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5 **IN THE COMPETITION**
6 **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

Monday 3rd July 2023

15 Before:
16 The Honourable Mr Justice Waksman
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18 Eamonn Doran
19
20 Derek Ridyard
21
22 (Sitting as a Tribunal in England and Wales)
23
24

25 **BETWEEN:**

26 Justin Le Patourel **Class Representative**

27
28 v

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30
31 (I) BT Group PLC
32 (II) British Telecommunications PLC

Respondents

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34
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36 **A P P E A R A N C E S**

37
38 Ronit Kreisberger KC, Derek Spitz, Jack Williams, Matthew Barry (On behalf of the Class
39 Representative)

40
41 Daniel Beard KC, Sarah Love and Allan Cerim (On behalf of the Respondents)

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Monday, 3 July 2023

(10.00 am)

(Proceedings delayed)

(10.13 am)

Submissions by MS KREISBERGER

MR JUSTICE WAKSMAN: Ms Kreisberger.

MS KREISBERGER: Good morning, sir.

MR JUSTICE WAKSMAN: Morning.

Yes.

MS KREISBERGER: Sir, I am grateful for the early start. I am sorry we lost some of our advantage on updating bundles, but so as not to squander it, I suggest that I move straight away to the first application. I am grateful to you, sir, for the Tribunal's letter of 29 June setting out the order for our agenda.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: I should just mention I anticipate that the first application will take a little longer to deal with than the second, so in terms of timing we won't need too much on the Reply.

So, turning to the Class Representative's application for amendments to the Claim Form, with the Tribunal's permission, I will structure my submissions in four parts. I will address you just very briefly on the legal test for amendments; I will make some introductory remarks; and then I will move on to deal with the two sets of amendments. The first set relates to market definition and the second to the benchmark for testing excessive prices.

If I may, beginning with the first part, the legal test, this is the Tribunal's approach to

1 amendments, and just for convenience we set this out in the Class Representative
2 skeleton.

3 **MR JUSTICE WAKSMAN:** Yes.

4 **MS KREISBERGER:** That is at hearing bundle 1, tab 1, page 8.

5 **MR JUSTICE WAKSMAN:** Yes.

6 **MS KREISBERGER:** If I could ask you to turn to paragraphs 9 and 10, the Tribunal
7 Guide sets out that this is an exercise of the Tribunal's powers of case management.
8 That is at paragraph 9, the second half of the page. And then we have cited there
9 Enron, which provides that the power to amend is of course discretionary to grant
10 amendments. And the Tribunal will consider all the circumstances. They may
11 include the merits of the amendments, whether they could or should have been
12 raised at an earlier stage; whether the amendments might require further facts to be
13 found; possible prejudice to either side; and of course the overriding objective to
14 secure the just, expeditious and economical conduct of claims. Of course they are
15 set out in the Tribunal's governing principles.

16 So that is the approach, and it is well known.

17 If I could ask members of the Tribunal to keep bundle 1 open, as I failed to do, and
18 turn to tab 5 in the bundle. That is page 58 for anyone that is on electronic bundles.

19 **MR JUSTICE WAKSMAN:** Yes.

20 **MS KREISBERGER:** The application relates to the amendments in yellow, which
21 I must admit I find a little hard to see given short-sightedness. The amendments in
22 purple relate to an earlier round of amendments which BT consented to.

23 Now, by way of very brief prefatory remark, the amendments meet the legal test that
24 I just took you to and they are, in my submission, the type of the amendments one
25 might expect to go through on the nod to be consented to. That is because, broadly,
26 in overview, they arise out of BT's evidence and BT's disclosure, so they couldn't

1 have been made at an earlier stage, but they were foreshadowed in the Class
2 Representative's pleaded case and the evidence at certification as being matters
3 which could only be settled after the Class Representative had seen BT's
4 documents. That point was made. They also narrow the issues between the parties
5 and they refine the economic case that the Tribunal is now very familiar with.
6 So, they are precisely the kind of fine tuning that one expects to see once one has
7 sight of the disclosure documents in an excessive pricing case because
8 an excessive pricing case of course turns on BT's costs, their prices and their margin
9 data.

10 Now, the nature of these cases, particularly in a CPO context, is that the class rep --
11 proposed Class Representative as they were at the time -- does what they can at
12 certification based on publicly available information, but once the veil is lifted and
13 they are given access to the Defendant's granular data, the Class Representative, as
14 he now is, and his expert need no longer rely on proxies for costs because they have
15 the costs themselves.

16 Now, before I turn to the detail just one further preliminary remark, which is that
17 Mr Boylan of Simmons & Simmons exhibits a letter from BT's expert, Dr Jenkins of
18 Oxera, in support of BT's opposition to the draft amendments.

19 Now, you will notice it is not a statement. It is not signed by a statement of truth, so
20 it is not evidence, it is submission, but nonetheless I am going to deal with the point
21 she makes and I am going to show you that those points regrettably mischaracterise
22 Mr Le Patourel's case. And despite her experience, she seems in that letter to
23 misunderstand what is being asked of the experts in their first round reports. I am
24 going to take you through that and make those points good.

25 With that, if I then move to the next part of my submissions, which is to address the
26 amendments to market definition.

1 **MR JUSTICE WAKSMAN:** Yes.

2 **MS KREISBERGER:** I am going to show you the pleadings and the proposed
3 amendments, the evidence which prompted them and then I am going to give you
4 five reasons why the amendment should be allowed. And I will address BT's
5 objections as I go along. I am just going to do some reorganisation, it is a little
6 cramped up here.

7 Thank you.

8 Now, in a nutshell, on the market definition amendment, this is a technical
9 amendment about whether the two customer groups, voice-only customers and split
10 purchase customers, are in the same market.

11 The reason I say it is a technical amendment is because it is an amendment that is
12 sought in the interests of accuracy -- one wants to get it right -- but as the Class
13 Representative makes clear in the pleading itself, it makes no difference whatsoever
14 to the assessment of dominance or the assessment of abuse. We are really in
15 council of perfection territory.

16 So if I could start with the existing Claim Form before we turn to the amends, so that
17 version of the Claim Form --

18 **MR JUSTICE WAKSMAN:** Can't we just use the amendment thing because we can
19 see what has been crossed out, otherwise we have to go backwards and forwards.

20 **MS KREISBERGER:** If I could ask you to bear with me simply because my own
21 bundle references are to tab 27 -- if you are more comfortable with the amended
22 version --

23 **MR JUSTICE WAKSMAN:** I mean, if you tell us which paragraphs, we can see
24 that --

25 **MS KREISBERGER:** I will leave it to you.

26 **MR JUSTICE WAKSMAN:** -- we have been working off the new draft and seeing

1 | what, for example, was said in paragraph 133 at early stages.

2 | **MS KREISBERGER:** Understood. Yes. You can see that. I am going to stick with
3 | my version.

4 | **MR JUSTICE WAKSMAN:** You stick with yours. Yes, right.

