after hearing the parties and having regard to the need to exclude information of the kind referred to in

paragraph 1(2) of Schedule 4 to the [Enterprise] Act."

So one needs then to turn to the relevant test in paragraph 1(2) of Schedule 4 to the Enterprise Act, which is the other document which should be with the Tribunal. That provision provides that:

"In preparing that document the Tribunal shall have regard to the need for excluding, so far as practicable—

(a)information the disclosure of which would in its opinion be contrary to the public interest ..."

We say that has no application here:

"(b)commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;

"(c)information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

Now, we say that none of those categories are remotely engaged by the description which Ofcom though it appropriate to make in the notification decision but which were not embodied in the final Decision. We say it is not commercially information at all in a sense. If one looks at (b), it is not commercial information, it is Ofcom's comments on the culture at Virgin Media which was present in the notification. It is not clear how this kind of comment made by a third party amounts to Virgin's information at all, still less commercial information. It is a long way from the kind of pricing or financial information which this provision is usually invoked to cover, and it is also unclear how it could possibly significantly harm the legitimate business interests of Virgin, no dispute that the phrase appeared in the provisional decision but not in the final Decision.

Then it obviously does not relate "to the private affairs of an individual, the disclosure of which would or might in its opinion significantly harm his interests". It is a phrase made solely at the level of the collectivity of the company and does not in any way highlight or single out any individual and nor can any specific individual be inferred from that term and to my cost there is Supreme Court authority, which I have not got with me, in the financial services arena, the case of Macris v Financial Conduct Authority.

CHAIRMAN: I am aware of the case.

MR HERBERG: You are aware of the point in that case, that in a monstrous decision of the Supreme Court they held there was no protection given where a phrase was used at the collectivity level even if it could be inferred from an individual. But is not the situation here anyway, we say.

So we say, for what it is worth, that there are no good reasons for cloaking that phrase in a confidentiality ring.

I would simply leave it at that. That is Ofcom's position.

CHAIRMAN: Thank you.

MR HERBERG: But, in any event, we say that Virgin significantly overstates what can be read into the dropping of that, of the offending phrase, from the final Decision. It was used, firstly, in the introductory summary section to the penalty section, if I can ask you to go back to the notification in section 5, the proposed penalty from paragraph 5.1 onwards. It was used at paragraph 5.8 in the introductory section:

"We have identified evidence that points to a ... across VM. We consider that this was a material contributing factor in the contraventions identified in this notification which adds to their seriousness ..."

Now, the evidence to which Ofcom was referring, "we have identified evidence", the

evidence to which Ofcom was referring can only be, obviously was what follows in the penalty section and that was in particular 5.27, whether appropriate steps were taken to prevent the contraventions, whether senior management should have been aware, all the analysis under that, all the way through to the end of 5.27, all the way through to 5.33, and indeed you will see the phrase repeated at the end of 5.32, so it comes a second time there, the same phrase is repeated in the last sentence of 5.32. So it's obvious that that's where it is coming from. And also 5.34, whether Virgin took timely and effective steps to end and remedy the contraventions.

Well, the short point is that all that material remained in the Decision. None of the substance on which that judgment was based was in any way excised or minimised or lessened as a criticism of Virgin. All of this was set out, I should say, in provisional finding 5 I don't need to go back to that, 4.44 all the way through to 4.63 of the notification. You'll remember that all these criticisms were made a breach at the stage of the notification but they were turned into a consideration in relation to penalty in the final Decision. So that is the basis, though there's even more detailed consideration of the material at that part of the Decision.

But it all remained in the final Decision and it was all relied on, heavily relied on, in making the findings of seriousness of breach, as I have already shown you in the final Decision, and particular the factors were picked out as of particular seriousness, so that we say that the fact that Ofcom chose to drop the particular phrase highlighted by Virgin can hardly be said to be such a serious matter going to penalty. I certainly accept, and you can see it shining out of their representations, that the firm felt hot under the colour about that phrase in particular being used as a soundbite or whatever, no doubt, but it grossly

overstates the significance to the Decision to suggest that that was some hugely grave allegation that was subsequently withdrawn. It is an absolutely unjustified way of looking at it. Ofcom decided not to use the epithet but all the evidence remained and was expressly relied on and used.

Then we come on to other stray factors. Material financial harm, I don't think I need to address that, that is paragraph 83 of our skeleton.

Breach of 9.2(j). Virgin contends that it was disproportionate because it was a makeweight allegation. That argument was made also to Ofcom and it was considered and it was rejected in the final Decision. It was said to be an important consumer protection provision and Ofcom found that the breach of 9.2(j) was serious and harmful to consumers, I won't go back to it, the Decision 5.91. And, importantly, Virgin has not challenged Ofcom's finding of a breach of 9.2(j). Although Ofcom stated that the penalty was set principally in relation to the breach of 9.3, Ofcom, we say, rightly took the breach of 9.2(j) into account in determining the proper penalty and was right and certainly entitled to do so.

Then, my Lady, finally I come to the comparison of Ofcom's penalty decision with the EE decision and whether it's proportionate when one is looking at that particular metric. Virgin contends that the penalty of 7 million which was imposed on it was disproportionate when compared to the penalty of 9 million before reduction which was imposed on EE in a decision the same charges on the same day, issued on the same day.

Now, the first point is a consideration of the proportionality between the two decisions at all. It is obviously a task which the Tribunal is equipped to do and we will look and make such comparisons with the EE decision as it thinks it appropriate. It is a part of assessing the proportionality of this Decision. We

fully accept that you look at a similar case, especially one issued on the same day and especially one where both the underlying facts and the charges show distinct parallels. So we fully accept that it will be part of the Tribunal's proportionality exercise to do a cross-check looking at the two decisions. But we say, contrary to my learned friend's submissions, there can be no criticism of the way that Ofcom proceeded when it reached this Decision and indeed when it reached the EE decision.

Because the criticisms were made, can I take you back to Mr Leathley's statement, which I've referred to but have not actually gone to until now, in the first case bundle at tab 8. He deals in general terms with his determination of the appropriate penalty, starting at paragraph 9. I read this, you have no doubt read it again. But he deals in particular with the EE investigation at paragraph 11 onwards. He says:

"On 11 October, I met with the decision maker in a separate case relating to EE's early termination charges and its compliance with GC 9.3 and 9.2(j). The meeting was held at the request of the EE decision maker. The case teams involved in both investigations were also present at this meeting. A note comparing aspects of each case and some of the factors relevant to the assessment of penalty was prepared by the leader of the case teams for the purposes of our discussion of the similarities and differences between the two cases."

And you were shown that yesterday:

"At the time of my meeting my consideration of the Virgin Media case was advanced, reviewed the material set out, shared the oral hearing, discussed the reps with the case team and set out my views in the light of the reps on the substance of the contraventions which I intended to confirm. As I explained to the EE

decision maker at the meeting, at the point in time I had a range of 6 to 8 million for the penalty I was considering."

He understands that the EE decision maker was appointed on 27 September, so shortly before the meeting, very shortly before the meeting in question, he had only just been appointed, and had been provided with a draft of the statement of facts set out the case team's view of the contraventions in that case and the underlying evidence:

"I was aware that the EE case was at an earlier stage that the Virgin Media case when the meeting took place. I determined the penalty on 24 October. I took this decision without knowing what the decision maker in the EE case had determined or was going to determine in respect of the contraventions and the penalty in that case. Accordingly, I was not in a position to consider the comparability of the EE penalty with the penalty I was proposing to impose. In the event, I understood the determination in the EE case took place at a later date and was subsequently finalised under a settlement agreement."

The publication was not until 16 November of that year, of 2018.

So what is quite plain is that Mr Leathley did not have an opportunity before he finalised the Decision in this case to consider comparability with the EE decision. We say no criticism can be made of him about that. It does not mean, of course, that Ofcom as a whole, looking at Ofcom collectively, did not do any cross-comparison between the two cases because the decision maker in the EE case did know at the very least the range of penalties, the pretty accurate range of penalties which the Tribunal was considering in this case, between 6 and 8 million. So he had at least that in mind, indeed may have known more since the Virgin Decision was finalised shortly afterwards.

So certainly this Tribunal should not assume that there was not all proper

co-ordination between Ofcom in relation to the two decisions, because the EE case may have considered the Virgin penalty and achieve consistency that way.

But, in a way, that is a bit of a sideshow because the Tribunal is in the position now to consider the two decisions and make its assessment, a proportionality assessment between them.

And we say in that connection that Virgin significantly overstates the respect in which its case was less serious than that of EE. We say in paragraph 87 of our skeleton the Virgin's conduct was in fact similar to EEs and in some respects worse. In other respects it was better and that is no doubt why Virgin's penalty was significantly lower than EE's penalty: 7 million as opposed to 9 million. One obviously cannot take the settlement discount into account. So there were respects in which EE's case was significantly better than EEs, not least because it was in other respects worse.

Firstly, I will just deal with these lightly because the Tribunal will have seen these in our skeleton, the amount by which Virgin customers was overcharged was 2.8 million, as we know. At the lower estimate, the amount by which EE's customer was overcharged was 3 million but there was a higher estimate of 4.3 million. So it is in between those two figures. So clearly the balance favours EE even. On the lowest estimate it was slightly less and on a higher estimate it was significantly less than EE. So that is the first point.

Virgin seeks to characterise EE's error in failing to spot its contraventions as a complete disregard for compliance and therefore more serious than Virgin's own failure. That is skeleton paragraph 158C. We absolutely do not accept that. We say that both CPs were guilty of a failure of governance, insofar as the breaches were undetected until the end of the relevant periods. The

relevant judgment in the EE decision is in paragraph 2.11. I am not going to take up time. It is at tab 31. We say the relevant passage says there is no evidence to suggest that EE had in place processes to review or check contractual terms or ETCs for compliance with GC 9.2(j) or 9.3. So no evidence that EE had in place processes to review or check contractual terms.

