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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

Case No: 1381/7/7/21

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9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

Friday 13 May 2022

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15 Before:
16 The Honourable Mr Justice Waksman
17 Eamonn Doran
18 Derek Ridyard
19 (Sitting as a Tribunal in England and Wales)
20

21
22 **BETWEEN:**

23
24 Justin Le Patourel

Class Representatives

25
26 v

27
28 BT Group PLC

Defendants

29
30
31 **A P P E A R A N C E S**

32
33 Ronit Kreisberger QC and Nikolaus Grubeck (On behalf of Justin Le Patourel)
34 Sarah Ford QC and Allan Cerim (On behalf of BT Group PLC)
35

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(2.00 pm)

Case Management Conference

THE CHAIRMAN: (Audio distortion) -- proceedings in open court, and an official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of these proceedings and a breach of that provision is punishable as a contempt of court.

Yes, Ms Kreisberger.

MS KREISBERGER: May it please the Tribunal. I appear with Mr Grubeck for Mr Le Patourel, the class representative; and Ms Ford and Mr Cerim appear for BT.

Sir, just in terms of housekeeping, there is one CMC bundle and one authorities bundle. A number of authorities were added to that this morning.

Sir, can I also check you have had handed up a revised draft order this afternoon?

THE CHAIRMAN: Yes, we have just received that, thank you.

MS KREISBERGER: It just has a couple of tweaks in, which we will come to.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, this is the first CMC following certification of the class representative's claim. We had the consequential hearing on 19 October last year, remotely.

As you know, BT's appeal has been dismissed in respect of the opt-out procedure, and now is the appropriate juncture to lay down directions to trial.

Sir, if I could ask you to keep the revised draft order open.

THE CHAIRMAN: Yes.

MS KREISBERGER: As I hope you have seen from the skeletons, much is now

1 common ground between the parties. In terms of the draft order,
2 paragraphs 1 to 7 are largely agreed, save for paragraph 4B, and 15 to 19 are
3 agreed -- thank you.

4 In overview, matters which aren't in dispute, happily the order as to the three
5 elements of disclosure divided into three tranches, those are agreed and the
6 first tranche has already taken place.

7 It's also agreed that the expert economists should meet on 30 June of this year to
8 determine a number of issues, including whether further disclosure is required
9 and to produce a joint note by 15 July of this year.

10 And it's also agreed that there should be a further CMC on or after 14 November this
11 year following the disclosure process.

12 In terms of key points in dispute, the class representative invites the Tribunal to list
13 the trial date for the first available date from 13 November 2023 and to make
14 an order providing for the exchange of factual and expert evidence.

15 Now, following the Tribunal's very helpful indication yesterday, the class
16 representative supports the Tribunal's proposal that this panel conduct the
17 case management of these proceedings to trial and the trial itself, with
18 a separate panel being constituted, if necessary, for the purposes of reviewing
19 a collective settlement application.

20 Just pausing there. So on the various points I have raised, BT resists any directions
21 being laid down today after 14 November this year, so they just want to go up
22 to the CMC in November. BT vigorously resists the listing of the trial date,
23 and also opposes the class representative's application for permission for two
24 of its experts. And I will take you, if I may, to that. What we don't know is
25 where they stand on the Tribunal's recent proposal.

26 **THE CHAIRMAN:** Yes, well, let me just stop for one moment. I just want to have

1 a quick word with my judicial assistant.

2 **(Pause)**

3 Yes. Well, it seems to me in a way the question of what to do about another Tribunal
4 is a sort of threshold point in a way. So let me just, first of all, ask Ms Ford
5 what her position is, without inviting any submissions at this stage.

6 **MS FORD:** Sir, our position is that we are very much in the Tribunal's hands as to
7 the way in which it thinks it is appropriate. The reason we have drawn this
8 issue to the Tribunal's attention is because it seems to us that the guide does
9 direct that matters should proceed in a certain way. We do anticipate that
10 there is a rationale for the reason for why the guide says that, and so we were
11 proposing to address the Tribunal on that rationale, but we remain in
12 the Tribunal's hands as to the best way to proceed --

13 **THE CHAIRMAN:** Well, I think the best thing to do, then, since the class
14 representative supports it, is for you, effectively, to say whatever you would
15 like to say about that proposal, and then if Ms Kreisberger wants to come
16 back on anything, she can, and then we will make a decision, it seems to me.
17 Thank you so much.

18 **MS FORD:** Sir, in that case, can we start with the relevant passage in the guide?
19 Which is in the authorities bundle, tab 5 at page 120.

20 The relevant provision is paragraph 6.7 of the guide, and it seems to us that three
21 particular points come out of paragraph 6.7 that bear on the issue before
22 the Tribunal.

23 The first is that an application for approval of a collective settlement will often involve
24 the Tribunal being shown material, which in the event that the settlement is
25 not approved and the case continues to trial should not be placed before
26 a Tribunal hearing the trial and deciding the merits. That's the first point.

1 Secondly, this paragraph then says:

2 "If the proceedings are certified as opt-out collective proceedings, the panel
3 conducting the case management, the case management Tribunal, will, at
4 an appropriate stage prior to the trial, determine that the proceedings should
5 thereafter be heard by a separate panel."

6 And pausing there. This is the reason why we draw this issue to the Tribunal's
7 attention because it does seem to direct a particular course of action.

8 Thirdly, as to when that should take place. This paragraph says it should be at
9 an appropriate stage prior to the trial.

10 So that's what the guide says. As to why the guide should contemplate that there
11 should be this handing over of the reins from one Tribunal to another, some
12 insight into that was given by Mr Justice Roth in his explanation in
13 *Merricks v MasterCard*, and as the Tribunal will appreciate, the Practice Guide
14 has the status of a Practice Direction which is issued by the president of the
15 Tribunal. And Mr Justice Roth was the then president, and it's his name that
16 appears on page 1 of the guide. And he was then commenting on this
17 provision in *Merricks*, and the transcript is in tab 6, page 124.

18 **THE CHAIRMAN:** Yes.

19 **MS FORD:** Starting at line 16, he says:

20 "And you will appreciate, as explained in the Tribunal's guide, that this Tribunal
21 being, as it were, the authorisation Tribunal, will not be the trial Tribunal and
22 will not then be responsible for the directions going forward to trial because if
23 at any time the parties [that is to say the class representative and the
24 defendant] should wish to agree a settlement, that has to be put before
25 the Tribunal. That would involve looking at privileged material almost
26 certainly, such as counsel's advice as to why this settlement is reasonable

1 and why it should be approved, so that cannot go to the trial Tribunal in case it
2 is not approved and that will come back to us."

3 He goes on to say:

4 "So that's the way the scheme has been set up to divide it, so directions will be a
5 matter for the trial Tribunal which will be appointed promptly."

6 In my submission, three things come out of that passage. The first is that
7 Mr Justice Roth appears clear that directions are a matter for the trial
8 Tribunal. He then makes clear that any settlement cannot go back to the trial
9 Tribunal, it goes back to the authorisation Tribunal. And in that way the trial
10 Tribunal isn't compromised by having sight of material that might be
11 privileged, and so it doesn't have to be reappointed.

12 But equally, and importantly in my submission, that also means that there is
13 an informed and up-to-speed Tribunal already assembled and appointed,
14 which is in the position to consider and approve any collective settlement.

15 And it seems to us that the fact that there is this already assembled and informed
16 Tribunal both facilitates collective settlement, which might be considered to be
17 an underpinning rationale, and it also facilitates the Tribunal in performing its
18 important function, which is to scrutinise settlements in the interests of the
19 class. That is a function which is conferred on the Tribunal and which there is
20 not an equivalent function, for example, in the High Court, but it's for
21 the Tribunal to satisfy itself that it considers a settlement appropriate.

22 **THE CHAIRMAN:** Although it's fair to say that if you consider what used to be called
23 "infant settlements" in the High Court, whether, for example, there's a clinical
24 negligence or a personal injury action commenced in the name of a minor,
25 a judge does have to approve that settlement. That judge may have had
26 nothing to do with the case at all. Seems to work.

1 **MS FORD:** Sir, that may well be right. It seems to us that there must be a rationale
2 for the guide envisaging that there should be this transfer of competence.
3 Equally, it will always be the case that the authorisation Tribunal will be
4 the Tribunal that is up to speed. And so one might say in every CPO
5 application: why is it that you are now proposing that that Tribunal hand over
6 the reins? And it seemed to us that the rationale might well be that it
7 facilitates settlement and it facilitates the Tribunal in performing its important
8 oversight and scrutiny function.

9 There was a submission made in the class representative's skeleton argument at
10 paragraph 18B that it would be a problem if there was a premature
11 appointment of the trial Tribunal because if the Tribunal is then asked to
12 approve a collective settlement, then you would have to approve yet a further
13 the Tribunal.

14 **THE CHAIRMAN:** Your point is it would go back to the original one, I see that, and
15 I see that's what's contemplated --

16 **MS FORD:** That seems to be the way the guide proposes to deal with that. And one
17 might equally say, well, why don't we wait and see whether it's necessary for
18 a collective settlement to be approved? And if it transpires to be necessary,
19 then we can appoint a new Tribunal at that stage.

20 And it seems to us that there might potentially be two difficulties with that approach.

21 The first is that it means that if a collective settlement is contemplated, then
22 the parties have to ask the Tribunal to appoint a new panel at that point. And
23 that means either that it discloses, or it at least risks disclosing, the fact that
24 a settlement is contemplated. And that seems to us to be information which
25 shouldn't be canvassed before a trial Tribunal.

26 **THE CHAIRMAN:** Why would it not be disclosed in the other way?

1 **MS FORD:** Because there would be an already appointed Tribunal who could then
2 be asked to look at the settlement without it being necessary to then disclose
3 it to the trial Tribunal.

4 **THE CHAIRMAN:** But if, as I am confident he has, the president would have the
5 power -- it's not suggested he hasn't got the power to appoint a different
6 Tribunal -- why would the approach not be, if there is going to be a collective
7 settlement, for the request to be made directly to the president?

8 **MS FORD:** Certainly, that would have to be the way in which it would be done to try
9 and avoid the information coming to the attention of the trial Tribunal. There
10 doesn't seem to be an established mechanism for that because, obviously,
11 that's not the way in which the guide conceives that it will be approached.