5 | **MS KREISBERGER:** In that case, you are in -- sir, you have that in front of you, you
6 | have the amended Claim Form.

7 | **MR JUSTICE WAKSMAN:** Yes.

8 | **MS KREISBERGER:** For those following the unamended version, it is page 342 of
9 | the bundle.

10 | If I could ask you to turn up paragraph 124A and (b). I am on page 388, it is 104 in
11 | your version, sir.

12 | Now, you see there that the pleading -- so this is the section dealing with the
13 | infringement and the pleaded claims are these. They are for loss and damage
14 | caused by BT's breach of statutory duty -- I am sorry, sir, I am taking you to the
15 | wrong paragraph, I am skipping ahead. I am going to come back to 120, if I may.
16 | I am going to ask you to look at 124 for now. I will come back to the infringement
17 | passages when I deal with the benchmark.

18 | So if I could ask you to move forward to 124A and (b).

19 | **MR JUSTICE WAKSMAN:** Yes.

20 | **MS KREISBERGER:** "While the precise delineation of the affected markets will be
21 | a matter for factual and expert evidence at trial, the class rep avers that the relevant
22 | product and geographic markets are ... the market for SFV access and SFV calls,
23 | together SFV services, supplied in the UK to voice-only customers."

24 | And the second market at (b) is the same market:
25 | "Access and calls to split purchase customers."

26 | So prior to evidence and disclosure we pleaded separate markets by customer

1 group, that was the primary case on market definition. The Class Representative
2 also pleaded an alternative case at 125 and that is at (b) over the page, 107.

3 Further or alternatively:

4 "... if notwithstanding BT's ability to price discriminate between voice-only and split
5 purchase customers, those customer groups form part of the same market."

6 And then there is a re-re-definition for these purposes of the relevant markets. It is
7 a single market for SFV access not segmented by customer group. So it couldn't be
8 clearer.

9 So primary case, two markets; secondary case, differentiated markets by customer
10 group, if it is not right that BT can price discriminate between them.

11 **MR JUSTICE WAKSMAN:** Yes.

12 **MS KREISBERGER:** Just so you have it, the Claim Form goes on to deal with
13 dominance in each of those markets by customer group and you can see that from
14 the headings under "Dominance"; "SFV services", "Supply to Voice Only", and over
15 the page, "SFV services to Split Purchase Customers". So it looks at market power
16 for each and pleads the case in relation to each.

17 We then get to paragraph 130 at the end of this section before abuse:

18 "Alternatively, to the extent that Voice Only and Split Purchase Customers are in the
19 same market, contrary to the Parker report, it is averred that BT is dominant in the
20 relevant market(s) for the supply of SFV services and/or SFV access for those
21 customers combined for the reasons set out above."

22 So you see there it doesn't make any difference which way you cut it in relation to
23 customer groups, the pleaded case on dominance, market power, is the same. That
24 is at paragraph 130.

25 **MR JUSTICE WAKSMAN:** Yes.

26 **MS KREISBERGER:** So no difference on the dominance analysis. The pleaded

1 case.

2 So what paragraph 130 really tells you is, as I said, this is an academic point and it
3 ultimately goes nowhere.

4 Now that was echoed by Mr Parker in his first report to certification. If I may just
5 show you that. That is in hearing bundle 3, tab 3, page 132.

6 You see the heading there is on this point at 6.23:

7 "Are voice-only and split purchase customers in the same market?"

8 Then at 131 Mr Parker records:

9 "The statement found [that is the Ofcom statement] separate markets for the
10 purchase of each of access and calls by voice-only customers on the basis that
11 providers could identify which of their customers were voice-only and which were
12 split purchase. Although providers hadn't historically discriminated between them,
13 Ofcom considered that they had the ability to do so if they wished."

14 And Mr Parker added:

15 "I agree with Ofcom's view that [they are in separate markets]. This is clearly the
16 case from 1 April 2018 when the BT commitments were implemented and there was
17 in fact price discrimination. Prior to that, I consider that the key issue is that
18 providers had the ability to price discriminate, as they subsequently demonstrated,
19 and so it is correct from an economic perspective to treat each customer group as
20 being in separate markets for the whole of the claim period. However, as
21 I demonstrate below, it makes no difference to my subsequent conclusions on
22 dominance, or to my analysis of abuse or to my methodology for assessing
23 aggregate damages whether one treats these two customer groups as being in the
24 same or separate markets."

25 If I could ask the members of the panel to now turn back to hearing bundle 1, I will
26 join you at tab 5 and take you through the amendments. Market definition starts at

1 page 104 and you may be there already.

2 So at the top of the page are the paragraphs I showed you, which have been struck
3 out. That is at the top of 105. Those are the two separate markets for customer
4 groups. In its place there is 124A, which states:

5 "For the period beginning no later than the start of the claim period on
6 1 October 2015 and ending on 31 March 2018, the relevant market is the market for
7 SFV services calls and access to voice-only and split purchase customers.
8 Alternatively, there are distinct precommitment markets for the supply of SFV
9 services to voice-only and to split purchase customers respectively."

10 And then this is explained. Particulars are at (a):

11 "As regards customer groups, if BT's allegation that during this period it could not
12 price discriminate between them on the basis of its allegation that BT could not
13 obtain information from Openreach, which would enable it to identify split purchase
14 customers, if that is correct, which is a matter outside of the Class Representative's
15 knowledge, voice-only customers and split purchase customers should be treated as
16 being within the same relevant market. But if, contrary to that allegation, BT could
17 price discriminate between the two groups during this period, then they should be
18 treated as being within distinct relevant markets."

19 So that is the amendment for which we seek permission, and it is fully explained
20 there as to why that is.

21 **MR JUSTICE WAKSMAN:** Yes.

22 **MS KREISBERGER:** Then if I could ask you to go down to 124B and read sub
23 paragraph (b), this is on the post-commitments markets:

24 "As regard customer groups, they are in separate markets after the commitments
25 because BT was able to and did price discriminate between them during this period
26 post-commitments. Accordingly, the lower price is charged for SFV services

1 supplied to voice-only customers did not constrain materially or at all the higher
2 prices charged to split purchase customers."

3 So that is the pleaded amendment.

4 **MR JUSTICE WAKSMAN:** Yes.

5 **MS KREISBERGER:** So post-commitment, BT could and did price discriminate, so
6 that is unambiguous, two markets.

7 I would like to show you what BT plead in response to the version without the
8 amendments of course.

9 **MR JUSTICE WAKSMAN:** Yes.

10 **MS KREISBERGER:** That is at tab 6, page 144, and if I could ask to you go forward
11 to 160, paragraph 46, "Market definition":

12 "BT will in due course adduce factual and expert evidence on the question of market
13 definition. Pending such factual and expert evidence, BT anticipates that the
14 relevant product market for parts of and/or all the Claim Period is for
15 telecommunications services in the UK excluding the Hull area --"

16 **[stenographer removed from videolink due to technical problems]**

17 **MS KREISBERGER:** It does.