We say, having regard to all of the failures of the Virgin process, that that was effectively similar, that none of the ETC issues were picked up despite repeated opportunities for its governance process to do so. And in some ways, Virgin's situation was worse because, of course, its employees actually spotted the problem and chose not to take prompt steps, as I have already addressed. There were no equivalent findings to that in the EE case and that was a finding to which Ofcom in this case paid particular regard.

Virgin then contends that EE took no steps to stop or remedy the breach until Ofcom opened its investigation. The short answer to that is neither did Virgin, on Ofcom's findings. Virgin tried to argue it did but that was carefully considered and rejected, 87.3.

Virgin contends that the remedial steps which it has taken go further than proposed by EE. Now, in fact there is a measure of truth in this because although both CPs undertook to refund customers who had been overcharged, in EE's case it was not possible to do that exercise to the same level of completion, or practical completion, as Virgin achieved because of the duration of the contravention and incomplete records, and we give the reference to the EE decision at 4.25 there.

So EE ended up providing a refund of 2.7 million in respect of an overcharge which was 3 million at the lowest estimate or 4.3 million at the higher estimate. But

it is not the case that 1.6 million will never be refunded. That rather overstates it. It is not clear that the overcharge was that much, that was the higher estimate, but some level in between those two figures is the appropriate comparison and therefore I would certainly accept that on that particular metric Virgin are in a better place, a slightly better place, than EE were.

There is one respect in which the failure to spot by -- I think this is a point of submission I made earlier -- there is one submission in which the failure to spot and pick up the error by Virgin was, we say, rather worse than in the EE case, and that is because in Virgin's case it was, as Ofcom found, a relatively obvious point that should have been picked up because it was a breach of their own contractual terms. They were simply charging customers more than our own contractual terms. In the EE case, there was no breach of the contractual terms, there was not any obvious hard-edged point like that. It was that on the fairness/proportionality reasoning it was held that the charges were unjustified because they did not take account of discounts that had in fact been given to customers. So there is a degree to which, although EE plainly missed opportunities to consider whether its ETC has breached 9.3, it was not such an obvious breach as Virgin's own, and you will see that factor being effectively reflected in the EE decision at paragraph 4.12, where the Ofcom effectively noted that EE's contravention involves charging excessive ETCs to customers who were in receipt of discounts to their recurring subscription price, rather than charging ETCs that were excessive to undiscounted prices, which is obviously a different contravention.

Then Virgin contends that it was overwhelmingly cooperative during the investigation. Well, you have already seen the reasoning on that, that was not

what Ofcom found. Virgin may claim that EE received credit for cooperation, it is true, whereas Virgin did not. We say that was fully justified by Ofcom's findings, that although Virgin had generally provided Ofcom with information in a timely manner, this is Decision notice paragraph 5.98, that there were errors that required remediation and so on and so forth, and we set out at paragraph 87.6 Virgin's response to various notices which contain discrepancies. I am not going to go through those in detail now, but they are set out at detail at 87.6, and those errors do not include the quite separate and more serious problem in relation to the third information request, where it was seen as being so misleading that it led to a separate charge and penalty determination against Virgin, which is set out in the bundle.

These involved the claim that Matterhorn did not involve consideration of ETCs and also the claim that the particular level of senior officer who was responsible for sign-up was avoiding identification of a role that was less senior than was in fact the case.

Those formed the basis of a separate penalisation, so those were not taken into account. But even apart from those, there were various problems in relation to information requests that were noted in the final Decision.

Now, there is then a comparison with other penalty precedents in the Decision. I don't think I need to go to those, paragraph 88 is where we deal with those in our skeleton.

So the last point I need to deal with relates to the turnover issue and the comparison of the EE.

CHAIRMAN: Yes, well, we do need to take a break, but I was going to let you, if it this is very short.

MR HERBERG: It is probably five minutes.

CHAIRMAN: It is probably still more convenient to take a break before the reply, so do the five minutes.

MR HERBERG: I'm grateful. It is an issue which I need to deal with because you will recall that we set out in a first version of our skeleton and then replaced that because an error was detected in relation to the EE decision very recently that caused some reconsideration and I need to, first of all, explain to the Tribunal what that error was and, secondly, address you on how it affects how you compare the two decisions.

CHAIRMAN: Yes.

MR HERBERG: Can I hand up three copies of the confidential material underlying the EE case that were provided to my learned friend at the end of last week. (Handed). This underlay our change of position. This was all to do with what was the relevant turnover, which obviously is an important figure when you are comparing cases. There was an error in our former paragraph 89 of our skeleton which talked about EE's penalty as a percentage of its relevant turnover. In short, the figure that we gave for EE was too high. How this came about was as follows. Under section, I don't need to go to it, 97.1 of the Communications Act, a penalty under section 96A shall not exceed 10 per cent of the turnover of the person's relevant business. Relevant business is defined under 97.5 as inter alia the provision of an electronic communications network or service. What Ofcom did wrong in EE's case was to use the incorrect figure for relevant turnover. If I can refer to the document I have just handed up. If you go to paragraph 13 of that document on page 13, you can see a request:

"Please provide full details of any EE turnover in the year specified in question 12 above [which it has in responding to that question] regarding or treated as not

being part of the turnover of its relevant business ..."

The response is:

"Our starting point is to take turnover of EE's relevant business for the period of the relevant year. This is taken from the revenue line of the income statement ... We then make two adjustments. First we made an adjustment by deducting turnover that is not related to the provision of communication services as defined in section 97(5) of the Act. EE Limited's turnover after making these deductions is ..."

And then you see a figure. That is the figure which should have been taken and used, we say, in the EE decision, because that is, in fact, the relevant turnover figure. It is the deduction which comes to the figure which is relevant business, the provision of electronic communications network or service.

But then they say:

"Secondly, we made an adjustment by deducting turnover that is not attributable to product and customer segment where ETCs apply. We therefore deduct wholesale ... MVNO, emergency services network, ESN ... After making these deductions you get ..."

Then you see another figure there. Now, that figure, that second figure, was the figure which was taken, it was accepted by the case team, but that plainly wrongly excludes some business which did derive from the provision of electric communications service. My instructions are this was a simple error, the relevant caseworker simply selected the wrong figure and used it as a basis for the decision. And the result is that the EE penalty as a percentage of relevant turnover is lower than we originally though when we drafted the skeleton.

CHAIRMAN: Is it also lower than the decision maker thought?

MR HERBERG: Yes. No. No. Well, the decision maker thought that the relevant turnover was the lower figure.

CHAIRMAN: Oh, I see.

MR HERBERG: So, yes, so the decision maker would have thought the relevant position was higher because the turnover was lower and therefore the percentage figure would be higher.

CHAIRMAN: So you are saying the case team deciding on the level of the EE penalty used that lower number?

MR HERBERG: Yes.

CHAIRMAN: Okay.

MR HERBERG: So as a result the EE penalty as it was in fact made, the relevant percentages of turnover are not those set out in EE's submissions, are the estimates. Yes, it is the estimates in the second part of the paragraph. So one compares the figure just before the confidentiality ring in the sixth line with the Virgin figure, which is the second figure given. So those are the comparisons, which shows a significant disparity or a relatively significant disparity when one looks at the figures in fact erroneously used in the EE.

If the correct figure was used, as we had originally thought in our skeleton argument, then our submission in the skeleton, that the penalties were very nearly at the same level, was right. So, in other words, if the correct figure had been used then the comparison between the EE decision and the Virgin Decision will show that the penalties were effectively set at roughly the same level of turnover.

Oh, I'm sorry, that is not right. (Pause).

CHAIRMAN: Is it sensible to break --

MR HERBERG: I was a bit ambitious.

CHAIRMAN: -- while we get that absolutely clarified.

MR HERBERG: I've made that submission the wrong way around. I see what I've done.

CHAIRMAN: Okay. I think we are going need to come back to that briefly. We need to take a break.

(3.36 pm)

(A short break)

(3.55 pm)

MR HERBERG: My Lady, thank you for giving me the opportunity to collect my thoughts. It has been a long day and I think I can expedite matters.

CHAIRMAN: Yes, which I was going to ask you to do in any event.

MR HERBERG: Indeed. I am conscious I am eating into my learned friend's time. The short point is that the EE decision wrongly used the lower of the two turnover figures I showed you on page 13 of the document I handed up. The EE decision maker used the figure given to him by the case team taken in error and wrongly used that figure. That produced the percentage of relevant turnover figure in the first version of our skeleton, where we said they were roughly the same, it was roughly the same for EE as Virgin. So, in other words, the EE decision maker though that he was imposing a penalty which, we say, relative to turnover, was about the same as that imposed on Virgin. But, in fact, if one uses the higher correct turnover figure, in other words the other figure on page 13, that higher figure produces the disparity shown in the sixth line of paragraph 89 of our skeleton as it now stands, shows the disparity between the two cases.

CHAIRMAN: Yes, I think we have that.

MR HERBERG: That is the point. My short submission in relation to that is that the

error which Ofcom made in relation to the EE decision does not, should not help Virgin in anyway at all or infect the penalty which was imposed on it. To put it colloquially, EE may have got away with it in that the wrong figure was used. But there can be no possible claim on Virgin's part to be able to share in that error and to have an incorrect turnover figure used in its case as well, effectively. If there was an error, it is an error which should not be perpetuated when you compare -- there was an error and it should not be perpetuated when you compare as part of your proportionality exercise the two decisions.

CHAIRMAN: Thank you.

MR HERBERG: That is our submission.

My Lady, unless I can assist further.