12 It does also, in our submission, raise a problem insofar as settlement might arise at
13 a relatively late stage of the proceedings. And in those circumstances, it
14 would obviously be enormously disruptive to have to appoint a whole new
15 Tribunal at that stage, and that potential disruption might well feed into the
16 conduct of the trial.

17 So that, in our submission, is why the guide envisages that a trial Tribunal will be
18 appointed, and not that one might wait and see whether or not it's actually
19 necessary to do so.

20 The Tribunal, in its letter of yesterday, has canvassed an alternative, which is that
21 the authorisation Tribunal then manages the matter all the way through to trial
22 and then there is another Tribunal appointed to consider any collective
23 settlement.

24 **THE CHAIRMAN:** Yes.

25 **MS FORD:** It seemed to us that that, potentially, raised a similar problem in terms of
26 the risk of disclosure to the trial Tribunal of the fact that collective settlement is

1 contemplated, in that you would have to ask for the appointment of
2 an alternative Tribunal. And particularly if that would entail, for example,
3 adjournment of the trial or extensions to deadlines to accommodate that
4 process, that does risk the matter coming to the attention of a trial Tribunal.

5 And of course the Tribunal will be conscious that the parties who would be involved
6 in the process of consulting the Tribunal about the collective settlement will be
7 those that will be involved in the trial.

8 But the second concern that it seemed to us that a possible course of action might
9 raise would be that one would then have a whole new Tribunal, which was not
10 briefed and which had not been read in, and had not had the opportunity to
11 read into the case, who would have to be assembled and appointed in order
12 to approve any collective settlement.

13 And so that, potentially, could delay the approval of the collective settlement, and
14 equally make it more likely that there might be delay in the trial process. And
15 it also, it seemed to us, might, potentially, hinder the Tribunal in the exercise
16 of its function of scrutiny, as compared to the scenario contemplated by the
17 guide, which is that you would have a Tribunal which is already well versed in
18 the proceedings and which has had oversight of the proceedings right from
19 the point of authorisation, both substantively and procedurally.

20 So it did seem to us that having a ready-formed Tribunal in the wings that's
21 competent to deal with settlement might well be the rationale behind this
22 direction.

23 For that reason, it seemed that the guide had been carefully thought out and it was
24 certainly advancing a pragmatic solution to these issues, but I do reiterate that
25 we have raised this in order that the Tribunal can take the most appropriate
26 course, in the light of the submissions.

1 **THE CHAIRMAN:** Thank you very much.

2 Ms Kreisberger, was there anything you would like to say?

3 **MS KREISBERGER:** Thank you, sir, yes. We support this proposal from
4 the Tribunal. There are two reasons for that. Obvious efficiencies in having
5 continuity right the way through to trial, that has to be a particular advantage
6 in the context of complex collective proceedings; and secondly, continuity
7 through to trial represents the ordinary approach in civil litigation.

8 And I will deal with some of the points Ms Ford made at the end, if I may. But this
9 seems a pragmatic and efficient approach, which is in line with the Tribunal's
10 rules and the guide. If I could just show you the relevant provisions, briefly.

11 Can I ask if members of the panel have a full copy of the rules and the guide?

12 **THE CHAIRMAN:** I think we all have, thank you.

13 **MS KREISBERGER:** I'm grateful. I will take this briskly, but this must be the
14 starting point as to how the Tribunal manages this issue.

15 So beginning with rule 4, which is at page 7 of my version of the rules. The
16 overriding governing principle is that cases should be dealt with justly and at
17 proportionate cost.

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** And rule 4.2D provides that ensures that the case be dealt
20 with expeditiously and fairly.

21 And then rule 4.2E, dealing justly and at proportionate cost includes allotting to the
22 case an appropriate share of the Tribunal's resources, while taking into
23 account the need to allot resources to other cases. So the efficiency to
24 the Tribunal is an overriding consideration, as well as to the litigation.

25 Then going forward to rule 115, in terms of the Tribunal's powers to order this, this is
26 a provision that was noted by the Court of Appeal in the judgment in these

1 proceedings. That's the general power of the Tribunal:

2 "Subject to the provisions of these rules, the Tribunal may regulate its own
3 procedure."

4 And finally, rule 88, so going backwards to page 49:

5 "The Tribunal may, at any time, give any directions it thinks appropriate for the case
6 management of the collective proceedings."

7 So these are the provisions which empower this Tribunal to give this direction.

8 **THE CHAIRMAN:** Yes.

9 **MS KREISBERGER:** Then if I could ask you to -- well, we will turn to the guide, but

10 I will do it by reference to the Court of Appeal's judgment in these
11 proceedings, and that's at tab 11 of the CMC bundle.

12 **THE CHAIRMAN:** Yes.

13 **MS KREISBERGER:** If I could ask you to turn up page 188R, paragraph 48.

14 **THE CHAIRMAN:** Yes, which paragraph do you want to take me to?

15 **MS KREISBERGER:** 48.

16 **THE CHAIRMAN:** 48. Just a moment.

17 Yes.

18 **MS KREISBERGER:** And the Court of Appeal said:

19 "The guide recognises that the CAT will need to undertake intensive case
20 management at collective proceedings, especially where they are opt-out.

21 This is justified by the need to protect the interests of the class."

22 Obviously paramount.

23 Paragraph 6.7 says:

24 "Collective proceedings, and in particular opt-out collective proceedings require
25 intensive case management by the Tribunal so as to ensure the interests of
26 class are adequately protected."

1 So then if we turn up paragraph 6.7 of the guide, which Ms Ford took you to, that's
2 the provision the Court of Appeal were there commenting on. It's very clear
3 that the suggestion of moving from a case management panel to a trial panel
4 is because approval of collective settlement will often involve a Tribunal being
5 shown material, which in the event that the settlement is not approved and the
6 case continues to trial, should not be placed before a Tribunal hearing the trial
7 and deciding the merits.

8 That's why 6.7 suggests that there be a handover. That's the rationale.

9 Now, the Tribunal's different proposal, the alternative proposal, squarely meets that
10 same rationale, clearly, and it's more efficient because it avoids the need for
11 handover. So it's within the rules that I took you to.

12 Now, there is no other reason given for this suggestion of a handover; it is only that
13 concern. Ms Ford suggested some others, but there is no suggestion of that
14 in the rules or in the guide. It's the WP concern.

15 So then turning to the ordinary position in civil litigation, the usual rule is that a judge
16 who makes a preliminary decision, such as a decision on a strike-out
17 application or an application for permission to appeal, can then go on to hear
18 the case.

19 It's well-established -- and there is Court of Appeal authority on the rule which we
20 have added to the bundle.

21 If I could ask you to turn up the authorities bundle, tab 9, that's a judgment in a case
22 called Albion Water, which was a very long-running episode in this Tribunal on
23 excessive pricing.

24 **THE CHAIRMAN:** Yes.

25 **MS KREISBERGER:** And you will see in that case Lord Justice Richards -- I will just
26 let you turn it up, sir.

1 **THE CHAIRMAN:** Yes.

2 **MS KREISBERGER:** Lord Justice Richards refused permission to appeal on the
3 papers in these proceedings.

4 **THE CHAIRMAN:** Yes.

5 **MS KREISBERGER:** Bear with me. I'm not dealing with the version added to the
6 bundle.

7 **THE CHAIRMAN:** Sorry, where does this go to, this point?

8 **MS KREISBERGER:** So really what I am doing here is anticipating the criticism that
9 the rationale is not simply the concern about WP material, but that in some
10 way the Tribunal is tainted by having heard --

11 **THE CHAIRMAN:** I'm not sure, Ms Ford wasn't making that submission.

12 **MS FORD:** I'm not making that submission.

13 **THE CHAIRMAN:** You may not need to address it.

14 **MS KREISBERGER:** I'm happy to leave it.

15 **THE CHAIRMAN:** Thank you so much.

16 **MS KREISBERGER:** But I really just want to emphasise --

17 **THE CHAIRMAN:** I see that point, yes.

18 **MS KREISBERGER:** I'm grateful for that. In that case, sir, I can end by addressing
19 Ms Ford's points.

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** She said that it would facilitate settlement if there's a different
22 Tribunal. Now, by the time that the Tribunal is approached to approve
23 a collective settlement, it's been agreed between the parties, so ... so that's
24 the first point.

25 Sir, you already made the point that the request would be to the president, so again
26 the Tribunal wouldn't be tainted. And in any event, as you have seen, the

1 concern is WP material; the fact of settlement is not a great secret that needs
2 to be kept from the trial Tribunal.

3 And lastly, coming back to concerns about efficiency, if there is no approach in
4 relation to collective settlement, no application, then no other Tribunal need
5 be constituted.

6 Sir, those are my submissions on that point.

7 **THE CHAIRMAN:** Thank you. Thank you very much.

8 Was there something you wanted to add, Ms Ford?

9 **MS FORD:** Sir, I only make a very brief point in response to the factors -- the
10 emphasis on the question of efficiency. I would simply point out that it cuts
11 both ways, in the sense that it is potentially inefficient to have to get a new
12 Tribunal appointed and up to speed in order for a collective settlement to be
13 appointed, and it did seem to us that reliance on factors, such as continuity
14 through to trial, are factors which arise in every CPR application. So there
15 must have been some reason why the guide and the president contemplated
16 that, notwithstanding those factors, it would be more prudent to have
17 an authorisation Tribunal and a separate trial Tribunal.

18 **THE CHAIRMAN:** Thank you very much. Just give me one moment.

19 **(Pause)**

20 Well, thank you both very much indeed for your submissions. We have come to
21 a clear view about it, and as we have and as this is the first time that this
22 particular point has arisen, I'm just going to give a short reasoned judgment in
23 respect of it, which -- I think there was a problem with your official transcriber.
24 Has that now been resolved?

25 Right.

26

1 **Ruling on appointment of Trial Tribunal (see [2022] CAT [21])**

2 **THE CHAIRMAN:** We apologise we have taken so long, but it seemed to us proper
3 to deal with this point fully before we deal with the other directions. And in
4 due course, once we have had a transcript, we can of course tidy it up as we
5 need to.

6 Ms Kreisberger, can we then go to what you say is next, logically, on the agenda?

7 **MS KREISBERGER:** Yes, I'm very grateful for that. So the items on the agenda, in
8 that case, are: timetable to trial and listing of the trial date. Disclosure, if it is
9 helpful to address the Tribunal on that, it is not in dispute.