18 **MR JUSTICE WAKSMAN:** I have that, yes.

19 **MS KREISBERGER:** But also -- and it is relevant they haven't told us why, they
20 have simply pleaded it, but that is right. They say they are in one market.

21 Now, sir, the additional point I want to draw out is that the Class Representative is
22 criticised for updating the pleading to match BT's case, as you say, as best he can in
23 the light of disclosure and evidence, but BT holds all the evidential cards -- we are
24 going to look at them briefly -- but hasn't told us why that is BT's case. So we have
25 done the best we can to explain why we are now in agreement, why this is common
26 ground, we are ad idem.

1 So I said I would turn to the evidence on this point. Sir, as you well know, at the time
2 of pleading the Class Representative had the Ofcom 2017 material, and that is why
3 the Class Representative's primary case was at that stage that there were two
4 markets.

5 If I could ask you to turn up the third hearing bundle, tab 1, page 8. This is the
6 Ofcom 2017 statement and this is what Ofcom said at page 8, paragraph 1.10:

7 "Since the February consultation we have been made aware that providers of
8 standalone telephony services on Openreach's network are in fact able to identify
9 which of their customers are voice-only and which are split purchasers, therefore
10 while providers have not so far set different prices between these two customer
11 groups, they could do so if they wished. Accordingly, we are no longer of the view
12 that voice-only and split purchase customers should be considered part of the same
13 market."

14 And footnote 3 at the first sentence says at the bottom of the page:

15 "BT has told us that it can seek information from Openreach on a monthly basis to
16 confirm which of their lines are voice-only."

17 So that is what we had then. BT now says the reverse.

18 What I do want to show you today, and I will take the point crisply, but it is
19 necessary, given the way in which BT have framed its opposition, is that even today
20 the position isn't clear and certainly the Class Representative hasn't been able to get
21 to the bottom of it. And I will show you the documents.

22 If we could first go to Mr Bunt's(?) second statement at hearing bundle 4, tab 3,
23 page 79, paragraph 111.

24 Now, so you have it, this is the evidence which has prompted the amendment
25 change.

26 **MR JUSTICE WAKSMAN:** Yes.

1 **MS KREISBERGER:** "Our SFV customer base was comprised of both VO and SP
2 customers. In 2016 the voice division didn't have any way of identifying and verifying
3 the size of these two customer groups. Openreach provides both service providers
4 and customers with access to phone and broadband infrastructure in the UK. It was
5 established as part of the BT Group in 2006, after BT agreed a series of
6 undertakings with Ofcom in September 2005 which were replaced with voluntary
7 commitments in 2017."

8 Those are different commitments from the SFV commitments that we are looking at:

9 "Under these arrangements Openreach wasn't permitted to provide us with
10 information on customers who took broadband with another provider on their
11 network. Confidential Openreach information, including customer information, could
12 only be shared between the BT Group and Openreach in limited circumstances
13 because BT needed to treat Openreach as a separate, independent entity.
14 However, as part of our agreement with Ofcom following the 2017 review,
15 Openreach was permitted to tell us which SFV customers had broadband
16 connections with other service providers. This was implemented in time for the
17 2018/2019 price change. From this point onwards we in voice division could more
18 accurately distinguish between the customer groups."

19 So that is what Mr Bunt says.

20 Now, if I could just show you what Mr Boylan says about this in his fifth statement,
21 hearing bundle 2, tab 2, page 30.

22 Mr Boylan says this:

23 "As Mr Bunt explains... BT was only entitled to obtain confidential Openreach
24 information in certain limited circumstances following the [2005 undertakings]
25 replaced with [the 2017 commitments], and so while able to seek that information, as
26 confirmed in the footnote to the Ofcom report, was not permitted to do so, so could

1 seek it but wasn't allowed to."

2 And he goes on:

3 "Those voluntary commitments... were... publicly available and should be well
4 known to someone in the position of the Class Representative, who was employed
5 by Ofcom for some 12 years and whose work was directly related to Openreach,
6 including work on the process for transferring between providers operating on the
7 national Openreach network."

8 I am going to come back to that. He goes on:

9 "The fact that BT did not have the ability to identify and verify the size of the VOCs
10 and SPCs is clear from its defence, served on 3 December 2021, some one and
11 a half years ago. BT expressly denies it has records of the numbers of customers in
12 the Class belonging to each subclass before the BT Commitments were
13 implemented or that BT was or is able to identify those members of the Class that
14 purchased broadband services from a non-BT or Openreach network, so fall into
15 each subclass."

16 And he says:

17 "[We have] made it clear in correspondence as well ..."

18 He cites a letter and then makes a point on timing. We will come back to that.

19 Now, the problem is, despite what Mr Boylan says about the picture being clear, as
20 I say, the picture still isn't clear today and we have looked at it.

21 So, sir, I am conscious of the time, but my submission is we have looked at the 2005
22 undertakings and the March 2017 commitments, and I am not suggesting we go to
23 them, given time constraints and frankly how marginal a point this all is, but given
24 what has been said against the Class Representative I do need to make the
25 submission.

26 In short, those documents show that Openreach was prevented from providing

1 customer confidential information to BT, but that restriction is subject to various
2 exceptions and the Class Representative cannot tell, from the face of those
3 documents, whether information about customers taking broadband elsewhere was
4 customer confidential information or if it was whether Openreach could provide it to
5 BT under one of the exceptions.

6 Now, Mr Bunt hasn't helped us on this because he simply cites the undertakings and
7 he cites the 2017 commitments, but he hasn't told us which of the provisions apply or
8 why, or whether any of the exceptions apply. So the Class Representative is being
9 asked to do a lot of work.

10 And again because of the way this has been put, I need to show you that the picture
11 gets even muddier when one looks at some of the disclosure documents. I am going
12 to show you two. They are in hearing bundle 1, tabs 64 and 65. That is page 586.

13 You see from the first page, 586, that this is a slide deck prepared by BT for
14 a meeting with Ofcom on 1 June about the commitments in this case, the voice-only
15 commitments.

16 If I could ask you to turn to page 588, you see there, it is internal slide 6 and it is
17 headed "Earlier price reduction".

18 **MR JUSTICE WAKSMAN:** Sorry, 586?

19 **MS KREISBERGER:** 588. 586 is the front page. We haven't been told if this is in
20 the ring, but I will ask you to read this to yourselves, if I may. Mr Beard will no doubt
21 tell me.

22 **MR JUSTICE WAKSMAN:** We will just read it.

23 **MS KREISBERGER:** If I could ask you to just -- all you need read is the beginning
24 of the slide and the first bullet point.

25 It is out of confidentiality --

26 **MR BEARD:** No outer.

1 **MS KREISBERGER:** Oh, outer ring, so I won't read it out.

2 **(Pause)**

3 **MR JUSTICE WAKSMAN:** Yes.

4 **MS KREISBERGER:** So you see there in that first bullet point, without quoting it, it
5 is making a point about how BT consumer consumes information from Openreach.
6 That is the point there.