CHAIRMAN: Thank you. We just have one further question. Is it apparent from the documents in front of us when the EE decision was actually made? Is that on the face of the -- it isn't, okay, we don't have that in evidence.

MR HERBERG: I can --

CHAIRMAN: I don't think it is in evidence.

MR HERBERG: I don't think it is in evidence.

CHAIRMAN: Okay, thank you. Thank you.

Reply submissions by MR PALMER

MR PALMER: Madam, may I start, before turning to each of the grounds in turn, briefly, on the legal framework and the test to be applied. There may not be much between us given Mr Herberg's acceptance, as you put it to him, that if Ofcom got something material wrong then the Tribunal can interfere, but it is important to emphasise the two cases that I took you to in my submissions.

T-Mobile was the first, I won't go back to it now, that was Lord Justice Jacob, I just refer you back to the submissions I made about that case. And then the BT 08 preliminary issues case. They are not cases which turn on the former test on the merits as formally contained in section 195 of the Competition Act. They turn on what the requirements of Article 4 of the Framework Directive are. T-Mobile was a judicial review case. So we are not in section 195 territory at all. That was the point. The point was when you go by way of judicial review you can still fulfil the requirements of Article 4 and I rely on that case for explaining what the requirements of Article 4 actually are.

My learned friend is wrong to seek to distinguish the BT 08 preliminary issues case, which was a CAT case, but wrong to seek to distinguish it on the basis that it concerned the admissibility of evidence. That is right. It did concern the admissibility of evidence. But, as I made clear yesterday, the basis upon which the Court of Appeal held the Tribunal should resolve that issue is by reference to what the test is under Article 4 and therefore the need to review the merits of the case, not just of the decision. You recall that, I won't go back to it.

So Hutchison, which my learned friend relied on, has to be read in that context. It does not doubt those Court of Appeal authorities. It was a case, as my learned friend accepted, which concerned detailed predictions for the future, where on either basis, including on the Article 4 basis, the Tribunal's role will necessarily be more limited, because, as I pointed out, Lord Justice Jacob said a Tribunal is not a duplicate regulator who jumps in having been waiting in the wings and makes those forecasts for itself. And on that point the intensity of review is substantially different to the cases we have at present, where the full force of Article 4 applies.

So that is standard of review. That is what I want to say on that.

Turning next to ground 1A. The key point here, having heard Mr Herberg's submissions, is that on the case as he now puts it everything comes down to the CRA evidence on materiality. It is that evidence on which he relies as the basis for saying that the test in GC 9.3, that the conditional procedure in question must act as a disincentive, is fulfilled here. So I will address you in response to what he has said on the materiality point in light of that CRA evidence. I will do that in just one moment. But the prior point to make is that is not the basis upon which Ofcom considered this case, either at the notification stage, that we know, I don't have to repeat all that, but more importantly for present purposes at the Decision stage.

The CRA evidence does appear in the Decision, you have seen it and, for your note, again, it is paragraph 3.67, but it is presented there as an alternative fallback point. I will take you back to that in a moment.

Now, of course, I don't say that my learned friend cannot rely on a fallback point that was there. If it was in the Decision, it was there in that context. But the starting point is to understand that all the analysis up to that point in the Decision was applying a different test and that test was that the charges in fact imposed exceeded the charges which VM's customers under the terms of their contract, and condition M13 in particular, were entitled to expect. We were given examples in Ofcom's skeleton argument about someone expecting a certain figure, would ring up, be told a different figure and may be disincentivised. Now, in answer to questions, it was clarified how Ofcom now puts the case. They made clear they did not rely on the idea of some subjective expectation being defeated. Instead, as it was helpfully clarified, it is not that the figure exceeded that which we are entitled to expect. It is that it

exceeded the figure which they were entitled to pay, ie it is an objective entitlement to pay no more than M13 provides for. Nothing to do with expectation.

My learned friend is right to make that concession, of course. We say the right approach would have been to conduct an assessment such as the kind that CRA did to look at the objective effect of the higher prices to see if they revealed a material disincentive. My learned friend says yes, they did. So I will come to that. That is the point I am coming back to. But I do want to press upon the Tribunal this point: that when you look at the analysis in the Decision, that is not Ofcom's case, either as to how GC 9.3 should be interpreted and applied or how it was interpreted and applied in this case. I just want to show you that.

Can we go in the Decision first to paragraph 3.65. You will see the heading above the previous paragraph "Effect of VM's ETCs on customer switching". So this is the point in the Decision where Ofcom consider precisely this point. And, 3.64, they refer to our submission on the Polska case. You must demonstrate the disincentive that affects results by means of evidence of a material effect on switching. That was our submission. You need to show a material effect on switching. Of course, just pausing there, we know against the background that the notification does not address that at all. It refers to that pool on which there may have been an effect, but it does not seek to quantify, as it acknowledges.

So 3.65:

"As regards the application of GC 9.3, the European case law to which VM has referred is authority only for the proposition that the NRA must assess by reference to clear and objective factors whether conditions or procedures for

contract termination act as a disincentive to switch."

Pausing there, query that all turns on what you mean by disincentive, what amounts to disincentive here:

"Our analysis at paragraphs 3.19 – 3.38 above satisfies this test ..."

I just emphasise that.

" ... since it assesses VM's ETCs by reference to VM's own terms and conditions, the subscription charges for VM's headline packages, VAT and VM's revised ETC methodology which takes account of the cost savings detailed at paragraph 3.33 above."

So just pausing there. They are identifying what they say is the correct test, based on Polska, and saying that our analysis at paragraphs 3.19 to 38 above satisfies this test. Now, if you turn back to see what, and remind ourselves of what is in those paragraphs, it starts from bundle page 87.

What you have here is the assessment of the ETCs, as I pointed out earlier at 3.19 and 3.20, noting the difference between what was paid and what should have been paid under the contract. Looking at the bottom, last sentence of 3.20:

"In both cases, the ETC would be more than the customer would have expected to pay under VM's terms and conditions."

If you turn on through the following paragraphs, they are mainly just dealing with how you calculate the extent of the overcharge and so forth. You get to 3.36, which is the only reference in these paragraphs to an impact on the switching rates. They say:

"We discuss the impact of VM's ETCs on consumer rates in Section 5 of this document," ie that is only relevant to penalty on this primary case.

So what matters, so far as Ofcom is concerned, is just the fact that the overcharging has happened, that more was paid than customers expected to pay.

Turning back to that section, back to 3.66, again just continuing from where I broke off. They say:

"A disincentive need not necessarily delay or prevent a course of action – it may just make it more difficult or costly to complete. As recital 47 ... Accordingly, where the source of discouragement is established by reference to clear and objective factors, that is sufficient to demonstrate a breach even if the discouragement does not prevent or delay switching in most cases.

Now, again, I made my submission yesterday about that focus on the source of discouragement rather than the objective. So that, I say, is a mistake.

Then they go on in the alternative fallback, 3.67:

"In any event, analysis commissioned ..."

This is the paragraph, now relied upon at the forefront of my learned friend's submissions as actually establishing that there was material disincentive, thus GC 9.3 is engaged. You did not hear from him the submission that the fact of overcharging in itself necessarily created a disincentive to switch independently of what is now in the contents of 3.67. And that is important, in my submission when one gets to the penalty section because the penalty is premised upon the main belief of Ofcom that it is the overcharging of customers who did not switch which is the primary focus of the breach and which on its own establishes the breach. That is the breach which in their minds they are penalising.

So, then, what of this materiality point to which I said I would return? This is why this now becomes crucial to Ofcom's case on contravention. They now rely on it explicitly. We say two things about this paragraph, taken with paragraph 5.33, to which there is cross-reference, and which effectively rehearses the same points, but with numbers. We say two things, two main points about Ofcom's

handling of the CRA evidence. The first relates to what I'll call the 10 per cent point, ie what is the relevant baseline, what is the relevant denominator, and what are you comparing that figure in yellow in paragraph 3.67, what are you comparing that to? We know that they compared it to those in this what I call the subcategory of a subcategory, those long fixed term contracts, affected by the rates in question and who would be switching in any event.

We say they have got that denominator wrong. And the second point we make, you'll recall from yesterday, is that they ignored in this materiality calculation the extent of the delay caused, and you will remember the number of days.

Now, that second point I can deal with quickly. Because my learned friend did not deal with it; instead he said that is a reference to harm. The submission that he made to you was that is only relevant to the extent of the harm caused. We say that is a misdirection by Ofcom. Ofcom were wrong to leave that factor out of the question as to whether the effect on switching was material. You cannot separate that number in yellow from what the effect on that number in yellow actually was, which was that delay in switching rather than being deterred from switching. In assessing the question of materiality, you have to have regard to both. My learned friend did not deal with that and just said that latter point is only relevant to harm, not to the question of whether there has been contravention. It is relevant to the question of being in contravention because it goes to materiality of the effect on switching. Ofcom did not exercise its judgment on that basis. That is now clear.

As to the first point, the 10 per cent point, we know that 10 per cent of those who did switch would additionally have switched had the overcharge not happened. That is the figure that Ofcom rely on to establish materiality.

CHAIRMAN: Say that again, 10 per cent?

MR PALMER: The 10 per cent figure is based on the difference between the switching rates which would have been expected. So we know how many did in fact switch who were affected by the overcharge and the CRA evidence --

CHAIRMAN: Suggests 10 per cent more --

MR PALMER: 10 per cent higher would have switched than that low number had that overcharge not occurred. They say, Ofcom says, that 10 per cent, that is a material number. We say that is the wrong focus, that the right comparison is not the number who would additionally have switched as compared to those who did switch. We say that effect has to be viewed in the context instead of the number switching overall.