10 **THE CHAIRMAN:** So far as -- if I can just help here. So far as the very helpful
11 proposals for disclosure is concerned, at least in your first, second and third
12 tranches, you seem to be agreed about that. We don't have any particular
13 comments about it, so we don't need to take that point any further.

14 **MS KREISBERGER:** That's very helpful, thank you, sir.

15 That then leaves factual and expert evidence, including timetable for that, and there
16 is also the lifting of the stay, but that's also not in dispute.

17 Now, sir, we're asking for a trial in November next year. That's a year and a half
18 from today; three years from the issue of the CPO. BT refer to that as
19 "a truncated and expedited timetable" in their skeleton. It's not. It doesn't
20 come close. It is quite leisurely compared to some proceedings I am involved
21 in.

22 Now, sir, I am ready to address you, should it be helpful, on why it is appropriate to
23 lift the trial date today, given what BT say that it's all premature. I can take
24 you to the rules, I can take you to the guide.

25 **THE CHAIRMAN:** I think that, first of all, let me just interject that. Any trial can't be
26 before January 2024. That's simply in terms of the administrative burdens in

1 relation to CAT on other matters. So that's going to be the starting point in
2 terms of when a trial is likely to be.

3 Now, I think what would be helpful is if I could -- it doesn't seem to me there is going
4 to be any point in setting a trial date unless you're also talking about directions
5 to trial, unless there is some variant about that.

6 But can I just, first of all, in the light of the decision we have just given, hear from
7 Ms Ford on what the objection is now, as a matter of principle, to setting a trial
8 date and dealing with directions to trial? And then we will see where we go.

9 Yes.

10 **MS FORD:** Sir (audio distortion) there are many uncertainties and many moving
11 parts, and for that reason, it would be premature to set down a timetable to
12 trial in this case now.

13 Just to work through what those uncertainties are, the first concerns the limitations in
14 the available data, which is necessary to determine the matters that are in
15 issue in these claims and how those limitations might be overcome.

16 As the Tribunal has already heard, the parties are agreed that the economists should
17 be getting together to discuss by 30 June 2022, and one of the matters which
18 they are due to discuss is issues of data limitation.

19 Now, we have identified in correspondence three examples of what we say are
20 potential data limitation issues. If the Tribunal looks at the CMC bundle,
21 tab 48, please.

22 **THE CHAIRMAN:** Yes.

23 **MS FORD:** Page 404 -- this is a letter of 25 March 2022. Page 404, the three
24 bullets are the three points which we have identified, and the first concerns
25 what data will be required from third party sources, such as Ofcom and/or
26 BT's competitors, in order to undertake the necessary economic analysis of

1 the relevant market and BT's position and conduct within it, and how that data
2 will be obtained.

3 Just to be clear, these are the points which, in our submission, the economists need
4 to be discussing at their meeting.

5 **THE CHAIRMAN:** Yes.

6 **MS FORD:** The second point is how to identify the best customers in the class.

7 The Tribunal will recall that Ofcom estimated that there might be some
8 17 per cent of business customers in the class. And that is relevant to both
9 parties' expert analyses in two respects.

10 The first is the question as to the extent to which those customers might have
11 passed on any overcharge; and the second is that the claim period for
12 voice-only customers, who are also business customers, is different because
13 those customers weren't the beneficiary of the BT commitments that incepted
14 at a particular time. And so it is going to be necessary for the parties' experts
15 to have a means of identifying business customers, and BT has clarified that
16 its data does not extend to that. So the experts need to discuss how that is
17 going to be addressed.

18 The third point that is identified in this letter is how to determine the number of
19 individuals in each subclass, in the light of the fact that, as again, BT has
20 drawn this to the class representative's attention, BT isn't able to differentiate
21 between voice-only and split purchase customers before the inception of the
22 BT commitments.

23 And that's an important matter which affects both parties' analyses as well because
24 neither party is going to be in a position to put forward its analysis of the
25 quantum of the claim, without knowing how many potential class members fall
26 within each of the subclasses.

1 And so these are matters that we have identified that need to be resolved in terms of
2 the limitations on the data. Both parties are agreed that it is prudent that the
3 experts should get together to discuss these sorts of issues and how to
4 overcome them, and how the parties will then go forward, in the light of what
5 the experts agree, obviously remains relatively uncertain.

6 **THE CHAIRMAN:** Could I just ask a question in that regard? This is, essentially,
7 a factual question as to how you identify the business customers and how
8 many of them there are, and then the question of the numbers in the
9 voice-only or the split-bundle customers. Very happy that the parties think
10 that the experts should look at that, as well as a number of other things they're
11 being tasked with, but on this particular point, how are they likely to assist?
12 Because it's a pure question of fact here. I'm wondering what the experts will
13 add to the exercise of people, as it were, scratching their heads and saying,
14 "Well, what other indicators are there?"

15 For example, I seem to remember there was a VAT question which was said to be
16 one possible indicator in relation to business customers, but you might have
17 business customers who aren't paying VAT.

18 For example, how will an expert help with you this, as opposed to lawyers thinking of
19 ways to obtain evidence which is what you have to do here?

20 **MS FORD:** Well, no doubt the parties need to take both of those routes. The
21 lawyers need to put their thinking caps on, but the experts often have
22 important insights to offer in that respect, because ultimately it is their
23 methodology, so they will have views about how their methodology can
24 grapple with or overcome potential limitations in the data.

25 So, for example, the class representative has raised in correspondence -- made
26 reference in correspondence to the possibility that one might need survey

1 evidence. And again, that's a further element of uncertainty and it is one
2 which we have said also ought to be discussed by the experts. And so the
3 experts will have an input as to whether or not they might be assisted by
4 survey evidence, in what fields, in relation to what matters and how that would
5 be factored into their methodology.

6 **THE CHAIRMAN:** Now, following on from that, I see that this letter makes the point,
7 and I remember it from when we were hearing the opt-out application, that
8 Ofcom made an estimate that was 17 per cent, and indeed said it's 391,000
9 class members. Well, how did it find -- that must be in the report somewhere
10 as to how it did it.

11 And equally, am I not right in thinking that we have actually got numbers for the two
12 different groups, the voice-only and the split-bundle, which have come from
13 somewhere? Someone might correct me --

14 **MS FORD:** Sir, I'm afraid I am unable --

15 **THE CHAIRMAN:** Someone started this work because it's in the Ofcom report. Has
16 anybody looked at the Ofcom report and said, "Well, for example, the Ofcom
17 methodology is a good place to start"?

18 **MS FORD:** Well, sir, that actually ties in with the first bullet points, which concerns
19 the extent to which third parties might hold the relevant data, including Ofcom.
20 In that context it may be that an appropriate course of action might be to try to
21 obtain the relevant material from Ofcom, because Ofcom has a greater insight
22 into these matters.

23 **THE CHAIRMAN:** That seems to me to be an obvious course, if I may say so.
24 The only reason I am mentioning it, Ms Ford, is because you don't want to start
25 reinventing the wheel. And it may be, we know not, that you're never going to
26 get a completely precise answer to these questions, but courts and tribunals

1 have to deal with that sort of problem all the time, and if they have to make
2 estimates, they make estimates.

3 **MS FORD:** Sir, that's absolutely the case and it may turn out to be that that is the
4 scenario. And that's one of the matters that the experts will be asked to
5 discuss and try to reach a way forward on.

6 The simple point we make at this stage is that that's an exercise which still has to
7 take place, and which is one source of potential uncertainty that suggests that
8 it might not be prudent at this stage to be trying to set down a rigid timetable
9 as to how these things take place.

10 I have mentioned the second uncertainty, which is the class representative's
11 indication that they might want to rely on statistical and survey evidence.

12 That's --

13 **THE CHAIRMAN:** That's just them, not both of you wanting to do that. What's your
14 position?

15 **MS FORD:** Sir, we haven't been in a position to express a view either way because
16 we invited the class representative to clarify in what way they saw this feeding
17 in. We haven't received any clarification in that respect, so it remains very
18 much up in the air. But it does really underline a point, that the parties are at
19 the very early stages of seeking to establish how it is that these issues are
20 going to be determined and tried between us.

21 So our proposal as to how that should be taken forward is that it is also a matter that
22 can be discussed by the experts, and that might then indicate how might this
23 material help.

24 The third uncertainty is the scope of the expert evidence that will be needed in this
25 case. The Tribunal is aware that there is common ground that there should
26 be an economist and actuarial evidence. And Tribunal is also aware that

1 there has been belated attempts to seek a further economist and unspecified
2 behavioural evidence. I will, obviously, address the Tribunal in due course at
3 the appropriate point as to the merits of those suggestions.

4 **THE CHAIRMAN:** Yes.

5 **MS FORD:** But we do say that the very fact that these suggestions are being made
6 at a relatively shortly period before this CMC, and without a lot of clarification,
7 introduces a further degree of uncertainty about how these matters are to be
8 progressed to trial.

9 **THE CHAIRMAN:** Yes.

10 **MS FORD:** Sir, the fourth uncertainty is the fact that the CMA has indicated that it
11 will file written observations on 29 July in these proceedings. We obviously
12 don't know the content of those submissions, and we don't know what impact,
13 if any, they may have on the conduct of the trial and the way in which the
14 parties set down directions at trial.

15 The fifth uncertainty is that this regime for trying claims, claims not of one single
16 claimant or one corporate group, but a whole class of claimants, is an entirely
17 new one. And it's inevitable that the novelty of the regime will present
18 challenges for both the Tribunal and the parties. And this afternoon's
19 discussion of how one addresses, for example, the constitution of a Tribunal
20 is an example.

21 **THE CHAIRMAN:** Yes.

22 **MS FORD:** On any view, stand-alone comprehensive pricing claims raise complex
23 issues of law, fact and economics, and that's the case when they are
24 a conventional single party claim. How one goes about addressing that in the
25 context of collective proceedings is uncharted territory. And in our
26 submission, for that reason it is unrealistic to treat this claim as

1 a straightforward dispute which can be resolved by setting down a timetable
2 to trial in a relatively mechanistic way.

3 So those, in our submission, are the key uncertainties which affect the setting down
4 of a timetable and the attempt to estimate a trial length. And it is particularly
5 telling, in our submission, that until very recently the class representative itself
6 felt unable to put forward an estimate of trial length at all.

7 The Tribunal will be aware that in the original version of the order that was filed, it
8 was suggested that a trial should be listed to commence on the first available
9 date from 13 November, with a time estimate to be considered at the next
10 CMC.