7 Then for completeness, next tab, page 594, could you have a look at number 3. So
8 this is a speaking note, as we understand it, that accompanied that slide deck that
9 I have just shown you, and under the heading "Timing of price down" you have the
10 speaking note that supports the slide I just showed you. If I could ask to you read
11 number 3.

12 **(Pause)**

13 **MR JUSTICE WAKSMAN:** Yes.

14 **MS KREISBERGER:** Now, as the Class Representative reads them, these
15 documents seem to be suggesting technical obstacles to the way in which
16 information is consumed. What they don't refer to is information sharing restrictions
17 and the 2017 commitments or a requirement to obtain Ofcom's permission to get
18 information from Openreach, which is what is said in Mr Beard's skeleton at
19 paragraph 23(b)(i), for your note.

20 Now, look, whether there is a connection between the two, we just don't know. And
21 you will appreciate for today's purposes I am not trying to get to the bottom of this
22 point --

23 **MR JUSTICE WAKSMAN:** I was about to say, I mean, your position is it may be
24 that in fact they can't discriminate, in which case your primary case now is they are
25 one market, which is what BT say anyway. But if in fact they can, it is still two, but it
26 doesn't make any difference in the long run anyway.

1 **MS KREISBERGER:** Absolutely.

2 **MR JUSTICE WAKSMAN:** I have that point -- I am not sure there is much more we
3 need to say about that amendment. We will see whether this particular amendment
4 is in fact part of the crux of Mr Beard's real objection to the amendment. I don't think
5 it is.

6 **MS KREISBERGER:** Well, that is not how it is put in the skeleton --

7 **MR BEARD:** -- if it assists, it really isn't.

8 **MR JUSTICE WAKSMAN:** Right, thank you.

9 **MS KREISBERGER:** In that case, I am going to make my point very briefly.

10 **MR JUSTICE WAKSMAN:** Yes, please.

11 **MS KREISBERGER:** Unless of course the point is being abandoned altogether and
12 I needn't --

13 **MR JUSTICE WAKSMAN:** Can we just pause for one second and try and cut to the
14 chase here. Mr Beard will correct me if I am wrong. You can sit down for a minute,
15 Ms Kreisberger. I don't read Mr Beard's skeleton as some root-and-branch objection
16 to this amendment application. BT seem to be saying -- BT certainly say they need
17 further information of one kind or another before they can deal with it. And they are
18 either saying that we shouldn't deal with it at all today until that information is
19 provided, or that information has to be provided as part and parcel of the conditions
20 for permission to amend.

21 In that regard, I am not sure that it is actually being said that there is something
22 further that you need to provide by way of information on this bit of your amendment,
23 contrast the case of the competitive benchmark counterfactual price; am I in the right
24 direction --

25 **MR BEARD:** You're very much in the right direction. We are not dropping the
26 market definition. I will deal with it briefly, but the real issues lie elsewhere here

1 because as Dr Jenkins has made clear, as I hope we have made clear, market
2 definition, we understand that they are shifting across towards us. They could have
3 done it a lot earlier and there are costs and ramifications. We will deal with that.

4 But leave that for a moment, the real issue here is in relation to the substantive
5 change that is being made in relation to benchmarks and an allegation of
6 excessiveness in relation to calls which have not been made previously.

7 Sir, you have the position very much. I will go through the relevant law, but that is
8 the issue here today.

9 **MR JUSTICE WAKSMAN:** Well, I think, Ms Kreisberger, you have heard that.
10 I think we have got the points on market definition. We will see what Mr Beard says
11 insofar as he is saying, "No, you still should have permission to amend by itself",
12 which I don't think he is going to say, or whether there is some informational
13 requirement, but you will have a chance to deal with that in reply.

14 **MS KREISBERGER:** I am grateful for that, sir. The only point I leave you with in
15 that case because Mr Beard did just make that point is that we do maintain the two
16 alternative definitions --

17 **MR JUSTICE WAKSMAN:** Yes.

18 **MS KREISBERGER:** -- for good reason because we still don't know what answer is.

19 **MR JUSTICE WAKSMAN:** Yes, I have that point.

20 **MS KREISBERGER:** With that, then I am very grateful and I will move on to the
21 benchmark, if I may.

22 **MR JUSTICE WAKSMAN:** Yes.

23 **MS KREISBERGER:** Now, the Class Representative is asking permission for
24 amendments which refine the costs plus benchmark, and that is the benchmark
25 which applies to limb 1 of the United Brands test.

26 **MR JUSTICE WAKSMAN:** Yes.

1 **MS KREISBERGER:** Now -- you are nodding, sir, we went into this in some quite
2 real depth at certification.

3 **MR JUSTICE WAKSMAN:** Yes.

4 **MS KREISBERGER:** And sir, you will recall that limb 1 compares price with cost to
5 determine whether a price is excessive. It is a cost price test.

6 Limb 2 is the unfairness limb. It compares the dominant firm's price with other
7 meaningful price comparators, such as similar offerings by the same firm or by
8 rivals -- unfairness.

9 Given limb 1, the starting point in an excessive pricing case will always be to
10 measure costs if you have access to them. And therein lies the challenge for
11 a claimant, particularly a claimant who is not a competing business, as used to be
12 the usual way these cases went. But here you have a class of consumers who have
13 no access from the outset to the dominant firm's internal cost and margin data.

14 Now, of course this claim has been largely facilitated by the Ofcom materials which
15 did, to some extent, shine a light on BT's data, but only partially so.

16 Now, the panel will recall that Mr Parker did the best he could at certification using
17 that Ofcom material and, as you observed in your certification judgment, Ofcom
18 presented the best available evidence at that time.

19 Now, Mr Parker made three things clear at certification and they are core elements
20 of the Claim Form. And I will take you to them.

21 The first is that the overpriced product -- the overcharge being alleged -- is on SFV
22 services and that is made up of two components, calls and access. That is the first
23 point.

24 The second point is his methodology for testing whether SFV services have been
25 priced abusively is the two limbs of United Brands: cost versus price under limb 1,
26 fairness comparators under limb 2. That is the methodology.

1 As I said, the best available benchmark to him at the time of certification, based on
2 Ofcom's work, was the price of line rental in 2009, which you will recall he treated as
3 a competitive price. He took that as the competitive market --

4 **MR JUSTICE WAKSMAN:** Yes.

5 **MS KREISBERGER:** -- and he projected it forwards over time based on
6 adjustments for increases in the major cost component, wholesale line rental. So he
7 adjusted it.

8 And the Class Representative pleaded in terms -- and I will show you the language --
9 that that was a costs plus benchmark for limb 1 -- for the purposes of limb 1.

10 As these things go, it was a pretty robust benchmark to have pre-disclosure, but
11 it wasn't the full ticket because it only looked at access, so it was confined to one of
12 the two components -- line rental is access and the infringement was on access and
13 calls -- and it wasn't based on actual costs incurred every year in the claim period, it
14 just used a point in time and then projected it forwards.