Now, when I use the word overall, I don't mean the 5.5 million customers that Virgin has. I don't mean that one should narrow it down only to those in contract either, which would be a substantially lower figure, you have the actual figure there, Decision 5.35, for your note. That is because GC 9.3's focus is ensuring that conditions and procedures don't have a disincentive on switching, and the view has to be taken as to the overall level of switching, I gave you the 15 per cent level of churn, typical churn, for Virgin generally, it would be about 800,000/820,000 customers per year. That is the relevant baseline against which to consider the effect of this procedure, if that is what it was. Just as Article 30, paragraph 2 is concerned with the overall use of number portability, that is the importance of Polska, to respond to my learned friend's puzzlement about that, it is just have you imposed a charge which has deterred a few people at the margin? It is: have you imposed a charge which is higher than that which is liable to mean that people don't make use of the service?

So you have to take that overall approach. When you do that, you have a figure

which is less than 1 per cent.

So we say those are two misdirections on the handling of materiality of the CRA evidence.

Now, I don't need this additional procedural point but I make it because it comes out of comments that, madam, you made during the course of my learned friend's submissions.

CHAIRMAN: Can I just go back to that. The Decision, you are throwing out numbers, some of which may or may not be confidential, I assume the ones you have actually used --

MR PALMER: I think I have stayed the right side of the line.

CHAIRMAN: Where are those figures in either the Decision, the notification, or the CRA report? So you have used some average churn numbers.

MR PALMER: That is from VM's published figures.

CHAIRMAN: Are they in the representations?

MR PALMER: No, they are not. This is my procedural point to you, madam, this exactly anticipates the point I was about to make. I was saying I do not need it, perhaps I do in light of the point you have taken. It is this. You raised the point, madam, of course the CRA evidence was not available at the time of the notification, it is not the basis of the decision that was consulted on.

My learned friend says: oh, yes, but of course Virgin cannot complain about that because we have used their evidence but they did not of course consult us on how they were going to interpret this evidence. The CRA evidence, if you were to accept it at face value and accept it on the basis that it was put forward by Virgin, comes to the conclusion that the effect on switching was not material.

CHAIRMAN: That expresses that opinion.

MR PALMER: Yes, it expresses that opinion and it does so, you will recall my submissions from yesterday, at paragraph 88, having considered the length of the delay. You will remember I said Ofcom's reasoning stops at paragraph 81, which identifies that 10 per cent figure, but the reasoning goes on. That falls out of account. And we are never consulted on that. So the points I now --

CHAIRMAN: Sorry, would it not have been open to Virgin, if they though that the right starting point was overall switching numbers, the numbers you have just referred to that I think you said you had taken from Virgin's annual report --

MR PALMER: Yes.

CHAIRMAN: -- I am not sure it is anywhere in the documents in front of us --

MR PALMER: The other number put forward, to answer your question directly, madam, is in the representations advanced by Virgin in response to Ofcom's notification. It is the written representations at paragraph 11.

CHAIRMAN: Sorry, what tab is that?

MR PALMER: Sorry, tab 11, I don't have the paragraph number instantly to hand, we will find that for you, madam.

CHAIRMAN: Yes. Because you are asking the Tribunal to do things that are -- you know, you have given us some numbers but is not --

MR PALMER: It comes out of --

CHAIRMAN: -- jumping off the page at me.

MR PALMER: I will try and assist you in two ways. The first way is the representations that Virgin made it took as the denominator its customer base, that is the 5.5 million and said: look, you've got [figure] per cent effect. Now, Ofcom say that is wrong, that is too wide. So now we say --

CHAIRMAN: So that was five point what?

MR PALMER: 5.5, approximate.

CHAIRMAN: Yes.

MR PALMER: Ofcom say that is wrong, it is meaningless to compare it against the whole customer base and they now say, well we reject that. We say, well okay if they are right about that then they should be concentrating on the level of churn, the level of switchers.

Now, the precise figure of that, I have given you one, that is not in evidence for the reasons I have given, it is in published information. But we are talking about orders of magnitude here. We are talking about the difference between 1 per cent and 10 per cent. That is the point. They focused on the wrong figure when they should have been looking at something which in order of magnitude differently, different.

CHAIRMAN: Just to be clear, sorry, from going down an alleyway here. The level of churn is for all customers on any contract outside -- where they are in or outside an early termination period.

MR PALMER: Yes, that is all customers. I can show you in the CRA report two things which will assist. That is tab 12. The first within tab 12 is at page 510 figure 3 and there you see in the blue bars, the decreasing ETCs over time from month 1 of the contract through to month 12. You see how they decline. Then the orange, you see the switching rates which generally obviously, as you would expect, are low during the currency of the contract then spike upwards afterwards as people who come to the end of their commitment period become interested in switching. That is when you expect most switching to happen at the end of someone's 12 month minimum term, or very shortly afterwards before declining and continuing, no doubt, beyond month 21.

Ofcom's assessment of the CRA, then at tab 14, paragraph 22, also then accepts that these rates are modest in the context of these higher numbers. In particular, [figure] number switches among in contract customer in the relevant period. So that is obviously a subset of my figure. It is disclosing contracts so you expect most switches --

CHAIRMAN: What do you mean? Does in contract mean during the 12 months?

MR PALMER: During the 12 months. Yes, that is what in contract means, yes, in the context, yes. Obviously they remain on a rolling contract after that, but here that means in that initial commitment period. So obviously after that switching increases and you have seen roughly by how much, so there is the evidence on it. Now, we say that we would be wrong even to take that low [figure] number because there is no reason for the purposes of GC9.3 why you should restrict yourself only to in contract customers. There is no basis for doing that. If anything, it is a reverse. If I am right on my first point under ground 1A, that the carve-out excludes in contract customers, in fact the focus should be on the [figure] afterwards, but if I am wrong about that --

CHAIRMAN: The [figure] not being in evidence.

MR PALMER: Okay, however many numbers that is. You understand. You can see from the spikes and the bar chart how exponentially higher suddenly and you can see where that number is derived from. So as a matter of scale it is in evidence.

CHAIRMAN: I see.

MR PALMER: So if I am wrong on the carve-out point, and GC 9.3 includes in contract customers, as well as the rest of out of contract -- out of initial commitment period customers, then that is support for the proposition that you should look at the whole lot to see whether there is a material effect on

switching, to see whether this is acting as, in a material way, a disincentive on switching. That is the error which they make. We are talking orders of magnitude here. I don't need to persuade the Tribunal of the exact correct figure, I just need to persuade you that Ofcom materially erred by an order of magnitude as it happens 10 per cent rather than something like 1 per cent and in that calculation neglected to give weight to the length of the delay and to consider that in the context of materiality, rather than harm relevant to penalty.

So that has now become, in light of my learned friend's submissions, the key points on ground 1. I will deal more swiftly with the remaining points on ground 1, but I emphasise that that now becomes, in my submission, the focus.

The remaining point on ground 1A is this: that in construing GC 9.3 it is essential to remember the context of what Ofcom say they did correctly. They say they copied out Article 30(6). It is not identical wording but any difference in the wording is immaterial. They went for a copy out approach of implementation. It cannot therefore have a different meaning than Article 30(6) itself. It follows from that that the various aids to construction which had been put forward by Ofcom are completely immaterial insofar as they concern the context of the way that GC 9.4 is put, we're told you should read them together, or in particular on the statement that Ofcom made, which refers briefly and without explanation to ETCs at the time that it amended the general conditions. The fact that it included a passing reference to ETCs cannot effect the interpretation of Article 30(6). So those points are of complete irrelevance, they leave the only point relied on by my learned friend in this context as recital 47, which he himself accepted could not be determinative.

The next point he relied on was the point about Ofcom saying if Virgin were right on

its construction, then it would be able to raise ETCs to penal levels, you'll recall that point, and my learned friend responded to the points I had made about Consumer Rights Act, and he said: but the trouble with the Consumer Rights Act in this context is it only applies to contractual provisions. That does not meet our point. He says, if we were right, we would be able to make contractual provisions to raise ETCs to penal levels. Of course it would be means of contract that we did. That is precisely our point. We can't. He is simply wrong to say we could raise levels to penal levels by any other means other than through a contract so that it is controlled.

So my learned friend in all those submissions has not met the point that the carve-out must extend to ETCs, as he accepts, he accepts that point, makes no provision as to what the level of those ETCs should be. Indeed, as the guidance under the Consumer Rights Act points out, different providers have set ETCs at different levels. Some more generously than others. GC 9.3 does not control that level. That is why it is not enough to say that you have created an unlawful disincentive simply by imposing ETCs at any particular level.

Briefly on the point on legal certainty, my learned friend referred to the authority Amicus, the point there being you should reach an interpretation of what the provision in question means and then judge whether the implementing provision is sufficiently precise and clear. And that is precisely our point here. Look at the trouble that Ofcom have had with it. Firstly. They told us in the notification it was all about proportionality and fairness. They now abandon that. Then they told us in the Decision it is all about charging more than the contract provides irrespective of effect. They have now abandoned that. And yet, they say, this provision was sufficiently precise and clear for us to know

exactly what it means. It is not. Even if within scope of Article 30(6) it would be open to them to impose a condition which tightly controlled the accuracy of billing in this context, they have not done so, and you cannot say that it is sufficiently precise and clear to have that effect when they themselves have altered their position now twice on how it should be interpreted and applied.

Lastly under the ground 1, under ground 1E, I covered 1D along the way by now, ground 1E, it was the effect on competition, which they say is no part of the test in GC 9.3. That rather misses the point. The point is it is a point which could be relevant to materiality. It is another way of looking at materiality. If the effects of higher ETCs were such as to have an effect on competition, that would be a route to a finding of materiality. A key point now, it is undisputed that there was no such finding in this case and the CRA evidence that there was no such effect was clear on that and it was not disputed.