11 And in correspondence, if the Tribunal turns up tab 72, page 504 --

12 **THE CHAIRMAN:** Yes.

13 **MS FORD:** -- the Tribunal will see there is a heading there, item 3, "Timetable to
14 Trial", and in the third paragraph under that head, the class representative is
15 saying:

16 "By the time of the next CMC, which is to be listed at the next mutually convenient
17 date on or after 14 November 2022, the parties will be in a position to provide
18 a realistic estimate of trial length."

19 Now, if the next CMC is the point at which a realistic estimate of trial length can be
20 provided, then in our submission, that is the sensible point at which one then
21 seeks to set down a matter for trial. And one can infer from what's said in this
22 paragraph that the class representative accepted that a realistic estimate for
23 trial length could not be identified any earlier.

24 Now, as the Tribunal is aware, in the class representative's skeleton argument which
25 was lodged on Tuesday, it was proposed that there should be a provisional
26 estimate of six weeks. And that estimate was then suggested to be revisited

1 at the CMC.

2 But in our submission it is not clear on what basis that six weeks is put forward.

3 Nothing at all has changed since the letter of 5 May, which suggested that
4 a realistic time estimate could not be made until the CMC. And in our
5 submission, this estimate remains unrealistic. And the giveaway is the
6 wording in the skeleton, which says it should be "revisited at the next CMC".

7 **THE CHAIRMAN:** You may say you're not in a position to venture any suggestion
8 about it, but does your side have a view at this stage as to how long they think
9 the trial will need to be?

10 **MS FORD:** Sir, our position is that, given the uncertainties and the moving parts, we
11 are not in a position to give an informed assessment of how long the trial
12 might be. And we agree with the sentiment that was expressed by the class
13 representative at the beginning of May, that the time when that estimate can
14 be firmed up is at the next CMC, once many of these moving parts, hopefully,
15 have started to crystallise.

16 **THE CHAIRMAN:** Right.

17 **MS FORD:** Sir, one point I would emphasise is the fact that, in our submission, it is
18 not yet time for this matter to be set down for trial, doesn't mean that the
19 matter is going to stagnate and nothing is going to happen. The parties have
20 agreed that there is plenty to keep them occupied in the meantime. And so if
21 we look at the draft order, the parties have agreed three tranches of
22 disclosure, including one which we have already given. They have agreed the
23 experts' meeting.

24 **THE CHAIRMAN:** Sorry, let me just get out -- sorry, let me just get out the draft
25 order.

26 Yes.

1 **MS FORD:** Sir, I was just indicating the matters that have been agreed to take place
2 between now and the next CMC.

3 So we have already given a tranche of disclosure and it has been agreed that the
4 parties' experts will meet by 30 June to discuss how the various data
5 availability issues and other matters can be addressed, and then by 15 July
6 they're going to produce a joint note setting out their proposed methodology.

7 There is then a further tranche, significant tranche, of disclosure, which is going to be
8 given by 30 August 2022; and then under paragraph 6, a further significant
9 tranche of disclosure by 24 October 2022. And that leads us up then to the
10 14 November CMC.

11 **THE CHAIRMAN:** Yes.

12 **MS FORD:** Of course, now that the Tribunal has determined that it will be
13 the Tribunal that will be sitting for the further CMC, that does provide the
14 continuity to enable this Tribunal to then set down the trial timetable, in the
15 light of the information that's then become available.

16 We have sought to emphasise in our skeleton that we have taken a very proactive
17 and constructive approach to the directions in these proceedings. We first
18 wrote to the class representative on 2 March 2021, so that was over a year
19 ago, on the subject of document and data retention. The Tribunal will see that
20 behind CMC bundle tab 16.

21 So this is 2 March 2021, over a year ago. By that date, BT had already undertaken
22 considerable work to identify the data that was, potentially, relevant to the
23 class representative claims, and in the light of that work, what this letter does
24 is set out in detail some five databases where relevant data was identified to
25 be held.

26 BT has also instructed third party consultants, Deloitte, at considerable expense to

1 assist it in collating and understanding the vast quantity of data which is in
2 these databases. They have undertaken considerable preliminary work.
3 They have identified the databases. They have identified the relevant data
4 within the databases. They have done additional work transferring the data,
5 data mapping, data verification and analysis, all of which was undertaken with
6 the purpose of ensuring that we, BT, were in a position to engage
7 constructively with the class representative and what is needed by way of
8 data and document for these proceedings.

9 In my submission, it is because BT, essentially, front-loaded a year's work in this way
10 by starting back before March 2021, that the parties are in a position to be
11 before this Tribunal now with an agreed means of proceeding and three
12 agreed tranches of disclosure, one of which has already been provided. And
13 that the Tribunal will appreciate from the quite detailed description we have
14 set out in our skeleton of what is going to be done, that it is no small exercise.

15 BT has also taken a proactive and constructive approach to the preparation for this
16 CMC. We first invited the class representative to engage in correspondence
17 about directions back on 15 December 2021. That's tab 24 in the bundle.
18 The Tribunal will see at the bottom of page 313, this is a letter on behalf of
19 BT:

20 "We note that the class representative has not attempted to engage in any
21 correspondence with BT as regards directions and the other matters
22 regarding the future conduct of the collective proceedings on which the parties
23 need to liaise, and ideally agree on ahead of the CMC. This includes, for
24 example ..."

25 And we set out the matters that needed to be discussed.

26 There are then a whole series of letters in this bundle whereby we chased for

1 engagement. The first one is behind tab 27. This is a letter to the Tribunal
2 where in the second paragraph we noted that the class representative hadn't
3 yet attempted to engage in correspondence regarding the CMC. There is
4 then behind tab 29 a letter in which we said -- and this is 10 January 2022:

5 "We haven't received any proposals from you concerning the format and transfer of
6 data requests ..."

7 And so this letter set out our proposals.

8 We then chased on 14 January 2022 -- this is tab 31 -- referring to the upcoming
9 CMC, as noted in our letters:

10 "The class representative is yet to engage in any correspondence with BT regarding
11 its proposals."

12 We then, tab 33, this is a letter that was responding to some queries about data. But
13 at the end of this letter, the final paragraph of the letter, we said:

14 "We look forward to receiving responses to queries, as well as the class
15 representative's proposals in respect of directions and other matters."

16 Tab 34, we chased again specifically for proposals.

17 Tab 35, we again expressed concern about the failure to engage and hampering
18 preparations for the next CMC.

19 So that paragraph says:

20 "As we have repeated in correspondence multiple times without any response, we
21 remain concerned that your failure to engage on critical issues, such as
22 disclosure and the scope of expert and factual evidence, will hamper
23 preparations for the next CMC."

24 The reason I emphasise this course of correspondence and the efforts that we have
25 made is because I anticipate that there may be a tendency to seek to dismiss
26 BT's submissions about, for example, the trial timetable as an attempt to delay

1 the progress of the proceedings.

2 **THE CHAIRMAN:** Well, I don't know whether that's going to be made. I think the
3 one point that did emerge, and indeed it, as you know, was something
4 the Tribunal had to consider, was the question of directions, and indeed
5 a CMC, before the outcome of the decision of the Court of Appeal was known,
6 because of course had you succeeded in the appeal, there wouldn't be
7 a case.

8 **MS FORD:** Sir, that's entirely true --

9 **THE CHAIRMAN:** That's not an entirely unfair approach to take.

10 **MS FORD:** Sir, we were, at one point, raising the question whether the CMC should
11 be adjourned for precisely that reason.

12 **THE CHAIRMAN:** Yes, quite. But anyway, I doubt that the suggestion is going to
13 be made that you don't want to have a trial date agreed because you're
14 seeking to delay, not least in circumstances where that, itself, is a recent
15 change of position in the class representative.

16 **MS FORD:** I'm grateful, sir. In that case, I don't need to press that point any further.

17 Sir, we're equally conscious in this context that the Tribunal will have in mind the
18 class representative's case as to the vulnerability of the class. And
19 the Tribunal will obviously also have well in mind that that is a characterisation
20 which is disputed in these proceedings. We have addressed that at
21 paragraph 14B of our skeleton and it also comes up in our defence at
22 paragraph 24A.

23 I make the simple point that, in those circumstances, where that is a matter which is
24 very much in dispute, in our submission that is not a factor which should be
25 permitted to unduly influence considerations as to prudent case management.

26 Sir, I have already made submissions about the novelty of this regime, and those

1 too, in my submission, mean that the issues in these proceedings need to be
2 carefully and fairly tried.

3 This is not a follow-on claim; this is a stand-alone claim. There could be no
4 presumption of liability. And as the Tribunal will be aware, the sums involved
5 are considerable, so it is important that this matter is fairly tried, and the
6 nature of the directions and the approach to case management obviously
7 feeds into that consideration.

8 So for those reasons, in our submission, the various moving parts and the degree of
9 uncertainty at this stage mean that it would be best if a trial timetable is set
10 down at the next CMC, rather than now.

11 **THE CHAIRMAN:** Thank you very much. Ms Kreisberger.

12 **MS KREISBERGER:** Thank you, sir. If I begin by handing up a table --

13 **(Pause)**

14 **THE CHAIRMAN:** Sorry, I had completely forgotten about that, because initially we
15 weren't sure if you were here. But, yes, the break is long overdue. We will
16 rise for about ten minutes now.

17 **(3.27 pm)**

18 **(A short break)**

19 **(3.43 pm)**

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** Thank you, sir, and member of the panel. We have handed
22 up a table. Can I just ask if you have received that?

23 **THE CHAIRMAN:** Yes.

24 **MS KREISBERGER:** That's the two rival proposed timetables to trial. The one on
25 the left is Mr Le Patourel's, as set out in the draft order; the one on the right is
26 the timetable which we have, I should say, deduced from BT's skeleton.

1 They're a little coy about dates. They don't give most of these dates, but they
2 give what they think the gaps should be in between the various stages, so we
3 have worked it out.

4 It's just helpful to have that as we work through. And sir, we now have your helpful
5 indication that a possible trial date would be January 2024, but not before
6 then. So we can see that, for instance, there might be a little flex in the dates
7 on the left-hand column. And in fact not a million miles apart even from BT's
8 dates, but we don't accept them, they're very spread out -- of course BT's
9 primary submission, as you've heard, is "Just don't do anything
10 before November", but this is their secondary position.