15 Fast forward to today, the disclosure process has recently come to an end and BT
16 has lifted the veil on costs, revenue and margin data for revenue and calls.

17 **MR JUSTICE WAKSMAN:** When did it start, this disclosure process, to include this
18 type of data, just out of interest?

19 **MS KREISBERGER:** I have a table that I think we can hand up and it is simply
20 a neutral statement of all disclosure and it records the steps --

21 **MR JUSTICE WAKSMAN:** Yes, we just wanted to know when it started, what
22 period we are looking at.

23 **MS KREISBERGER:** So third tranche -- is it third tranche -- yes, it's 13 May 2022,
24 but you will see from this table it carries on to as recently as June and --

25 **MR JUSTICE WAKSMAN:** June of this year?

26 **MS KREISBERGER:** June this year. I think it was last Friday. But you will see it

1 has -- the data has come in batches. And this table is structured data, so it is the
2 relevant data for these purposes.

3 **MR JUSTICE WAKSMAN:** Yes.

4 **MS KREISBERGER:** Right, so those are the steps.

5 **MR JUSTICE WAKSMAN:** Yes. Thank you.

6 **MS KREISBERGER:** Now, as I say, we now have this data and we have the
7 summary tables as well, which have been quite important from the Class
8 Representatives' perspective and getting a handle on this data.

9 Now, Mr Parker and his team have been analysing that data and they can now
10 construct a more accurate costs plus benchmark using actual cost data, not a proxy
11 based on a historic price projected forwards over time.

12 **MR BEARD:** I am just going to put down a marker, if I may. Evidence from
13 Ms Kreisberger as to what Mr Parker has been doing, is doing -- and similarly from
14 Ms Houghton -- is not sufficient. If Ms Kreisberger wants to provide evidence as to
15 what is going on, that should have been done. I will leave it for there for the
16 moment.

17 **MR JUSTICE WAKSMAN:** Thank you.

18 **MS KREISBERGER:** Sir, we don't accept that. As I said, we have a letter from
19 Dr Jenkins, but all I am saying is that, as is well known, Mr Parker has been looking
20 at the data as provided for under the joint expert process. I am certainly not going to
21 be giving evidence on my feet.

22 **MR JUSTICE WAKSMAN:** No, there is a point underlying this which is that as
23 a result of the costs plus figures, whatever they are that you are now using, you have
24 obviously got something because you have amended your damages calculation.

25 **MS KREISBERGER:** Correct. We have the costs.

26 **MR JUSTICE WAKSMAN:** But one of the problems that certainly the Tribunal

1 I think is concerned about at this stage is -- and tell me if I have this wrong, looking in
2 particular at paragraph 133D I think it is of the Claim Form -- where is the actual
3 counterfactual price that you are using; where is the calculation to get to that price in
4 the pleadings?

5 **MS KREISBERGER:** I am going to take you through the relevant paragraphs. Can
6 I come back to that?

7 **MR JUSTICE WAKSMAN:** Could you just tell me now where the calculation is?

8 **MS KREISBERGER:** It is where the percentages are and someone will give me the
9 paragraph. 133D.

10 **MR JUSTICE WAKSMAN:** Yes.

11 **MS KREISBERGER:** That gives you the percentage by which the prices are higher
12 than the competitive level.

13 **MR JUSTICE WAKSMAN:** That, I understand. That is the price -- what they have
14 been charging compared to what the competitive level is; what is the competitive
15 level? What is the competitive benchmark, the costs plus figure that you are now
16 using?

17 **MS KREISBERGER:** Well, it will be the product of the costs plus benchmark over
18 time, so that will be in the expert evidence --

19 **MR JUSTICE WAKSMAN:** Well, that is where we have to have a little discussion,
20 I think, if I may, and I think we can do it now.

21 I think one of the problems that -- one of the points that is taken against you is you
22 must have done a calculation --

23 **MS KREISBERGER:** Well, we have given the damages figure.

24 **MR JUSTICE WAKSMAN:** -- well, you know, you must have done a calculation
25 because otherwise you couldn't have got to the damages figure, right? But this
26 pleading doesn't show what that calculation is, it doesn't show what you have said

1 the base costs are; what you have said the line rental costs are; what you have
2 attributed by way of a margin on top of that. None of that is there. Why isn't it there?

3 **MS KREISBERGER:** Well, because that is exactly what one would expect to see in
4 the economist's report. The infringement is that the price is above the competitive
5 level. We have given a lot of detail -- I am going to take you through it -- as to what
6 costs go into the benchmark, whether the fact that it is long run incremental costs
7 and the margin --

8 **MR JUSTICE WAKSMAN:** Yes, but they can't -- you see it wasn't a problem here
9 when you were using, as it were, a proxy -- and I am not saying that in any pejorative
10 sense -- because everybody knew what the figures were because they came from
11 BT to begin with. It was the line rental from 2009 with some adjustments. It's dead
12 easy in that sense.

13 The point is -- and I am not taking any timing point at this stage other than
14 historically -- had you done a costs -- a full bottom-up costs plus calculation at the
15 very beginning in this case, you would have pleaded it out. You wouldn't have just
16 said, "Oh, the result of all that is £200 million in damages." You would have pleaded
17 it out and said what your calculation is, and then the other side would be able to see
18 where you were going and what they said about it.

19 **MS KREISBERGER:** Well, sir, at that stage it was in the expert report and the
20 pleading -- the infringement is the excessive price --

21 **MR JUSTICE WAKSMAN:** There wasn't a bottom-up costs plus analysis --

22 **MS KREISBERGER:** No, it was by reference to --

23 **MR JUSTICE WAKSMAN:** Sorry, I will try again. Had you done the full costs plus
24 analysis in the first place, had you not got a proxy available to you, that would have
25 gone into an initial expert's report which would have been available at certification
26 stage; and secondly, it would have gone into the pleading.

1 The point that is being taken against you now -- and we have some sympathy with it
2 for today's purposes -- is it is all very well saying this, and that is fine you and want to
3 change from the proxy to a costs plus. And points can be made about that, but all
4 right, you are changing it now. You say you couldn't have done it any earlier, but
5 there is no detail of what that calculation is. Normally, in a damages claim -- and
6 I don't restrict this to competition cases -- if you say you claim X, you explain how
7 you get to that figure. And it is not there at all. And your expert must have done
8 some work on it because otherwise you couldn't increase your damages figure.
9 It is not really enough to say, "Well, it will all come out in an expert's report in the
10 fullness of time", especially if you say it should be done by exchange because you
11 are going to have ships passing in the night here. That is -- you want to know what
12 I think is the central problem -- that is where it is at the moment.
13 I am not saying it is not soluble, but I think if your position is going to be that you
14 simply don't have to do anything more and we can now just wait for experts' reports
15 to be exchanged in the fullness of time, you are going to have some difficulty
16 persuading us about that.

17 **MS KREISBERGER:** Sir, might I just take a moment?