So that takes you to the end of ground 1. I just return and emphasise the key flaw which, in my submission, discloses unlawfulness and discloses the basis upon which it should remitted to Ofcom is now that they've put their case on the centrality of the CRA evidence, they need to reconsider that materiality.

CHAIRMAN: This may be my fault but I had not picked up that Ofcom had, as you said, abandoned the basis in the Decision of the difference between the contractual terms and the amounts charged.

MR PALMER: The point which they clarified is it is not enough for them to identify a disincentive effect simply by referring to the fact that the ETCs applied were higher than the ETCs which customers, as they put it, were entitled to expect, or did expect. That is not enough to show disincentive. In the Decision they approached it, there may not have been an express concession to this, saying: we accept that, put it in those terms, but he did say

in answer to questions from the Tribunal: no, it is not about expectation, it is about entitlement.

CHAIRMAN: Yes, I know he said that but I am not sure that follows.

MR PALMER: Well, as I have shown you, in the Decision, until you get that to fallback position addressing CRA, you get nothing on that, indeed you get an express denial from them that it is necessary to show an actual impact on switching.

Instead, they refer back, as you will recall, to those paragraphs which deal with the assessment of the extent of the overcharge and say that is sufficient, in the Decision they say that is sufficient to discharge the Polska test. That is precisely what they say.

CHAIRMAN: Indeed they do, but I don't understand that to be dropped. What I understand to be clarified is that they are not expressing it as a subjective test of expectation.

MR PALMER: Then the question becomes: once that has been made clear, where do you find in the Decision the evidence of disincentive effect? The answer is nowhere other than in that fallback position on CRA. It says nothing. That is why they have abandoned that case. They may not say they have abandoned the case, but that is the effect of the submissions that my learned friend has made. He kept going back to say: I don't understand why Mr Palmer put Polska at the forefront of this submission, I am very puzzled because look at the CRA evidence, that determines the point. That has become, therefore, the forefront of their case, because if that point is wrong, what else have they got to fulfil the Polska test as properly construed on my submission as it should be? You will recall the terms of paragraph 25 and the submissions I made about that. There is not anything else which fulfils that

test of showing that ETCs had been raised to a point when they are reliable to prevent customers taking advantage of the service concerned. There is only the CRA.

CHAIRMAN: I do not think they have withdrawn the submission that says that you do not in fact have to show an actual disincentive effect.

MR PALMER: Well, if they have not, then in my submission they are wrong, because the words of GC 9.3, as in the words of 30(6) are quite clear, act as a disincentive, if you were going to find an infringement you must have a condition or procedure which acts as a disincentive.

CHAIRMAN: Well, Polska says, if I recall, in the English language version, liable to dissuade.

MR PALMER: Oh.

CHAIRMAN: I think it does.

MR PALMER: Up to a level which is -- not liable to dissuade at all, not in that economic demand curve sense, as I was at pains to point out, but actually reached a level where you are having an effect. It is not suggesting that any raised charge is liable to have that effect. You have to remember, in the context of number portability in particular, the provision is the charge, if any, must be such as does not act as a disincentive. Of course, any charge would be liable to disincentivise people if you take it on that, that is the importance of paragraph 25, that is not the right reading, so just as in the case of number portability you could say any charge would be liable to disincentivise. So you could say in the context of switching any overcharge that they would have would be liable to disincentivise. That is not the test, that is what Polska makes clear, the question is has it reached the point where it has the effect?

And then, once my learned friend clarifies he is not relying on any subjective

expectation argument, and simply the objective economic effect, it referred to the economic effect of the fact that they are being charged more than to which they were entitled to be charged, looking at it on that objective basis, what measure of disincentive do you have in Ofcom's reasoning anywhere? Answer: only that fallback paragraph dealing with CRA evidence, which is what then places that evidence, in my submissions, at the forefront of Ofcom's case, effectively. That is what it boils down to.

Unless there are further questions on ground 1, I will go to ground 2. I am conscious of the time and I need to finish at a reasonable hour.

The complaint here, boiled down, is that Ofcom acted in an unfair manner. Now, there was a question about procedural fairness and substantive fairness which arose. I think what I said yesterday was it is both. The reason I need both is when there is a procedural unfairness that will only sound, that will only have an effect if you can show that Virgin was prejudiced by reason of it, and I say that we were, and the prejudice I point to is the substantive unfairness that results from Ofcom's approach.

I want to just illustrate this. This is the point about the failure to separate out penalties --

CHAIRMAN: Yes.

MR PALMER: -- within the context of a statutory provision which limits the ultimate penalty to the maximum that is identified in the provisional decision, in the notification. I want to ask you to bear in mind that Ofcom has chosen, as a matter of its own enforcement policy, it is fully entitled to make this choice, but it's chosen to have a system whereby it has a provisional decision maker who is responsible for the notification and a separate decision maker who is responsible for the final decision. Now, that is entirely their own internal

procedure, it does not come from statute at all, that is just the way that they have set themselves up to run this process. Nothing wrong with that in principle, but it does have an effect, because both those decision makers are still acting in the name of Ofcom and it is Ofcom which has the statutory responsibilities to act fairly, in a procedurally fair manner, and in accordance with the statutory scheme.

Now, my learned friend's submission is that that final decision maker is entitled to consider afresh and for himself, the level of penalty to be applied on the evidence as it stands at that point and is not constrained to treat the original sum, which is that which was consulted upon, as any kind of starting point or reference point, other than as a statutory cap.

Let us just look at that a little bit more closely, because what that means is that in a case where there is more than one contravention in the notification, but only a single penalty in a notification, as here, but then one or more of those contraventions in the notification falls away, it is possible for the final decision maker to come up with a penalty which is higher than the one the provisional decision maker would have imposed had she been restricted to the good allegations only in the first place.

I just want to illustrate why that is so and why that is contrary to the statutory scheme. When you have a notification relating to one charge, with one penalty, it is obviously clear and everyone would accept that the final decision maker has no flexibility to go above the level that the provisional decision maker has reached. That is a position where we have contravention, one penalty, no flexibility at all to go higher. But on Ofcom's view, a final decision maker could increase a penalty in respect of one charge if it had been combined with another unfounded charge in the notification.

CHAIRMAN: I think we are clear about that concept to the matter of principle, yes.

MR PALMER: That is the effect of its submission. So just imagine scenario one: two breaches identified in one notification, and imagine that the provisional decision maker records in her working papers: I think 6 million plus 4 million here, say. That was not done in this case, we have seen the working paper, it did not split it up in that way. But imagine in a case that they had done that, they had decided to come to the overall total penalty on that basis, two separate independent contraventions dealt with together, 6 million plus 4 million she thinks to herself but decides just to include one penalty of 10 million in the notification. And then let us say that the final decision maker considers the second contravention identified should fall away.

Now, on Ofcom's approach, it would still be open to that final decision maker to impose a penalty of up to 10 million even though the provisional decision maker had though it only merited 6 million. In other words, there is a substantive disadvantage to the service provider in that scenario arising by reason of the fact simply that the provisional decision maker decided to call it ten, rather than six plus four.

We say that is simply a disadvantage and a detriment to the provider, which deprives it in practice of the statutory protection which the cap is meant to provide, that it is wrong in principle for Ofcom to proceed in that way.

Of course, in this case, Mr Leathley could not have gone back to a lower sum identified from the provisional decision maker because the provisional decision maker did not identify an original sum, but that does not make it any better.

I put forward two possible ways forward yesterday. One was to treat the discretion as a duty in these circumstances so that you have that clarity, that cap in

respect of the different contraventions. The other was for the provisional decision maker, although not presenting it in that way in the notification, to clearly record what sums have been allocated to two different breaches.

Now, given the potential for that unfairness, if you don't follow that procedure, I say that there is a duty at least to do one or two other on the decision maker. Under the statutory scheme, the only basis for lowering the penalty is on the basis of the submissions made. That is the point. If we take for a moment the statutory scheme again very briefly, but in tab 1 of volume 1 of the authorities. I just take you to 96A again just to show you again how this works. This arises from one of the questions from the Tribunal. 96A(2) includes the matters which must be included under notification includes at (e):

"specifies any penalty which OFCOM are minded to impose ..."

Then you go to 96C(1)(b), which is before you make the final decision Ofcom must "have allowed the person an opportunity to make representations about the matters notified". So that obviously includes the penalty which Ofcom are minded to impose.

Then 96C(4)(d):

"may require the person to pay—

(i)the penalty specified ... or

(ii)such lesser penalty as OFCOM consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention ..."

So it is set up to be reactive to those representations which in turn are reactive to the penalty specified.

Ofcom's position of the role of the final decision maker has been to jump that and say: no, we just take a fresh view, we don't use that minded to penalty at even

a starting point. So that is in principle wrong and the vice of it is really revealed by this failure then to respect the caps which can be attributed to separate contraventions.

Now, of course, my learned friend's answer to this, that some contraventions are related, is entirely consistent with what I said. On the facts of this case the overcharging allegation under 9.3 is obviously deeply linked with the 9.2(j) allegation of failing to have an accurate rate card. Completely connected. The penalty could have been applied in respect of those two together without separation quite happily because the facts are indistinguishable one from the other. But the home movers is a completely separate point. As is the T-shirt sizes.

We had reference to the guidelines to say they don't mandate a staged approach and the reasons that were given were perfectly consistent with the guidelines which do exist, which are to take an overall view of all the situation.