11 Now, sir, you have heard a lot from BT about the great complexity of this case and
12 their great diligence in pursuing it. Now, I want to make a number of points,
13 and I want to start with the fact that the trial date should be listed at the first
14 CMC. That's the ordinary approach, and I need only briefly take you, sir, to
15 the rules, but it is an important starting point.

16 If I could ask you to turn up rule 4, subparagraph 5C, so that's going back to the
17 governing principles that we looked at this morning.

18 Rule 5C provides:

19 "Active case management includes fixing a target date for the main hearing as early
20 as possible, together with the timetable for the proceedings up to the main
21 hearing, taking into account the nature of the case."

22 Rule 54.3A going forward -- in my version that's page 32, if that's helpful -- this is on
23 the purpose of the first CMC. Subparagraph 3A says:

24 "The purpose of the first case management conference is to give directions for the
25 efficient conduct of the proceedings, including to set a timetable up to an oral
26 hearing in the proceedings, and if appropriate, fix a date for that hearing."

1 And just so you have it -- there is no need to turn it up -- guide, paragraph 6.66 for
2 your note clarifies that references in this part of the rules to the first CMC in
3 collective proceedings should be treated as the first CMC after the CPO is
4 made. So that's today.

5 So, sir, that's the starting point. BT of course say, well, this case is different --
6 I should emphasise paragraph 6.66 makes clear that that applies to collective
7 proceedings.

8 Now, sir, I'm sure you have it in mind, it's in our skeleton, when the rules say "if
9 appropriate", it is particularly appropriate in this case that we have a date in
10 for everyone to work towards because based on Ofcom's estimates, 12,500
11 class members are dying every month. If there were a case where the trial
12 date needs to be listed, this is the one. We can't let things move on.

13 Now, in terms of BT's claims about factual complexity as far as they impinge on the
14 trial timetable, these claims are overblown.

15 Let me take you to an authority. Sir, this is the order in the Trucks litigation. If one is
16 talking about complex proceedings, Trucks has to be it. We're currently in trial
17 one of Trucks. Three trials have been listed. Complex multi-party litigation,
18 not single defendant litigation.

19 **THE CHAIRMAN:** What's the point you want to take me to the order in Trucks?

20 **MS KREISBERGER:** The trial date has been listed for April 2024. Now, we don't
21 need to turn up the order, with an eye on the time, but my submission is not
22 only did they not have the panel in place, they didn't even -- hadn't even
23 provided which claimants were in, but the trial was listed because of the
24 importance of the rules that the trial date be listed early on.

25 **THE CHAIRMAN:** But your position (inaudible) here was that you couldn't set a trial
26 date until the next CMC --

1 **MS KREISBERGER:** No, I think the point being made was about time estimates.

2 **THE CHAIRMAN:** Just the time estimate for trial -- I appreciate your point about
3 having directions to trial, it was always there, but the six weeks, where has
4 that come from?

5 **MS KREISBERGER:** Sir, that is an estimate based on the correspondence between
6 the parties about experts and witnesses --

7 **THE CHAIRMAN:** You're saying it's only the trial length that was the
8 imponderable --

9 **MS KREISBERGER:** It was always in the order. The original order in the trial
10 bundle provided for November 2023, so we have been agitated to set down
11 the trial from very early on. There's no debate about that.

12 And sir, given that you have raised the time estimate issue, if it's helpful just to flag --
13 and again, we don't necessarily need to go to it -- but the Sportradar order, it's
14 also in the authorities bundle, tab 8, that was also listed at an early CMC, way
15 ahead of time.

16 The time estimate there, over a year in advance -- well over a year advance -- was
17 23 days, but the order specifically provides that it could be adjusted
18 downwards, the way these things work, but the clear principle is you list the
19 trial date. And that is the class representative's clear submission today that
20 that should be done.

21 Sir, then we turn to BT's objections about complexity, and they made a number of
22 points. Let me deal with them. I have four here and a fifth in their skeleton.
23 I think I can deal with these rather briskly.

24 The first point they argue -- and I should just say here, sir, it's useful to have the
25 table to hand because we can see there is quite a lot of flex in it, and we can
26 now insert "trial date Jan 2024" or at least "not before Jan 2024".

1 Now, BT said the first complexity is working out the number of business customers.
2 We struggle to see how that impinges on the trial timetable. There are
3 various approaches. As you put it, sir, it's question of fact. We also have the
4 benefit of the Ofcom methodology. But BT might want to start by searching its
5 own records, its database.

6 **THE CHAIRMAN:** Well, Ms Ford says they can't do that -- can I just ask about this?
7 Because we're slightly troubled about the fact that both sides seem to have
8 been saying that, "Well, we will see what the experts say in a couple of
9 months about this". Why are you not getting on now, positively, with dealing
10 with these questions of numbers, especially given that there is a pretty strong
11 steer from Ofcom? I can't quite understand why it all seems to be being put
12 off to the experts, from your side's point of view.

13 **MS KREISBERGER:** Yes, I want to correct that.

14 **THE CHAIRMAN:** Right.

15 **MS KREISBERGER:** We consider that the best we have now is Ofcom and we
16 have now had the confidential documents and reviewing those, but to the
17 extent that BT says Ofcom is wrong, then we're in BT's hands to sort it out.
18 And we would like that sorted out as quickly as possible, so I'm sorry, sir, if
19 that's a correction to points made in the correspondence.

20 The second point that BT makes is third party disclosure. Well, they haven't
21 articulated any need for third party disclosure so far. If they consider at some
22 point that they do want to make such an application, there is space in the trial
23 timetable to do so. But that's pure speculation at this stage.

24 Third one: statistical and survey evidence. We are really quite baffled by this one.

25 **THE CHAIRMAN:** This is not your proposal. You're not asking for it.

26 **MS KREISBERGER:** We are -- we have indicated, to be transparent, that

1 Mr Parker, our economist, might rely on statistical evidence. That means
2 literature that he would append to his report. That's not a stage in the
3 timetable. He would simply refer to statistical literature in his report.

4 **THE CHAIRMAN:** Sorry, you mean literature which is all about statistics, in relation
5 to what?

6 **MS KREISBERGER:** This is on the demographics of the class, but it's thoroughly
7 irrelevant to timetable.

8 **THE CHAIRMAN:** Just help us on that: statistics in relation to the demographic of
9 this class of claimants?

10 **MS KREISBERGER:** Yes.

11 **THE CHAIRMAN:** But statistics saying what?

12 **MS KREISBERGER:** Publicly available --

13 **THE CHAIRMAN:** No, no, but to say what? That's what I want to know.

14 **MS KREISBERGER:** It goes to the point on compound interest, sir.

15 **THE CHAIRMAN:** It goes to the --

16 **MS KREISBERGER:** Interest being paid by particular demographics, whether there
17 is a variant. This is what I am told -- but, sir, I'm sure this should trouble you.

18 **THE CHAIRMAN:** Yes, that's why I wanted to know what it's about -- all right --
19 hang on, Ms Ford wants to say something.

20 **MS FORD:** I wonder if it assists the Tribunal, simply to show the Tribunal the letter
21 we were referring to when we raised this. It's tab 58 in the CMC bundle,
22 page 441.

23 **THE CHAIRMAN:** Right.

24 **MS FORD:** The sentence starts on the previous page. The discussion is about
25 factual evidence to be adduced by the parties.

26 So starting on page 440:

1 "The class representative considers this to be self-explanatory but for the avoidance
2 of doubt, the class representative considers that the parties should address
3 the type of factual evidence they will each wish to rely on during these
4 proceedings, including but not limited to, witness, statistical and survey
5 evidence that the parties will (audio distortion) ..."

6 That is the indication that we understood that this was within the contemplation of the
7 class representative. It doesn't come across from this letter that what was
8 contemplated was articles cited by Mr Parker.

9 **THE CHAIRMAN:** I need to know what the position is here, I think.

10 **MEMBER OF THE PANEL:** Is the survey evidence referred to here looking at
11 pre-existing surveys or new surveys that are about to be carried out?

12 **MS KREISBERGER:** So it was intended to cover both, but to the extent that Mr
13 Parker's evidence would rely on survey evidence, that would be appended to
14 his report.

15 **THE CHAIRMAN:** Sorry, that's --

16 **MS KREISBERGER:** So the reference to survey evidence, it's not unusual for
17 an economist to commission --

18 **MEMBER OF THE PANEL:** I understand that, but is it something that already exists
19 or is going to happen at some point?

20 **MS KREISBERGER:** It's not yet decided, but one wants to preserve latitude for the
21 economist commission survey evidence, should he --

22 **THE CHAIRMAN:** So you are talking about the possibility of commissioning new
23 survey evidence.

24 **MS KREISBERGER:** But it would be appended to Mr Parker's report.

25 **THE CHAIRMAN:** I know that. Never mind where it's appended to, we're just trying
26 to work out what the scope of the evidence is here, that's all. And I'm not sure

1 we're very clear at the moment -- it's one thing to say: just to let you know, the
2 expert is going to refer to some literature which is already in existence, which
3 contains some statistics. That's one thing. Commissioning survey evidence
4 in relation to this class is quite different. And at the moment, it doesn't seem
5 to me you don't actually know which of the two you're going to be doing.

6 **MS KREISBERGER:** Sir, that's correct.

7 **THE CHAIRMAN:** Right.

8 **MS KREISBERGER:** There is no concluded view. My submissions to you today are
9 directed purely to timetable.

10 **THE CHAIRMAN:** I know, but the point -- fine, but if there is a possibility about you
11 conducting a survey which is going to take time, that could affect the detail of
12 the trial timetable. It may not affect the concept of having directions to trial,
13 but it may affect the particular dates that are being talked about here.

14 **MS KREISBERGER:** Sir, with respect, on our timetable we're talking about a date of
15 1 May next year. That's in a year's time.

16 **THE CHAIRMAN:** Yes, it's just that you were making the point that the scope of the
17 statistical point isn't very large, but it could be. Anyway, you say whatever has
18 to be done in relation to statistics has to be done before the first expert report,
19 and that's not until May of next year.

20 **MS KREISBERGER:** Correct -- I will just take instructions on this.

21 And the intention, sir, if we go back to the draft order, is that this is precisely one of
22 the points that would be addressed at the joint meeting of the experts. So the
23 experts are to meet by 30 June to identify factual material that they require,
24 and so on. That's the very purpose of that. So this is premature. All we're
25 simply saying is it may be in the offing. The experts will discuss it. If it is, it
26 can be accommodated within this timetable.