18 **MR JUSTICE WAKSMAN:** Yes. We started at 10 am and we need to give the
19 transcriber a break, so let's have a break until 11.15 am.

20 **MS KREISBERGER:** I am grateful.

21 **MR JUSTICE WAKSMAN:** Thank you very much.

22 **(11.05 am)**

23 **(A short break)**

24 **(11.15 am)**

25 **MR JUSTICE WAKSMAN:** Yes.

26 **MS KREISBERGER:** Sir, I am very grateful for your indication before the

1 adjournment. Can I begin with a response to that, which is that the Class
2 Representative would be able to produce a table which essentially sets out the
3 numbers in relation to the points that are pleaded on the benchmark.

4 Now, I will still need to take you through, sir, and there are a number of important
5 points that need to be made, but so that you have it in mind what we would suggest
6 is that this week the Class Representative circulates a table, which would be
7 an Annex to the Claim Form to the amendments I am going to take you through and
8 we will simply give the numbers.

9 As I say, it is something that the Class Representative had approached in the same
10 way as one might a cartel damages claim, where the detailed values go into the
11 economist's report. But we are very happy to produce that table because, as you
12 say quite rightly, that work has been done. We have set out the benchmark.

13 **MR JUSTICE WAKSMAN:** Well, it is partly the stage at which it has reached
14 because again without getting into a blame game, it is now July and the trial starts
15 in January, and therefore there is limited time to get through all of this, subject to --
16 I am sure Mr Beard will have plenty to say about all that.

17 Right, so if we went back to 133D -- no, not 133D. On this point -- is that your end
18 conclusion 65 per cent higher than what it should have been.

19 **MS KREISBERGER:** That is right.

20 **MR JUSTICE WAKSMAN:** The actual --

21 **MS KREISBERGER:** The underlying numbers.

22 **MR JUSTICE WAKSMAN:** -- breakdown is earlier because the breakdown --

23 **MS KREISBERGER:** The benchmark is in 133D.

24 **MR JUSTICE WAKSMAN:** That is what I was looking for.

25 **MS KREISBERGER:** Would it be helpful if I take you through rather than delving in?

26 **MR JUSTICE WAKSMAN:** Yes, please.

1 **MS KREISBERGER:** I just wanted you to have that in mind. Adding a table with the
2 numbers -- and we would propose to do that this week, in fact by Thursday.

3 Sir, I do want to just make one remark and then I am going to dive in. And we
4 certainly don't want to get into a blame game, but it is a material point and it will be
5 relevant, including for timetabling. At the moment the Class Representative doesn't
6 know anything at all about BT's benchmark. I will show you how that arises and why
7 that is a problem.

8 **MR JUSTICE WAKSMAN:** You mean irrespective of the numbers?

9 **MS KREISBERGER:** Irrespective. It is not a level playing field. We have no sight --
10 it is not pleaded --

11 **MR JUSTICE WAKSMAN:** They denied that your original benchmark was
12 appropriate.

13 **MS KREISBERGER:** Yes --

14 **MR JUSTICE WAKSMAN:** -- for a number of reasons, but they didn't put their own
15 benchmark in.

16 **MS KREISBERGER:** Actually what they do, and I will show you the passage, is say,
17 "We are going to come to it in our expert evidence." So the Class Representative is
18 doing his best to come to the Tribunal with a very open hand.

19 **MR JUSTICE WAKSMAN:** Yes.

20 **MS KREISBERGER:** I will come back to that. As I say, I don't want to get into
21 a blame game, one is trying to be constructive at this point.

22 So I will cover the points in five parts, if I may: the pleadings; the Claim Form; the
23 defence; and the amendments; Mr Parker's preliminary evidence precertification,
24 which BT pray in aid very emphatically for their opposition; the joint expert process,
25 which you hear much of from Dr Jenkins.

26 And then I will deal with Dr Jenkins' criticisms. I will set them out and end on my

1 reasons why the amendment should be allowed.

2 If we turn back to the Claim Form and go to paragraph 120 -- I mistakenly took you
3 to this in my enthusiasm earlier -- paragraph 120, the claims are for loss and
4 damage caused by BT's breach of statutory duty on account of its infringement of the
5 chapter 2 prohibition, by virtue of its competitive charges for BT SFV services or
6 alternatively SFV access during the claim period. That is a clear statement of the
7 contours of the case on infringement. The case is overcharging of SFV services;
8 access only is an alternative case. That is as unamended.

9 I don't think we need to turn it back, perhaps just for your note, paragraph 30 of the
10 Claim Form defines SFV services and paragraph 33 makes clear that it is made up
11 of the two components, calls and access.

12 And that is then reiterated on this page at footnote 88, if I could just ask you to cast
13 your eye over it --

14 **MR JUSTICE WAKSMAN:** Yes.

15 **MS KREISBERGER:** -- on page 104.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MS KREISBERGER:** So "access" is just another word for line rental.

18 **MR JUSTICE WAKSMAN:** Yes.

19 **MS KREISBERGER:** You see, if you go forward to "market definition", what the
20 affected products are, the overcharged products. That is at 124A and (b). And they
21 both refer to -- this is unamended 124A and (b) at the top of the page -- they refer to
22 the market for SFV access and calls and the market -- and that is for voice-only and
23 SFV access and calls for split purchase. So the affected products in the market are
24 access and calls.

25 And paragraph 125, which is struck through on page 50 on page 107, that is the
26 alternative case of access and calls being in separate markets, which is the way

1 Ofcom treated them. So not a single market.

2 **MR JUSTICE WAKSMAN:** Yes.

3 **MS KREISBERGER:** And then you go forward to abuse at paragraph 131. I am
4 going to stick with my -- I just find the unamended version a little clearer and that's at
5 page 392 in that version.

6 **MR JUSTICE WAKSMAN:** 111 is on --

7 **MS KREISBERGER:** Page 111, I am grateful.

8 So as you would hope, paragraph 131 is consistent with the market definition and
9 paragraph 120, which I took you to:

10 "In the light of the matters pleaded above, and in particular the evidence in the
11 Parker report, at all material times during the claim period BT has imposed excessive
12 prices on each or any of the relevant markets in breach of the chapter 2 prohibition
13 for the provision of BT SFV services, or alternatively access."

14 So the excessively priced products are access and calls --

15 **MR RIDYARD:** Ms Kreisberger, I think the reason why it has maybe caused some
16 problems here is the way in which Mr Parker did his calculations because he did
17 the -- although you said you are claiming for the services and that is the two
18 components, the calculations were looking at the revenues and costs or revenues
19 against the cost benchmark simply for the line rental or the access.

20 **MS KREISBERGER:** Yes. I am getting there.

21 **MR RIDYARD:** Okay, but it is pretty important, I think.

22 **MS KREISBERGER:** It is, but I think what is important is also to see how it has
23 been pleaded because it is very important that we keep distinct what was done at
24 certification and for what purpose, and what the actual pleaded case is, which that is
25 the contours of the infringement. And so I am grateful for that.