Well, all of that is fine as far as it goes; the difficulty comes, which is that as a public authority they have an obligation to provide reasons which are adequate and sufficiently adequate in this context to allow an appeal consistently with Article 4 when the merits of the decision can be duly taken into account and that requires something more than here is my figure based on my own judgment, not related to the figure on which you were consulted, but a new figure with different weights according to what I think. There needs to be more transparency to be fair and adequate reasons. When you apply the Proctor & Gamble test, to which my learned friend referred in his skeleton argument, we say that is perfectly consistent with our approach. That reference to Proctor & Gamble is at paragraph 50, thank you, I am grateful to Mr Kuppen. The reference is paragraph -- it is in the defence. Sorry, it is in

the defence, I am grateful to my learned friend. You will find it in the defence at paragraph 50 of the defence. We say the test that we have outlined, which they should have been adopting, is entirely consistent with that authority. What is required is that the judgment must enable the appellate court to understand why the judge -- here, why Ofcom -- reached its decision. The decision must contain a summary of its basic factual conclusions and statement of the reason which has led them this reach the conclusion which they do on those basic facts. We don't have that in respect of the quantum of the penalty such for us to be able to pursue an effective appeal to the required standard.

Now, Ofcom's guidelines cover a range of cases. CMA, competition cases, are always, almost by definition, big ticket. But the bigger the ticket, the more onerous that obligation to spell out your steps. That is why the CMA, of course, mandates its stepped approach but, of course, it is still allowed, it's open to Ofcom, to provide transparency in these cases which concern very significant penalties, it is not enough simply to pluck a figure out of the air and say: that is the judgment, you cannot look behind that, that is a regulatory judgment, there is nothing else you can do to scrutinise it, when we are meant to have an meaningful opportunity to make representations on it.

So to ground 3, finally. The main point here is allied to that ground 2 point about the home movers allegation. My learned friend began his submission by acknowledging that the amount of gain or loss is a touchstone of seriousness, as he put it. Entirely right, it is entirely normal to. Therefore an assessment of the seriousness of the home movers allegation must be allied to an assessment of the gain or loss which Virgin Media was meant to have made. That is gain to Virgin, loss to consumers.

Now, you remember the mathematics point, and my learned friend's response to that was: that is wrong, you can't say that that can be drawn from our actual Decision, that is not how we approach the matter. That is not correct when you look at the notification. Notification paragraph 4.38 to 40 is where it is largely discussed, but I can go to 4.40 to try to attempt to understand what the supposed vice was. We see the vice identified at 4.40:

" ... data suggests that the majority of customers on fixed term contracts moving to an address within VM's network opted to sign up to a new fixed contract. Over the period [that number] of subscribers said they terminated their contract before the end of the initial commitment period as a result of the home move to a property within reach of the end network and of these subscribers [that percentage] signed up to a new initial commitment period with VM at their new address. We note that in comparison a smaller proportion, [that number], of customers that were outside of their initial commitment period when terminating as a result of a home move and therefore not liable to pay ETCs signed up to a new fixed term contract with VM at their new address."

In other words, the vice identified is the charging of the ETC and specifically the fact that because an ETC was being charged to those in contract, VM could offer to waive that ETC if they signed up a new contract.

Now, there cannot, of course, be any objection to the idea that VM decides to waive its ETC, and my learned friend's point, as I understood it, says: look, the real vice here was they were being given an incentive by virtue of that waiver to enter into a new contract, but that just makes no sense on its own unless you contend that the ETC in the first place that you are waiving is somehow illegitimate. Why on earth shouldn't any one waive the charge if their

customer is going to enter into a new contract? The only possible basis for that complaint is if Ofcom believe that the ETC itself is illegitimate, otherwise the allegation just makes no sense. So when you get to 5.17C in the penalty section to see how this plays out, it is page 347 of the bundle, the allegation at C is that number of customers signed up to a new fixed contract following a home move rather than paying ETCs. As a result, these were disincentivised from switching. At 5.20, we also know that number signed up to a new fixed contract with VM during that period when they moved home rather than pay ETCs. That only makes sense if you are going to contend that they should not have been facing ETCs at all. Otherwise what on earth is the objection? And, absurdly, my learned friend, if I may respectfully say, does not mean Ofcom did not say that it should not have paid anything at all. Well, there is no alternative contractual provision which could be relied upon. I mean, there is no other basis, either you are saying that ETC is illegitimate or you are not. They were under the terms of the contract, M11, required to pay an ETC. Either that is objectionable or it was not. Clearly, Ofcom's case was that that was objectionable in the case of home movers who were sort of terminating through no fault of their own or, you know, through a different reason than someone who just wants to switch, to change provider.

But most absurd of all is the idea that you can see that this was not treated as seriously as we say it must have been, because it appears second in the list and because the analysis is much shorter. Well, a point can be no less serious for the fact the analysis is short. Some points just take a lot of analysis to establish, such as the overcharging inevitably requires a lot of assessment of the numbers. The fact that the point can be shortly expressed does not detract in any way from its seriousness. The most serious breaches

of all could be very shortly expressed. It is completely absurd to rely upon that, in my submission.

So that is the home movers. Then there is the cultural point, if I can put it that way. There is an issue about confidentiality which has been argued. The basis for that has been now expressed for the first time. The short answer to that is this: the first is that the rule 101(2) requires the Tribunal to have regard to the need to exclude information of the kind referred to in the Act. This is one factor, of course. But even under the Act, we fall under paragraph 1 subparagraph (2)(a), that is information the disclosure of which would in the Tribunal's opinion be contrary to the public interest. Why do I say that? Not because in isolation and in the abstract Ofcom's comment on this point would somehow harm the public interest, it is a wider public interest than that. The public interest is this: Ofcom's notifications to electronic service providers when it is taking enforcement action are always kept confidential and it is just the fact of them is disclosed. In a short press release on a short register the fact that an investigation has been opened is very shortly expressed, but no detail, least of all specific allegations of this kind are disclosed at that point, they are kept confidential. When the final decision is made, that is of course published, subject to redaction of genuine confidential material, business material and so forth, of course.

But Ofcom here made the choice to leave that out, this particular expression out. It is important that where they make a conscious decision to do so, and I will show you how you can tell it is conscious to do so in a moment, where they make the judgment that that phrase should not be repeated in the public document, it is important that that confidentiality of the initial notification is preserved. Ofcom needs to be able to test allegations in private through the

notification procedure, and allegations which then do not hold up are never disclosed in public. That is why there is no reference in the confirmation Decision to the home movers point, it just simply disappears, there is no reasoning as to why it is not upheld.

CHAIRMAN: Hang on. You must be expecting us to deal with home movers in some detail in the decision.

MR PALMER: Yes, because there is no sensitivity about that and we ask you to do that. So that can be waived if it is not harmful.

CHAIRMAN: Right.

MR PALMER: Confidentiality material is concerned with disclosure of harmful material, something that may damage someone's interests, and this phrase does.

CHAIRMAN: Well, hang on, no, you are relying on contrary to the public interest, you are not relying on contrary to Virgin's interest.

MR PALMER: No, the public interest is in being able to maintain the confidentiality of what appears in the notification. That doesn't mean someone in Virgin's position has to maintain that, it can chose to waive that completely.

CHAIRMAN: I did not understand that this is a sort of one-way street from Virgin's point of view.

MR PALMER: It must be, yes. Yes, it must. Ofcom has to test those ideas, it can put whatever allegations it wants to to any electronic service provider in private and if it upholds those allegations, they become public. That is Ofcom's prerogative. Virgin's prerogative is to resist any allegation which is made to it in private and, if it is not pursued in public, it is not upheld and not put in public, then Ofcom has no basis to choose of its own volition to put that in public. Virgin can, of course, say, you know: we were accused of breaching

our ETCs in respect of home movers but that allegation was not upheld because that information is confidential to it and it can waive that.

But, here, you have a conscious decision to exclude it. I want to show you how I can say it is conscious, because in the notification at paragraph 5.32, you have that paragraph beginning "We regard with particular seriousness" which finishes with the final two sentences, which are the harmful bits, not just that phrase but "we restrict for the purposes of confidentiality" submission, we are particularly concerned about that phrase, but you can see that there are two criticism, the criticisms made in those final two sentences of that paragraph, the more general rather than specific criticisms. If I ask you just to keep a finger in that page and then turn back to the Decision at paragraph 5.55, you have 5.55 beginning with "W-regard with particular seriousness".

MR HERBERG: If it helps, my Lady, it is certainly accepted that it was a conscious decision to remove that phrase. That is certainly not in any doubt, if it assists my learned friend.

MR PALMER: I'm grateful. I am going to make a supplementary point about that. You can see that because the paragraph ends with the eight months later point, which is just short of the final two sentences, and in its place what you have is 5.56, which does not appear in the notification but appears in the place of those last two sentences, which is VM's acknowledgement that its governance process failed to identified and take the right case of action in this instance and that it accepted that the issue should have been escalated but a poor judgment was made by a single individual. In other words, the change goes from the general to the particular, and I take no objection, obviously, to the particular, but that general allegation, we said in those lengthy submissions, which I will not go back to, that that was unsupportive, that they

could not make that inference from these individual criticisms, which they are entitled to make and did make. They overcooked it in the notification and, having overcooked it, they withdraw it and consciously decided not to rely on it. In those circumstances, we say we are entitled to continued confidentiality and it is the general interest that is in the public interest that Ofcom -- I cannot criticise them for making the point in the first place, they were totally entitled to make that point in the first place but that is because it is confidential at that stage.

CHAIRMAN: But I have some trouble, I have to say, and this may well not be relevant, but I have some difficulty with you saying that you assert this point, disclosure will be contrary to the public interest, whereas effectively at Virgin's election it can say that other points dealt with in the notification and not in the Decision are effectively at its election, if not excluded by being contrary to the public interest.