1 **THE CHAIRMAN:** Yes, fair enough.

2 **MS KREISBERGER:** The fourth point made by Ms Ford was the CMA intervention.

3 **THE CHAIRMAN:** Yes.

4 **MS KREISBERGER:** If we go to the table, that happened before second tranche
5 disclosure, so that's 29 July. It's hard to see how that has any impact. And
6 they have also made clear that their intervention is confined to the legal test
7 for excessive pricing, so they won't be bringing forward evidence.

8 **THE CHAIRMAN:** They're not going to adduce evidence? They have said that --

9 **MS KREISBERGER:** I think they reserve the right to intervene more fully, but they
10 have said, at present, the intention is to intervene on the legal test. I will give
11 you the reference.

12 **THE CHAIRMAN:** If you say that's what they have said ...

13 Yes.

14 **MS KREISBERGER:** Sir, there is another point that Ms Ford made in her skeleton.
15 She didn't pick it up today. It is in the skeleton at 14A. What she said there is
16 that one of the uncertainties which requires holding off a trial listing is that the
17 class representative seeks a novel remedy in the form of account credits
18 which will require careful case management. Somewhat frustrating to hear
19 them still singing this refrain. That submission was rejected --

20 **THE CHAIRMAN:** I know, it was all dealt with by the Court of --

21 **MS KREISBERGER:** Yes, okay. Sir, I will give you the reference, then, just for your
22 note. It's paragraph 88 of the Court of Appeal's judgment, first two sentences.
23 So that's -- really one has to ask if that is the best she can come up with on a need to
24 delay the listing of the trial. There is not very much here.

25 Sir, my submission is we're now at a juncture where we need a clear timeline to trial.
26 The indication for the Tribunal in relation to the January trial date is well

1 illustrative of the fact that people get booked up, including counsel. Counsel
2 are encouraged to write to the Tribunal in advance of the first CMC with their
3 availability for the trial date, given the indication that there will be a January
4 trial, and we suggest that be provided for in the order.

5 Sir, if I may, then, with your permission, move on to the particular directions.

6 **THE CHAIRMAN:** Before we do that, because this is a point of principle about
7 whether we do set directions to trial and something about trial dates, so I just
8 want to see if Ms Ford wants to come back on anything before we make our
9 decision on that point.

10 **MS FORD:** Sir, in my submission, the exchange that just took place between
11 the Tribunal and Ms Kreisberger concerning statistical and survey evidence is
12 illustrative of the wider problem. Ms Kreisberger was quite candid that she
13 didn't know whether or not it is proposed to rely on such evidence or not. In
14 the event that it transpires that the class representative does wish to rely on
15 such evidence, that immediately raises question marks for BT as to what it
16 goes to, how are they envisaging they're going to respond to it and how does
17 that fit into the timetable. In my submission, this is all illustrative of a broader
18 problem, in terms of the degree of uncertainty in this case.

19 In my submission, there is a fallacy that it is necessary to set down the trial timetable
20 now in order to make progress, and that, in my submission, is not correct.
21 The parties have agreed procedural steps towards the next CMC, and so
22 these proceedings will be progressed with a degree of expedition. It is not the
23 situation that nothing is going to happen if no trial timetable is set down. So in
24 my submission, the prudent course is to enable matters to proceed to the next
25 CMC in the way that has been agreed and then to revisit matters at that point.

26 **THE CHAIRMAN:** Just one moment, please.

1 Let us just deal with, is it a point of principle, which is whether we should make
2 directions to trial, as opposed to leaving all steps to be taken
3 after November 2022, until the CMC, which will now be before us in 2022; and
4 allied to that is the issue as to whether we should be setting a trial date or
5 a not-before date, leaving to one side for the moment the precise length of
6 trial.

7 It seems to us that the starting point is an imperative, particularly given the
8 demographic on this case to set a clear timetable to trial, unless it is simply,
9 clearly, unfair or impractical to do that.

10 The rules do emphasise and have some more -- possibly more complex cases have
11 emphasised the desirability of setting a trial date at the first CMC, and if one
12 does that, one is obviously going to be setting directions to trial.

13 But taking the Ofcom figures, just as a rough estimate at the moment, they suggest
14 that 12,500 people within the relevant class, because of the demographic and
15 their age, are dying each month.

16 And as we said in relation to our decision on the question of efficiency and trial
17 tribunals, there is an imperative to move this case forward, and that was
18 recognised by the timing of the Court of Appeal judgment.

19 In our judgment, there is no reason, based on fairness or practicability, for not setting
20 a trial timetable now. It is said there is some uncertainty, and we can see
21 that, for example, in relation to the question of the scope of any statistical or
22 survey evidence, which the class representative has flagged, but has by no
23 means fully articulated at this stage, and we are told that is something that the
24 experts will discuss at their first meeting in June. However, it does not seem
25 to us that that is a serious impediment to a well thought out trial timetable.

26 We do not consider that there are other matters which would impede that trial

1 timetable. We are aware of the fact that there is going to be some argument
2 about the individuals giving expert evidence, and that they might, either now
3 or to be decided later, be a question of a separate discipline, namely
4 behavioural science or behavioural economics. But again, provided there is
5 a sensible, well-structured trial timetable, it does not mean that any further
6 expert evidence, even if that is left until November 2022, cannot be
7 accommodated within the trial timetable.

8 We do agree that the submission now made that there is an additional complexity
9 which somehow affects all of this, namely the question of account credit, is
10 wholly unrealistic, not least because of the approach that was taken by the
11 Court of Appeal to that very question at paragraph 88 of its judgment.

12 For those reasons, we are quite clear in our own minds that there should be a trial
13 timetable set now.

14 The trial timetable shall be set, as we will discuss in due course, by what we
15 consider to be the proper time limit. It is not going to be governed by when
16 a trial might be.

17 However, it seems to us to be sensible to say something about the length of trial, but
18 we cannot be too specific, and we understand why that is at the moment,
19 because the precise ambit of the evidence at trial is not yet wholly clear.

20 What we are going to do is this: we are going to go through the steps to trial, leaving
21 out for the moment any of the contentious issues about expert evidence. We
22 will then end up with wherever the last pre-trial steps take place. We will then
23 look at a trial date at a reasonable point after those steps conclude, and we
24 will, today, prescribe a three-month trial window.

25 That is very important, from the point of view of the administration of CAT, because
26 its diary is filling up. It is one of the reasons why we could not offer you a date

1 in November 2023, even if it was appropriate.

2 The safety valve of course is that if something happens between now and November
3 which causes an upset to all of that, that can be taken care of at the next
4 CMC. And that's what we are going to do as a matter of principle.

5 With that, Ms Kreisberger, can we then turn to the first -- there is a contentious issue,
6 first of all, about the date of factual evidence -- there seems to be
7 a contentious issue on the date for factual evidence; you say 16 January and
8 BT says 24 February.

9 **MS KREISBERGER:** Sir, that is right. It probably makes sense to start with BT's
10 objection.

11 **THE CHAIRMAN:** Right.

12 **MS KREISBERGER:** Because 16 January is quite some time away. BT object on
13 the basis that they say that the gap between the third tranche disclosure and
14 statements of fact is inadequate. We don't follow that. There's no reason why
15 the exchange of witness statements should be judged by reference to when
16 the third tranche takes place. The third tranche, sir, is data drawn from the
17 databases. If anything, that's evidence which is relevant to the experts, not
18 the witnesses of fact.

19 Taking a generous approach, the relevant date is, at the earliest, 30 August date,
20 which is the date of the second tranche of disclosure. That's BT documents.
21 BT could of course provide its documents as it goes along. It's the class
22 representative that will see them for the first time on 30 August. But that's just
23 a very good gap, so it's a generous gap of four and a half months. So we
24 can't see any reason to have a later date than 16 January 2023.

25 **THE CHAIRMAN:** Right. Let me hear from Ms Ford.

26 Yes.

1 **MS FORD:** Sir, it is right to say that the concern is that the proposed date for
2 witness evidence is less than three months from the deadline for the third
3 tranche of disclosure, and that includes the December holiday period.

4 Our submission is that a period of four months after the end of disclosure would be
5 appropriate, given the number of witnesses that we presently envisage, which
6 is six.

7 It is worth emphasising that this distinction between coming at three months and four
8 months is really a modest request in the context of the scale of this case and
9 the potential for complexity.

10 The point has been taken that there is no reason for factual witnesses to refer to
11 data. In my submission, we are not at the stage where we can be sure
12 whether that is the case or not. It may well be that the factual witnesses need
13 to make some comments on data, which, as we understand it, is likely to feed
14 into the experts' reports. Of course the experts are dependent on what is the
15 factual position, and they opine on that.

16 In our submission, it is not possible to say categorically at this stage that it will not be
17 necessary for factual witnesses to engage in these matters. For those
18 reasons, in my submission, it is prudent to allow a period of four months to
19 enable the witnesses to address what comes out of that exercise, should it be
20 necessary to do so.

21 **THE CHAIRMAN:** We think the right date here is 27 January, that is three months --
22 a full three months from the last tranche, and we accept that much of the
23 disclosure is going to come earlier. We're not convinced at the moment there
24 is going to be any insuperable difficulty with that, on the basis that it is then
25 decided that one or more of the six witnesses need to comment on a huge
26 range of documents.

1 But one of the advantages of having the CMC in November, which is after the third
2 tranche of disclosure, if there is a genuine case for saying that it is simply
3 impossible for witnesses to make their witness statements by 27 January
4 because of what comes out in the disclosure, that case can be made then.
5 Otherwise what we're going to do for the time being -- or what we are going to
6 do is say 27 January for the factual evidence.

7 And then, Ms Kreisberger, it is simply a question of how long one allows for reply
8 evidence.

9 You've put in something like, what, is that six weeks?

10 **MS KREISBERGER:** Six weeks, sir.

11 **THE CHAIRMAN:** Yes. Let me just go straight to Ms Ford. Six weeks is quite
12 a long time, usually, for reply evidence. In my experience, it is quite often four
13 weeks. Is there some particular reason here or ...?

14 **MS FORD:** It's only, sir, that in our view, again, given the complexity of this case,
15 that we think that a two-month period will be more appropriate.

16 **THE CHAIRMAN:** I'm not persuaded by that. It's going to be six weeks.