26 Now, if we move on to paragraph 133, this is where you come to the benchmark --

1 and this is Mr Ridyard's point -- and the wording is very clear:

2 "Without prejudice to the generality of the foregoing ..."

3 In other words the infringement is as pleaded above:

4 "... the impugned access prices are significantly and consistently above ..."

5 So it is an illustration. So the infringement is called an access, but we have
6 an access benchmark only.

7 As it says in terms here, residential land line rental prices in 2009 provides a good
8 proxy for the competitive price level for SFV access -- that is only one component of
9 the two -- and is the best available -- and I stress "available" -- and most robust
10 competitive benchmark for these purposes. As Mr Parker explains, it is also a costs
11 plus approach.

12 So here we get to the benchmark and it makes clear without prejudice to the
13 generality of the case on abuse, it is more narrowly drawn because it is the best
14 available -- best available costs plus --

15 **MR JUSTICE WAKSMAN:** Just as a matter of interest, was there not a 2009
16 version of the call charges as well as the line rental?

17 **MS KREISBERGER:** No, there wasn't.

18 **MR JUSTICE WAKSMAN:** That is what I wanted to check.

19 **MS KREISBERGER:** You will see that all the way through and through the joint
20 process. That is why I don't need to put evidence from Mr Parker in front of you, it is
21 all there.

22 **MR JUSTICE WAKSMAN:** Yes. Thank you.

23 **MS KREISBERGER:** Just so you have it -- and Mr Beard can clarify if this is still
24 being challenged, I can deal with this then in reply if it is -- but 133(ii) sets out some
25 sensitivities for the analysis as well.

26 Then paragraph 136 says this:

1 "The above averments are supported by some of the Ofcom material. Whilst the
2 proposed Class Representative reserves the right to plead further particulars of
3 infringement following disclosure and evidence, the threshold of a triable issue as to
4 the excessive charges imposed by BT is clearly met. BT has a case to answer."
5 So you can see that is the target being aimed at here.
6 But this was as good as it got at the time on the basis of the Ofcom materials. And
7 really for completeness, can I just show you paragraphs 137 and 138, where loss
8 and damage is pleaded. Loss and damage in both those paragraphs is on BT SFV
9 services, alternatively SFV access. And that is in 138 again, so the damage suffered
10 is on both components of the service.
11 Sorry, I have a frog in my throat, sir.
12 **MR JUSTICE WAKSMAN:** You say the damage is both components, but originally
13 your damages were only based on, if I can put it this way, the excessive line rental
14 charges.
15 **MS KREISBERGER:** That is right.
16 **MR JUSTICE WAKSMAN:** Even you say it was the whole thing --
17 **MS KREISBERGER:** That is right because we couldn't -- that is right. It was
18 the only number.
19 **MR JUSTICE WAKSMAN:** Yes -- right.
20 **MS KREISBERGER:** Now, if could show you BT's defence at this point and then we
21 will turn back to the amendments, taking it chronologically. Tab 6, page 160, see
22 how they plead back to this.
23 Now, paragraph 42, BT notes the overall allegation -- 120 is noted, that was the first
24 paragraph I took you to -- and denies it.
25 And then if I could ask you to move down to paragraph 46 on that same page,
26 "market definition", you will note that in each of these Roman numerals -- I showed

1 | you this before -- it is access and calls, the market definition. So BT's case is about
2 | access and calls, so it is accepting that part of the Class Representative's case.

3 | Paragraph 48(b), again same point:

4 | "It is admitted that SFV access and calls form part of the same product market. They
5 | are typically brought together and jointly supplied."

6 | Then if you could turn to page 165 on abuse --

7 | **MR JUSTICE WAKSMAN:** Isn't the point here -- just because we spent some time
8 | looking at this -- they say that your benchmark is inappropriate; they give reasons
9 | why. They say in paragraph 58 that they will adduce expert evidence on how the
10 | prices compare to what they say is an appropriate benchmark, but they don't say
11 | what it is, and then they give some further criticisms there. That's the short point,
12 | isn't it?

13 | **MS KREISBERGER:** It is.

14 | **MR JUSTICE WAKSMAN:** Your point is: well, that is all terribly interesting, but they
15 | are complaining about us not giving detail, but they never actually put in their own
16 | counterfactual?

17 | **MS KREISBERGER:** You are way ahead of me, sir.

18 | **MR JUSTICE WAKSMAN:** We have that point.

19 | **MS KREISBERGER:** Absolutely. I am grateful. We are going to tell you in our
20 | expert evidence what it is, so yes, you have spotted the omission.

21 | The way in which it is pleaded is extremely vague and expansive, even at 57(a)(i) is
22 | just a vague reference to the wider nuanced competitive dynamics to telecom, so no
23 | clues on their benchmark.

24 | **MR JUSTICE WAKSMAN:** Yes.

25 | **MS KREISBERGER:** Moving on then -- and you have just saved me some time, sir,
26 | so thank you for that -- I will turn to the proposed amendments, which is back to

1 | tab 5, page 58. The amends actually start at 104.
2 | So you have the paragraphs 120 to 123 with some striking out which I showed you.
3 | If we go forward to 131 on page 111 we are back to the core infringement in relation
4 | to SFV services.
5 | **MR JUSTICE WAKSMAN:** Yes.
6 | **MS KREISBERGER:** And that hasn't changed. 132 hasn't varied apart from
7 | correcting a typo there. And then 133A to C is the pleading of the benchmark.
8 | **MR JUSTICE WAKSMAN:** Yes.
9 | **MS KREISBERGER:** And sir, I think you are quite familiar with this drafting now.
10 | **MR JUSTICE WAKSMAN:** We have been through it a few times this morning and
11 | we looked at it earlier on. In terms of any further information, the critical one is
12 | 133D, isn't it?
13 | **MS KREISBERGER:** That is right. So 133A makes the point that this arises out of
14 | disclosure.
15 | **MR JUSTICE WAKSMAN:** Yes.
16 | **MS KREISBERGER:** And 133(b) sets out the costs that go in the benchmark. As
17 | I said, that it is LRIC, the LRIC measure per line, and an estimated net margin.
18 | **MR JUSTICE WAKSMAN:** Yes.
19 | **MS KREISBERGER:** And 133C preserves the alternative case in relation to access.
20 | **MR JUSTICE WAKSMAN:** Yes.
21 | **MS KREISBERGER:** And 133D sets out the gulf -- that is why that is the heart of
22 | the infringement -- the gulf between the price and the competitive price.
23 | **MR JUSTICE WAKSMAN:** Yes.
24 | **MS KREISBERGER:** So those are all amendments to the limb 1 part of the test,
25 | and you have it, it is a shift from the 2009 proxy.
26 | **MR JUSTICE WAKSMAN:** Yes.

1 **MS KREISBERGER:** I don't think I showed you actually in the defence, there is
2 a passage where BT says, essentially, relying on Ofcom is cheating and you have
3 got to do the work from scratch. I might be able to just give you -- yes, it is
4 paragraph 59.