MR PALMER: If the point had somehow been confidential to Ofcom then that objection would be a very valid one. But the fact that it had made that itself, that put that complaint to Virgin, is in no way confidential to it. The interests which are being protected, the confidentiality attaches to Virgin, it is Virgin's interests which are being protected by this confidentiality, Ofcom has the opportunity to make the complaint. That is its interest, to put it to Virgin for its reaction: this is what we think, provisionally, we have reasonable grounds to believe, these are our reasons. Virgin then has the right to object and say: no, that is not justified. In this instance, that was upheld, that was consciously removed.

Now, you know, in contrast to the home movers, you know, Virgin has no particular sensitivity about the fact it was accused of this particular breach and it was

upheld. There is no problem about referring to that in open court. But it would be quite wrong for that sort of generalised allegation, unsupported by the evidence, to then be banded around in public when it is injurious to Virgin's interests, and we say that there is a wider public interest in protecting that information, which is injurious to individual providers, and the public interest lies in Ofcom's ability to raise whatever allegations it wants in private, and only to publish those which it considers are upheld.

MR HOLMES: Is it correct that, given that this expression has not been referred to in open court, that this point only arises if we were to feel it necessary to use the expression in the judgment?

MR PALMER: It does. Sir, you are right, because if you go back to the Enterprise Act at subparagraph (3), you see the words:

"But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision."

Of course, a fortiori, even if you don't think it falls within (2), you still have a discretion not to mention something if you don't think it is necessary to include it in the reasons for your decision.

MR HOLMES: So we may --

MR PALMER: I think my learned friend is entirely in agreement with that point.

MR HOLMES: -- or may not need to decide the point at all, in other words.

MR PALMER: So you may not need to decide the point at all. What I say as part of ground 3 and the reason why the point arises at all is that the case must have been considered more serious and the need for deterrent the greater when Ofcom was acting on the basis that there was this general failing mentioned in those last two sentences.

CHAIRMAN: It is late.

MR PALMER: You have the point. That is a serious allegation --

CHAIRMAN: Okay.

MR PALMER: -- because it goes beyond the individual to the general and it must have been relevant to deterrence, it must have been relevant to seriousness, but it was withdrawn, that is the point on that one.

CHAIRMAN: We have your submissions. I will just say I still have some difficulty in public interest versus (b), which talks about legitimate business interests which may clearly be engaged, but I think we should leave it.

MR PALMER: I rely on that in the alternative, if you feel that better covers the point. I have no attachment to (a).

CHAIRMAN: Well, no, because you've got the problem that it has to be commercial information.

MR PALMER: Well, this is the difficulty, but I say there is that public interest in the protection of the proceedings. There we are. And I remind you that you are not limited to those points, you have regard to those points.

CHAIRMAN: I know, I have that.

MR PALMER: So there is a fairness point in general as well, and that has its own appeal, in my submission. There we are, that is that point.

Then, lastly, you will be pleased to hear, is the EE decision point. Now, let me just deal with the last point first on this, which is the turnover point.

MR HOLMES: Can I just ask a preliminary point. Do we have that in the authorities bundles?

MR PALMER: Yes, you do. It is hearing bundle 1, tab 31. You've got the non-confidential version only. We obviously have not seen the confidential version. I did give you the reference yesterday, but I did not take you to it,

which may be why.

MR HOLMES: Thank you.

MR PALMER: The point which emerges from my learned friend's submissions on the differential proportion is that if Ofcom made a mistake, Virgin cannot benefit from that mistake. And they say, they don't assert, they seek to imply, without evidence, that EE's penalty would have been higher had that mistake not been made. We've got no evidence about that at all. No even direct statement about that at all. That seems to be the implication, which we say is a totally unfair basis upon which to proceed. Relevant to the size of company, EE's penalty was significantly smaller, but even if we take the turnover figures which Ofcom --

CHAIRMAN: When you say size of the company, do you mean overall size of the company as opposed to relevant turnover?

MR PALMER: I'm talking about relevant turn over. I'm sorry, I am using shorthand for relevant turnover. That is the metric.

CHAIRMAN: Sorry, using the accurate relevant turnover?

MR PALMER: Accurate, yes. Using the accurate relevant turnover the penalty for EE is significantly smaller than the penalty for VM. You get that from my learned friend's amended skeleton argument. At paragraph 89, he gives you the figure, two figures, the percentage of the penalty as against relevant turnover, and you can see the difference proportionately between them. I can't give you that percentage but you can see the difference, particularly if you know your seven times table.

In respect of offences which Ofcom now says are of broadly similar seriousness, as I understood what Mr Herberg said, he said it was in some respects more serious, in some respects less and overall similar, and, he says, as he said in

his original skeleton argument, if Ofcom's original belief in the size of EE's turnover had been accurate then the percentages would be broadly comparable. In fact, EE's would be slightly lower still than Virgin's, but they are pretty close.

So, in other words, the submission that is being made to you is that these are broadly comparable, broadly similar levels of seriousness. My learned friend accepts at the outset of his submissions on the EE's point that the Tribunal will look at both of these as it thinks appropriate, and he accepted that you should look at it in the context of the proportionality exercise.

Before we come to that comparison and the points he made on it, he made another preliminary point, he said it does not follow that an error was made by Ofcom in failing to do the very exercise which my learned friend says that the Tribunal should do. He says when you look at the facts, Mr Leathley did not have an opportunity to consider comparability. And clearly he had that opportunity. Clearly he did, because he had that meeting with the table that was produced at the request of EE's decision maker. There was nothing to stop him making a similar request at a later stage of the EE decision maker once that case had reached a more advanced stage to again compare notes.

CHAIRMAN: Are you effectively saying he should have delayed his decision?

MR PALMER: Yes.

CHAIRMAN: Because I think his witness statement says he made his decision on 24 October. Both decisions were released on 16 November, but we don't know, do we, when the EE decision was actually made.

MR PALMER: No, we don't. And, given that, it was open to him to delay his decision such that that exercise could be carried out as a final cross-check. Given that it has not been published, it does not effect until it is published.

That is the date of Decision. For all public law purposes, the date of Decision is 16 November 2018. Until that is published, it could be changed at any point.

CHAIRMAN: Is that right?

MR PALMER: Yes. absolutely right.

MR HOLMES: Would it not have been communicated in advance to the parties?

MR PALMER: No, you get notice of the time of publication, I think.

MR HOLMES: Because there is a non-confidential --

MR PALMER: You get a short amount of notice that the Decision is coming.

MR HOLMES: But in many instances you get a confidential version of the document sent to the parties for excisions to be made prior to publication of a non-confidential version, and we have here the non-confidential.

MR PALMER: May I just take instructions on that precise point. (Pause).

MR HERBERG: Can I just assist. On that last point, I am instructed that a non-confidential version comes later, so that the confidential version comes on the day of the press release and the non-confidential version comes later.

CHAIRMAN: Does that mean the Decision date was 16 November?

MR HERBERG: It means that that was the date of publication of the Decision.

MR HOLMES: Of the Decision. So the non-confidential version which we have, which has the date of 16 November, reflects the date of the confidential Decision and not the date of publication of the non-confidential one.

MR PALMER: Yes, that is correct.

MR HERBERG: I believe that is right.

MR PALMER: You will find the same date on the confidential decisions.

MR HERBERG: On the confidential version, precisely.

MR PALMER: So in Virgin's case the non-confidential version would have been

published later, but with the same original date of 16 November.

MR HOLMES: Yes.

MR PALMER: And, of course, the relevant date is that original date, not a later date when the non-confidential version -- so the date of this document, the non-confidential EE document, although it says 16 November, that reflects the date of the Decision, not the date of this version of the Decision.

MR HOLMES: Exactly. And the same principle, of course, applies to both EE and Virgin Media.

MR PALMER: So we were given notice that the Decision was coming and received the confidential Decision. Yes, you will see that it is signed by -- if you turn to the Decision, bundle page 128, so tab 3. I am grateful to Mr Kuppen. Tab 3, bundle page 128.

CHAIRMAN: So it is signed on 16 November.

MR PALMER: That is the date of Decision.

CHAIRMAN: Is that the same for EE?

MR PALMER: Page 663, behind the final tab in that bundle. (Pause). So that is the date of decision, and up to the point when that decision is signed off as 16 November, it was still open for Mr Leathley to say to Mr Rasmussen: I have come to my decision, subject to a further discussion to check that our approaches are consistent with each other. Nothing to stop that happening, that clear opportunity. There was an obligation to be consistent. Why on earth would there not be? So my learned friend's ultimate submission is: ah, but they are consistent, and he made in this context six points. I will just deal briefly with those six points and then I can finish.

If I can do it by reference to his skeleton argument upon which he based his submissions on this, it is paragraph 87.

The first point is that amount by which VM's customers were charged was roughly 2.8 and that compares with a minimum of 3 million, albeit that Ofcom's higher estimate was 4.3 million, and the amount which EE billed its customers was between 11.4 and 13.5, although some didn't pay and it was subsequently waived.

Now, that point about the lower and higher estimate; for the purposes of a penalty, EE had absolutely no basis to be able to rely on the lower --

(Pause due to a technical problem)

MR PALMER: Thank you. EE could have no benefit from an assumption in its favour on the lower estimate. The uncertainty in EE's case stems from the fact that its breaches, its overcharging of ETCs, stem back some 6 years, not 11 months, and they had lost a lot of the records, no longer had them. That is the reason for the vagueness.

The way Ofcom put it in their decision on this point is at page 653 behind tab 31 under the heading of seriousness and culpability. I just ask you to look at 4.13, subparagraph (d). You see those figures: 3 million to 4.3. Then at (e), EE has self-calculated it repay a total of 2.7 million. And (f), the contravention continued for at least 6 years and owing to its duration EE has been unable to provide refunds to all affected customers. Taking account of the repayments EE will make, up to 1.6 million of the amount overpaid will not be refunded, which is unrepaid gain to EE and unremedied harm to consumers.