17 I am just trying to find the diary.

18 **(Pause)**

19 Just a moment. The referendaire can probably calculate what six weeks is from
20 Friday, 27 January --

21 **MS KREISBERGER:** I am told 10 March.

22 **THE CHAIRMAN:** 10 March for reply evidence. Right.

23 Now, expert evidence. So let's assume -- we have 10 March, which will be the
24 completion of the factual evidence. I think I would like to hear first here, from
25 Ms Ford, because there is quite a significant difference, now, between you on
26 this.

1 **MS FORD:** Sir, as you can see from the table, the class -- the competing proposals
2 are the class representative is proposing 1 May 2023, which is only two
3 months after the responsive witness statements. And then responsive expert
4 reports six weeks later and an expert meeting two weeks later. And our
5 concern is really that that is an unrealistic period of time.

6 The oddity is that it has been fairly drastically curtailed from a timetable that was
7 originally proposed by the class representatives themselves, and which we
8 then indicated in correspondence that we were happy with. That is, if
9 the Tribunal turns up CMC bundle, tab 48.

10 This is BT's letter responding to the class representative's letter of 14 February
11 which enclosed draft directions.

12 **THE CHAIRMAN:** Yes.

13 **MS FORD:** If the Tribunal turns to page 405, there is a heading "Expert Evidence",
14 and what BT is doing here is expressing its agreement with the relative
15 periods of time that had been set out in the proposed directions. I don't take
16 the Tribunal to the directions themselves because the dates at the front
17 moved because the parties had debated disclosure deadlines. But what we
18 did do is say: we see the proposed periods that you have proposed for expert
19 evidence, and we agree with those periods.

20 And what we said there was:

21 "We're content with your proposed periods of four months following responsive
22 witness statements for exchange of economic expert reports, two months
23 from the exchange of expert reports to the exchange of responsive expert
24 reports and a meeting of experts one month later, and then the production of
25 the joint statement again one month later."

26 And that is the basis of the dates that we have proposed. We have simply said: we

1 agree with what you originally said.

2 **THE CHAIRMAN:** Right.

3 I follow that you have agreed with what they have said, but we have to look at the
4 realities as well on the ground. Does it need four months?

5 **MS FORD:** Sir, in my submission, it does. This is an allegation of excessive pricing.

6 The experts will play a very important role in expressing their views as to
7 whether the pricing was or was not excessive. And what the experts do is
8 they draw on the factual position and then they opine, in the light of the factual
9 background --

10 **THE CHAIRMAN:** Yes.

11 **MS FORD:** -- in the realms of their expertise. Given there is going to be this strong
12 inter-relationship between the factual position and the expert position in case
13 of excessive pricing, in my submission, it is necessary for the experts to have
14 a sensible period between the end of witness statements and the time when
15 they actually have to express their views. That of course means that they can
16 then take into account the other side's witness statements as well as the
17 matters that they may have seen in preparation for their own side, which is of
18 course the appropriate way for them to proceed.

19 I am conscious that the Tribunal has indicated that you would like to set the trial
20 timetable in a way which is divorced from the debate about the number of
21 experts, but it is relevant --

22 **THE CHAIRMAN:** Yes.

23 **MS FORD:** -- that the agreement that was expressed by BT in this letter was at
24 a point when it was understood that there would be two experts in two fields:
25 one economist and one actuarial expert per party. Of course matters have
26 moved on since then. We are now told that there is a possibility for

1 behavioural evidence and there is a request for a further economist.
2 In particular, the request for a further economist does feed into the debate on the
3 timetable, in my submission, because what's been proposed, as we
4 understand it, is some sort of job share arrangement, whereby two
5 economists opine on the issues, rather than one.

6 **THE CHAIRMAN:** Why does that affect the trial timetable?

7 **MS FORD:** In my submission, what's being said is it's much more efficient for two
8 people to do this and therefore we can meet this deadline.

9 **THE CHAIRMAN:** I see.

10 **MS FORD:** It rather implies that if you only had one economist, it might require
11 longer.

12 In our submission, in any event, the four-month period is prudent and necessary. It
13 doesn't depend on the number of economists in that way, but we do say it's
14 quite insightful that what's being said is: in order to meet this deadline, we
15 need two.

16 **THE CHAIRMAN:** Right. I'm not looking up emails, I actually just have a calendar
17 on my phone, in case anyone is wondering.

18 Just a moment, please.

19 **(Pause)**

20 Right, now, Ms Kreisberger.

21 **MS KREISBERGER:** Can I suggest a solution? We think four months is far too
22 long.

23 **THE CHAIRMAN:** Why propose it, then?

24 **MS KREISBERGER:** No, four months gap, that's BT's submission.

25 **THE CHAIRMAN:** I thought you had proposed four months after the responsive
26 evidence. Have I got that wrong? The letter says:

1 "BT is content with their proposal of four months following responsive statements
2 from the exchange of experts."

3 **MS KREISBERGER:** I don't know what happened with that letter, but the proposal
4 is what was here and what we have set out in our skeleton, which is 6 March
5 to 1 May.

6 But what we would suggest, given what the Tribunal has indicated for trial date, is
7 9 June. Sir, I'm just --

8 **THE CHAIRMAN:** That's about a week more than three months.

9 **MS KREISBERGER:** Well, the date now --

10 **THE CHAIRMAN:** 10 March.

11 **MS KREISBERGER:** It's 10 March, exactly.

12 **THE CHAIRMAN:** 9 June, that's three months and one week, I think.

13 **MS KREISBERGER:** Sir, I'm just trying to cut through this.

14 **THE CHAIRMAN:** All right. You say 9 June. Right.

15 **MS KREISBERGER:** And for reply evidence, so that you have it, sir, let me just
16 check that date.

17 **THE CHAIRMAN:** You had a six-week period, I think.

18 **MS KREISBERGER:** 21 July, which is -- it preserves the six-week gap.

19 **THE CHAIRMAN:** Yes. We agree with that latter proposal. I'm not quite sure what
20 happened with the correspondence earlier on. But even if they suggested
21 a four-month gap, if that's, plainly, inappropriate -- I'm not going to hold any
22 party to it -- you have to look at what the realities are.

23 We consider that even with certain imponderables about whether one or two people
24 are going to be making the expert report for the class representative,
25 three months and one week is quite sufficient for the expert reports to be
26 prepared from the date of the responsive evidence, which is 10 March.

1 So the expert reports will be produced on 9 June; reply expert evidence will be
2 21 July.

3 Now, that then leaves the question of joint expert meeting, which you're now running
4 into the vacation for.

5 **MS KREISBERGER:** Yes, so we're just trying to recalculate. I am conscious that
6 one gets into the holiday period and we don't have those experts' availability.

7 **THE CHAIRMAN:** Can I just help both sides? I think, as to what we would think
8 would be acceptable here, given that the trial can't start until, at the earliest
9 January 2024, this might be a case where they meet at the beginning of -- or
10 in the course of September and then a report at the beginning of October,
11 being realistic, and that gives the chance for all the other teams to become
12 involved, if they need to be.

13 **MS KREISBERGER:** Sir, we would be content with that.

14 **THE CHAIRMAN:** To be more precise about that, that the joint expert meeting must
15 take place by Friday, 15 September -- and I always think there is
16 an advantage in them working straightaway to get their report out -- and the
17 report should be produced by 6 October.

18 And then on that basis, you can have a PTR in the beginning of November, which
19 will allow for any slippage in the directions; in other words, a PTR on Friday,
20 10 November.

21 **MS KREISBERGER:** Sir, we're content with that. I'm grateful.

22 **THE CHAIRMAN:** On that basis -- and just give me one moment.

23 **(Pause)**

24 What we are then going to do is we are going to say that the trial will take place in
25 a three-month window from February to April, and we say February rather
26 than January because in that way, if there is any slippage or an alteration in

1 the timetable as a result of developments that have to be dealt with in
2 the November CMC, we have already built in a cushion for that, rather than
3 having to revisit the trial timetable window. So that's what we are going to
4 say, it will be within that three-month period.

5 All right.

6 **MS KREISBERGER:** Sir, I'm grateful.

7 **THE CHAIRMAN:** Now, that being the case, what we have left to deal with today --

8 I am conscious of the time -- is we have your two applications. One is about
9 two experts and one is about behavioural science.

10 Can I just try and assist the parties, given the hour? We have a view about your
11 application for behavioural science evidence, and we would like to suggest to
12 both sides what our provisional approach to that question is, and it may
13 obviate the need for extended debate on it.

14 We are not presently persuaded that it is appropriate to make an order today
15 granting permission for that expert evidence. It is a novel field and we're not
16 satisfied that we have enough detail which would enable us to consider the
17 question we have to consider, which is not merely whether this evidence
18 might be helpful in some way, but that it is actually necessary.

19 We think that the right course is to put that matter off for an ultimate decision at the
20 next CMC, but with a timetable before November for you to make a much
21 more detailed application -- and we say at this stage that that may be, if not
22 exhibiting a draft report, then a summary of what that report will contain,
23 because presumably you already have somebody in mind, otherwise you
24 don't know whether this evidence is going to help you or not.

25 And that any expert evidence on the basis that we give permission and that BT
26 wants its own expert is highly likely to be sequential, because we think your

1 side will very much have to make the running on this.
2 So we're not rejecting it out of hand forever. We're not going to make an order
3 today. And while we deal with something else, those behind you can think
4 about by what date you are going to present a much more detailed and
5 articulated application dealing with what the content of that report would
6 contain.

7 That's entirely without prejudice, Ms Ford, to any objections as a matter of principle
8 that you may wish to make; it's just telling you where we are at.

9 **MS FORD:** Sir, I'm grateful.

10 **THE CHAIRMAN:** Are you content with that approach for today?

11 **MS FORD:** Sir, yes, we are.

12 **THE CHAIRMAN:** Thank you.

13 You will have to be content with it as well, Ms Kreisberger.

14 Then what I do think we would like to deal with today in the time we have left with --
15 just a moment.

16 **MS FORD:** Sir, it may assist in relation to the remaining application, we know, in the
17 light of the Tribunal's indications about timetable, we no longer maintain any
18 objection to a second economic expert.

19 **THE CHAIRMAN:** Good. Thank you very much. That's dealt with that.

20 Thank you.

21 Now, is there anything else on the agenda that we need to decide today?

22 **MS KREISBERGER:** Sir, could I come back to you on the date for the detailed
23 application, 30 September?

24 **THE CHAIRMAN:** I think it will be earlier than that. If you have this in mind now,
25 you're in a position -- I mean, have you instructed somebody on this?

26 **MS KREISBERGER:** We haven't instructed anyone yet.

1 **THE CHAIRMAN:** So you don't really know whether this -- what's the basis for
2 thinking this evidence is going to assist?

3 **MS KREISBERGER:** There have been discussions with various individuals. There
4 has just been no formal --

5 **THE CHAIRMAN:** Right. No, I think that is too late and I think you need to have --
6 I think you need to have something by the end of June.

7 **MS KREISBERGER:** Sir, given that the application is going to be heard
8 in November, can we ask for further indulgence --

9 **THE CHAIRMAN:** Well, the only problem is you're going into the vacation, that's all
10 I am concerned about at the moment.

11 **MS KREISBERGER:** I think if we could have a date on the other side of vacation,
12 that would be much appreciated.

13 **THE CHAIRMAN:** It might be much appreciated, but you've come up with this at
14 a very short time before this hearing. The more we hear about it, the less
15 clear we are about it. You have to get a move on this, if you want to make
16 this -- everybody else has been working on very clearly defined areas of
17 expert evidence and this has been injected.

18 Let me just confer with my colleagues for one moment.

19 **(Pause)**

20 In order for the other side -- the object of this is if this is persuasive enough, you
21 never know, BT might object to it, but if they -- they may agree it, but if they
22 don't agree it and object to it, they have to have their own time to consider it,
23 and formulate things in time for November.

24 We think that this has to be done by Friday, 2 September. We're not going to make
25 it any later. If people have to work over August, well, that's what they're going
26 to have to do.

1 **MS KREISBERGER:** Sir, thank you. We will --

2 **THE CHAIRMAN:** What we will then say is that's when the refined application has to
3 be made, and then what we will say is that there then needs to be a date for
4 whether you're going to object or not. I think 2 September.

5 And then I think what we will say is by 8 October, BT must indicate whether they're
6 agreeable to it or not; and if not, to say why. And then that can be prepped
7 up, as it were, in skeletons in time for the November CMC.

8 **MS KREISBERGER:** Sir, I'm grateful. And that application will set out a list of
9 topics, essentially.

10 **THE CHAIRMAN:** You have to make the best fist of it as you can, on the basis of
11 we having indicated to you -- it may have been referred to by Lord Leggatt in
12 Lloyd v Google, but nonetheless, he was referring actually to literature, and
13 nothing more than that, whereas this is specific evidence. So you need to
14 make out a clear case for it.

15 **MS KREISBERGER:** Sir, we will. I'm sure you have well in mind that this evidence
16 goes to BT's mitigation --

17 **THE CHAIRMAN:** It's the mitigation argument, and I appreciate they have the
18 burden of proof in relation to failure to mitigate and all the rest of it. But
19 nonetheless, we have said what we have said. Right.

20 Have we actually got a date for the CMC in November yet?

21 **MS KREISBERGER:** Just turning to the order, we haven't got a date and I'm not
22 sure that enquiries have been made of the Tribunal yet --

23 **THE CHAIRMAN:** Right. I would have thought it should be mid November. Don't
24 leave it until the end of November. We could give a provisional date, and then
25 you could see whether you can make -- the parties can make it?

26 **(Pause)**

1 Let's give you two dates: 11 or 18 November. Parties can work to either of those,
2 that can be accommodated.

3 **MS KREISBERGER:** I am told the 18th, we already know that won't work on our
4 side.

5 **THE CHAIRMAN:** Well, then do the 11th.

6 **MS FORD:** I'm afraid we will have to consult about availability for the Tribunal.

7 **THE CHAIRMAN:** Those are the two dates we're offering at the moment. Unless
8 there is some serious problem, it should be one or other of those dates, but
9 you can then liaise with the Tribunal about that.

10 Just a moment, I am told -- yes, is there anything else, from your point of view, that
11 you want to -- and Ms Ford? There is something we want raise, which is the
12 question of the CPO notice, because don't we need to do a time by which that
13 goes out?

14 **MS KREISBERGER:** We do, and we're suggesting, sir -- I will just check -- it's
15 a date in November. We're suggesting six months from today, essentially --

16 **THE CHAIRMAN:** Right.

17 **MS KREISBERGER:** -- for the opt-out date.

18 **THE CHAIRMAN:** That's the opt-out date, but what about the publication of the
19 notice itself?

20 **MS KREISBERGER:** As soon as the order is made --

21 **THE CHAIRMAN:** Well, right.

22 **MS KREISBERGER:** -- it goes online.

23 **THE CHAIRMAN:** Right, opt-out date, a date in November --

24 **MS KREISBERGER:** Six months.

25 **THE CHAIRMAN:** -- probably six months, the opt-out date. All right, well, let's deal
26 with that now. You're saying six months from today, effectively, or more or

1 less?

2 **MS KREISBERGER:** Yes.

3 **THE CHAIRMAN:** So why don't we do 11 November for that?

4 Now, we just have some drafting comments because we appreciate that the form of
5 the notice was appended to the order on the last occasion, but looking at the
6 interests of the class, there are a couple of comments we have which we
7 would be grateful for you to embody, since we can of course -- we have the
8 power to vary the form of the order.

9 Let me just tell you what they are. You will need to get out the existing collective
10 proceedings order -- if you tell me when you have that -- and it's page 279 of
11 the bundle.

12 **MS KREISBERGER:** Sir, thank you.

13 **THE CHAIRMAN:** First of all, you need page numbers in the actual documents and
14 not the bundle numbering, obviously, starting at page 1. Can that be in
15 a fairly large font, please?

16 Secondly, under "Summary of Notice", we think it's important to draw the key points
17 of all of this to the class members, and therefore in the last paragraph on the
18 left-hand side:

19 "If the case results in a judgment [et cetera, et cetera] ... and if not, they won't have
20 to pay anything ..."

21 Can you put this in bold, please?

22 Thirdly, the shape of this is that you provide a summary and then this is a more
23 detailed explanation at the back. We think that should be highlighted, so
24 where -- on what would become page 281:

25 "Please read the notice carefully. Your legal rights may be affected if you act or
26 don't act ..."

1 Can you just put underneath there, same lettering:

2 "A more detailed explanation appears at pages ..."

3 Whatever it is.

4 Having reviewed it again, in the section where you say:

5 "Your legal rights and choices ..."

6 And you say:

7 "You had a BT landline ..."

8 And then you say:

9 "... or had a BT landline service and also a broadband service, from BT or anywhere

10 else, but these services were not packaged together as a ..."

11 You have "landline/broadband", shouldn't it be "landline and broadband package",

12 that contains both elements?

13 **MS KREISBERGER:** Yes, that's correct.

14 **THE CHAIRMAN:** At the bottom of the page, there seems to be some formatting:

15 "So we can keep you ..."

16 And then "informed" comes in the sort of gap there, if you can close that gap. You

17 have that at the bottom of page 281. Right.

18 Now, having set all of that out on the definition of the classes, if you go over the page

19 where you're dealing with opt-out, you've gone back and defined the classes

20 all over again. It seems to us that's potentially confusing, or at least it's

21 repetitive. So we would suggest -- and I'm not saying you have to adopt this

22 precise wording, you can come back if there is a problem and let the other

23 side know -- you can take out that whole bit about, "If you were living in",

24 down to "Supply to Kcom Group Limited".

25 It seems to us, all you need to say is:

26 "If you are eligible for the collective action ..."

1 And you have just told them how they would be on the previous page:
2 "... but wish to be excluded, then ..."
3 And then you continue:
4 "... you have the right to request to be excluded ... decide to opt out."
5 Do you see the point?
6 Right, and then you have all the general information, which we don't have
7 a particular difficulty with and we have looked at it before.
8 But if you go to point 9 of the general information:
9 "What is an opt-out proceeding? What is a domicile date?
10 "You do not need to do anything unless you wish to be excluded from the class ..."
11 And then we thought that you should say, again to repeat it:
12 "If you wish to be excluded, you must opt out."
13 And then can you put where it says "This notice explains at page 4 above", because
14 you've already dealt with the opt out, "at page 4 above and", and if you look at
15 the next page, 287, you have it again:
16 "At page 4 above and in more detail at paragraph 15 at page [whatever it is] 6
17 below."
18 The other point is of course you need to put the opt-out date in now, which is going
19 to be different. Can you -- ah yes, there was a further point, which was the
20 mode of communication, the opt-out. We thought this needs to be
21 highlighted.
22 In the summary, which is back at page 4, the last line:
23 "Requests to opt out must be received by ..."
24 Well, it's now going to be whatever it was, November. Was it 11 November?
25 "... 11 November ..."
26 And can you just say here:

1 "... and may be made online or by post ..."

2 Which I think is the two --

3 "... or by email ..."

4 Those are the three methods, and then say:

5 "Further details of this appear below."

6 Just so that people know that there is nothing mysterious about opting out. It's

7 a conventional -- it's going to be a letter, or it's going to be online or it's going

8 to be an email, and then there can be details later on, otherwise people might

9 get mystified and think, "If I don't know how to opt out, I don't know what to

10 do".

11 **MS KREISBERGER:** Yes, understood.

12 **THE CHAIRMAN:** Good, those are the points we had on that.

13 Can we quickly, please -- your print advert notice, this thing here (**indicated**):

14 "What is this claim about?"

15 And then you've put, six lines down:

16 "You may be eligible if you had a landline service without a bundled internet service

17 from BT."

18 Just in case people get confused:

19 "You may be eligible if you had a landline service provided by BT without a bundled

20 internet service from BT".

21 I don't want people thinking if they have a landline from anywhere; Alright?

22 And then on the right-hand side:

23 "Please contact us if you wish to see a copy of the report authorising ... to proceed ...

24 If you wish to see ... and/or the full notice of this order."

25 And it seems to us that, as a matter of your procedure, whichever -- if they write to

26 you asking questions about any of these, you should give them the full

1 response, the full pack.

2 Can you sort that out? And then as soon as you can, can you, please, send the
3 revised copies to the Tribunal and to BT?

4 **MS KREISBERGER:** Sir, that will be done.

5 **THE CHAIRMAN:** All right. Costs in the case for today. Thank you all very much
6 indeed. We will conclude now.

7 **(4.44 pm)**

8 **(The hearing concluded)**

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