Now, as soon as you have that finding, given that EE could not be allowed to benefit from that, there is a substantial amount of money there which will never be repaid to consumers, the exact quantum we don't know, but up to 1 .6 million. That needs to be reflected by the penalty. It needs to be deprived of its gain. And undoubtedly would have been in Ofcom's assessment of the quantum.

Again, they don't have the legibility to know exactly how that factored in, but the idea that EE should be able to keep up to £1.6 in these circumstances would be obviously unacceptable to any regulator.

That is an immediate clear and serious difference between their case and ours. They had higher amounts and they could not, as we have, repaid it all. At the time of The Decision, you know, we were up to nearly 99 per cent, now it is 99.9 per cent, and Ofcom knew that we were continuing to make efforts to trace everyone even to the point where someone had died to trace their estate and pay their £34 average to their estate. It obviously takes time but we committed to doing that and were doing that to the point where we got to 99.9 per cent repayment by January this year.

Now, that is a substantial difference in the seriousness, and the idea that it could have broadly equivalent penalties when they've pocketed up to 1.6 million, or would have done were it not for the penalty, is obviously unfair and incomparable.

That is the first point. The second point related to disregard for compliance.

CHAIRMAN: And we are comparing here the penalty charged on Virgin against the 9 million, are we not?

MR PALMER: Yes, but in terms of relevant percentage of turnover, which is broadly equivalent. So the difference between those two sums are because, as they thought, subject to their mistake, but they thought that was pretty much exactly the same proportion of relevant turnover.

CHAIRMAN: Oh, I see.

MR PALMER: So that has to be factored in because that is the key metric, and indeed their guidelines say it has to be having regard to that, and that is their consistent practice. Yesterday I showed you those tables where it is always

cross-referenced to percentage of relevant turnover. So we are not seeking here to say: oh, look, well, something must be attributable to the difference between seven and nine. Because even here, on my learned friend's submission, these were, he said, about the same level of seriousness, in some respects more serious, in some respects less serious, but overall about the same. Well, that is a very clear and serious difference between the two.

The second point in my learned friend's skeleton which he develops, 87.2, it says VM seeks to characterise EE's error in failing to spot its contraventions as a complete disregard for compliance and so more serious than its own. But he says the reverse is true and both CPs were guilty of a failure in governance.

But if you look in the EE decision at 2.11, paragraph 2.11, it is said there is no evidence to suggest that EE had processes in place to review or check its contractual terms or ETCs for compliance with 9.2(j) or 9.3 during the relevant periods. EE also has a history of non-compliance with the GCs, particularly on issues relating to charging and billing consumers.

So the first point here, our point about complete disregard for compliance, is this happened to EE in a context where they had history of non-compliance. VM had no such history. That's the first point.

The second point is in VM's case they were picked up during the relevant period. The focus for the criticism, you remember what [initials of VM employee] did, he said we can deal with this in the next November price review, which of course we accept was the wrong response, but it was picked up and the intention was to express: we will deal with this, this year. Too slow, obviously. Not acceptable in that respect.

CHAIRMAN: It depends what you think "deal with" means.

MR PALMER: Well, I ask you to go back to those emails.

CHAIRMAN: Yes, we can.

MR PALMER: The point is he has found the fault, he uses a swear word in respect of it, we can see the emails, obviously that is when he stumbles across this and thinks: oh. I hadn't thought of that, and then says: oh, well, we can address this in the context of the next -- which would not have been until November, this was in March.

Now, this, in contrast with EE, just went on undetected completely for six months with no intention to address it at all. Sorry, six years, six years with no intention to address it at all.

The third point relied upon was one of equivalence between the two cases. The point was that EE took no steps to stop or remedy until Ofcom opened its investigation and they say neither did VM. So that is not a point for either, that is a point of equivalence.

The fourth point relied upon was the ability to refund.

CHAIRMAN: You have already made that point.

MR PALMER: I have covered that. You have got my submissions on that. Again, that is clearly VM less serious than EE.

The fifth point which was made, I don't think it flows in exactly this way in the skeleton, but the fifth point that was taken against us was that there is no obvious contractual point in EE's case, and you will recall that right at the outset of his submissions today Mr Herberg put some reliance on the fact that there is no similar provision such as M13 in EE's case.

That, with respect, is a complete red herring. If, again, you go to the EE decision and turn to paragraph 3.21, you see the contractual terms in EE's case, 3.21:

"EE provided us with copies of some standard terms and conditions that applied [at

the time]. The following clauses ... applied."

And you turn over and it says:

" ... You will have to pay a charge for ending the Agreement before the end of the Minimum Term which We call the Cancellation Charge. The Cancellation Charge is the total of the Monthly Charges for the remainder of the Minimum Term, less any discount you are entitled to…."

Then there is an additional point about, in the next paragraph:

" You may be entitled to a discount on your Cancellation Charge, see our Plan Price Guide ..."

So those were the contractual terms.

Then turn to 3.56 for the findings under GC 9.3. The short point is, summarised here:

"As set out above, during the Relevant Periods EE's discount consumers were subject to terms and conditions that required them, if they wished to switch provider during the fixed term of their contract, to pay ETCs that did not take account of their discounted recurring subscription price. The ETCs were instead set based on a higher, undiscounted subscription price. In other words, discount consumers paid one retail price while they remained EE customers but were treated as if they were paying another, higher price if they wanted to leave and they were liable to ETCs based on that higher price. The conditions therefore required them to pay ETCs that were higher than they would have been had they been based on the subscription prices the consumers were actually paying."

In other words, it seems under the contractual charges of charges it did not mean the charges that they were actually paying less any discount but charges which they might have been paying had they not entered into the contract on the

basis of a discounted price.

Now, that very clearly would mean that they are paying higher prices automatically if they were leaving under the ETC than if they were staying, which runs right up against the unfair contract terms guidance. It cannot be a point to EE's advantage that they did not happen to include a term which was the equivalent of M13 in circumstances where it is common ground between Ofcom and Virgin that all M13 does is reflect VM's obligations under the Consumer Rights Act. EE were under precisely the same obligation. From the consumer's point of view, it does not matter at all whether M13 exists; they still have that right not to be subjected to an unfair termination charge.

So that is the difference relied by Ofcom in this case. That EE had not put it in a contractual term, notwithstanding they are still subject to the very same obligation.

I am directed to paragraph 3.24 to 3.25. I shan't turn to it now, but that is the basis upon which the terms and conditions operated and used the monthly rental charge in question.

That factor cannot possibly somehow lead EE's decision to be treated as less serious in this respect than Virgin's.

I think there is one last point on that. No, I don't need that point, that is fine.

The last point was the level of cooperation shown by VM. It was pointed out that EE had had some credit for being cooperative. But what is said at paragraph 87.6 of Ofcom's skeleton, 87.5 to 87.6 -- well, 5, 6 and 7 all deal with this point, but the criticisms of VM are made at 87.6. I just ask you to actually look at the substance of this, just to see what sort of issue we are talking about. May I remind you, I took it to you yesterday, but the reference by the provisional decision maker expressly noted when she came to consider

the penalty, it is at tab 25:

"VM has cooperated throughout and moved swiftly to fully remedy once investigation opened."

The key point here is VM had cooperated throughout. Then she said:

"Time wasted by us through incorrect information provided ..."

Which I take to be reference to the point which is raised here. And the point relied on by my learned friend is in volume 2 of VM4 at tab 36, page 737, this is the second information notice, information request. And if you turn to the final page, 740, there are two questions there. The first is: please explain the discrepancies between the fixed term telecom packages listed in 96.2 and 3 as set out in the table below. You can see that in one table a particular group of brands appeared in annex 2, it's missing annex 3, and the other appeared in annex 3, and is missing annex 2.

So a point of detail in all the information submitted that there was that discrepancy.

Then under paragraph 4: please explain the discrepancies which we have set out in the attached Excel document in relation to the information Virgin provided in response to various questions. And, again, they are inconsistencies between the name of the packages and dates packages, minor inconsistencies at C and the figures given for the number of subscribers, minor inconsistencies in the figures set out for number of subscribers and so forth.

That is the sort of point of detail which is being talked about. It is not, in my submission, evidence of a lack of cooperation; it's just that in any heavy information request there may be points of detail upon which Ofcom as regulator has to revert. Of course it would rather not have to revert. But the idea that this, sort of, need to make a second information request in respect of these sorts of points can somehow be balanced against the up to £1.6 million

which customers will never recover is ludicrously over-egging it.

And the second one is relied upon. The third notice isn't it relied upon and that is because it was expressly stated that the third notice was not going to be taken into account, it was dealt with separately. And then there is the fourth notice, which you can see from the paragraph, I need not take you, you have got the reference there.

MR HERBERG: Sorry, that's not right. The third notice is relied on. The parts there is just that there is a separate issue in the third notice which is not relied upon.

MR PALMER: I am grateful for that clarification.

CHAIRMAN: We can look at those.

MR PALMER: You can see my point, essentially. Given that other things are at least equal, you have to balance all this against the duration of EE's breaches, the higher number of customers affected, the higher quantum of charges, and the fact that of up to 1.6 million would never be recovered. We are in a different league.

Madam, those are my submissions in respect of ground 3. The upshot is we ask you to quash and remit, with such directions as the Tribunal thinks appropriate, which of course depend upon the grounds that you uphold. But, unless I can assist further. May I express all parties' gratitude for the Tribunal's willingness to sit late to fit us all in.

CHAIRMAN: It possibly should have been timetabled for more than two days.

MR PALMER: So it appears, I cannot resist that.

CHAIRMAN: Right. Assuming there is no housekeeping that we need to discuss, you will have the decision in due course.

MR PALMER: I am very grateful.

CHAIRMAN: Thank you both of you for your submissions.

(5.40 pm)

(The case adjourned)