5 **MR JUSTICE WAKSMAN:** Yes.

6 **MS KREISBERGER:** "BT avers that the class rep must establish its own standalone
7 claim. Any reliance on Ofcom cannot be used to short circuit established principles
8 ..."

9 And so on.

10 So this is, essentially, doing what BT says needs to be done, doing the work without
11 relying now on Ofcom now that we have full visibility.

12 Now, sir, I move on to the next part of my submissions in relation to Mr Parker's
13 evidence.

14 **MR JUSTICE WAKSMAN:** Yes.

15 **MS KREISBERGER:** And you picked up the point that the lacuna he faced at that
16 time was that he only had the access data because that is what Ofcom used. Let me
17 show you what he said about that.

18 **MR JUSTICE WAKSMAN:** Isn't this the point that -- no, show me what he said.

19 **MS KREISBERGER:** I think, given you asked the question, sir, just so you can see
20 how -- and Mr Ridyard's question as to how the narrow benchmark came about.
21 Paragraph 274 on page 170, that is the third bundle.

22 **MR JUSTICE WAKSMAN:** Third bundle, did you say?

23 **MS KREISBERGER:** Third bundle, tab 3, page 274.

24 So he says this:

25 "I am instructed to consider whether pricing was excessive. I have defined a single
26 market for SFV services, including both access and calls. I need to consider these

1 services as a whole for each customer group. To do so, I have adopted the following
2 approach. First, I consider the price of the access component and I begin by
3 identifying meaningful benchmarks; secondly, I examine whether there is evidence
4 that the prices for the calls component were below the competitive level. Ofcom also
5 adopted this broad approach. I make use of the data available in the public domain
6 and at each stage I say what I am going to need in due course to refine my analysis."

7 And then if you go forward to 286 on page 173, he says:

8 "I have to identify a competitive benchmark and typically I would adopt a costs plus
9 approach as one of three possible approaches."

10 The other two are price comparator approaches:

11 "Typically, I filled up a costs plus benchmark."

12 Then over the page at 288 he refers to the available comparator benchmarks; in
13 other words he is saying: look, this is what I would normally do, but here I have to do
14 the best I can.

15 If you then move forward, you see the heading, the heading couldn't be clearer on
16 page 174, the best available competitive benchmark for the access component. And
17 then if you move forward to 191, taking this crisply, heading at 8.4 -- so the section
18 I don't need to take you through looks at access and then he asks himself: well,
19 I didn't have the data to build a calls benchmark but I need to consider whether there
20 is an offsetting effect, in other words --

21 **MR JUSTICE WAKSMAN:** Yes.

22 **MS KREISBERGER:** Yes, were calls prices so low --

23 **MR JUSTICE WAKSMAN:** Yes.

24 **MS KREISBERGER:** -- he only has to do that because he couldn't build a calls
25 benchmark. It is a cure; it is a remedy for the narrow scope of the benchmark.

26 So he looks at that. And then at 339 he explains that:

1 "Because I have this market for both products, I have to look at calls to work out
2 whether they offset the higher than competitive prices of access."

3 And then he says: look, here there is no evidence that calls were below the
4 competitive level, average call prices for BT have increased since 2009. They have
5 decreased for their rivals.

6 And in answer to Mr Ridyard's question:

7 "Well, I do not have information on the prices and volumes for the calls component of
8 BT's SFV services. I am able to review revenue and volume data on BT and its
9 rivals' total calls. These data will include revenues and volumes from calls on
10 non-SFV services."

11 Then on the next page, paragraph 345, could I just ask you please to cast your eye
12 over that paragraph. That is his menu. That is his data requests in relation to calls,
13 and again I think in response to Mr Ridyard's question.

14 **MR JUSTICE WAKSMAN:** 345?

15 **MS KREISBERGER:** Paragraph 345 on page 193. It is what he is saying he would
16 like to see.

17 **MR JUSTICE WAKSMAN:** Yes.

18 **(Pause)**

19 **MR BEARD:** Might be worth reading 346 whilst you are finishing off there.

20 **MR JUSTICE WAKSMAN:** Thank you. Just a moment.

21 **(Pause)**

22 Yes.

23 **MS KREISBERGER:** You see he is asking for margin data on access and calls
24 there. We don't need to go through it, but he then went on to look at competitive
25 rebalancing issue between access and calls and he found no evidence of that. Just
26 for your note, that is at 361 to 363 and contains his conclusions.

1 Now, before I leave Mr Parker's preliminary evidence, I just want to show you two
2 paragraphs only from Parker 2, that is at tab 6 of this bundle, page 460,
3 paragraph 2.33. I am showing you this because matters moved on a little then, after
4 Mr Parker received the unredacted version of the Ofcom statements.

5 He says this:

6 "I had not anticipated cost allocation issues to be relevant at the time of Parker 1,
7 given the redactions, therefore to assess profitability for both SFV access and calls
8 services I will need this information in addition to what I asked for in Parker 1."

9 If you could look down there, 2.33 on page 460.

10 **MR JUSTICE WAKSMAN:** Right.

11 **(Pause)**

12 **MS KREISBERGER:** And you see over the page, C3, he is asking for the activities
13 and costs in each cost category between access and calls components, so he's
14 saying he needs this.

15 And then if I could take you to 2.38 on page 462:

16 "If anything, the data in figure 1 suggests that call prices may also have been
17 excessive. I identified in Parker 1 that this may have been the case [that is at
18 paragraph 363 which I haven't taken you to], but what I have got is not sufficient."

19 So that explains -- he explained at certification he would need this data on calls.

20 **MR RIDYARD:** Would it be fair to say that the general tone of Mr Parker's approach
21 here was he was focusing on the line rental and excessive pricing there? He was
22 then looking at the admittedly limited information about voice charges just to make
23 sure that wouldn't have an offsetting effect. But it wasn't -- he wasn't really flagging
24 up here, "By the way, I am only looking at half the story here and so my eventual
25 numbers could be twice as big and which is sort of where we actually got to in
26 practice."

1 | Could more have been done here, do you think, to flag up the fact that because you
2 | are only looking at one element of the two elements in services, that the damage
3 | figure produced by the original benchmark was only half the story?

4 | I must say my reading of this at the time was that the information on voice charges
5 | was just being -- wanted to be gathered as a cross-check to make sure he wasn't
6 | over-egging the story, whereas in fact, as it has turned out now, your case is that,
7 | you know, there was a big chunk of damage on the access and there is now another
8 | big chunk of damage on the voices as well.

9 | **MS KREISBERGER:** Yes, I understand the point, but the -- I think it is important to
10 | understand what his report was being produced for. The case was the case that was
11 | pleaded and it couldn't have actually been pleaded -- I mean, there is no ambiguity
12 | whatsoever in the pleading.

13 | The pleading states in terms the infringement is on calls and access; the relevant
14 | market is calls and access; the overcharge is on calls and access. But the
15 | benchmark, the best available -- and that is again pleaded language -- the best
16 | available benchmark is access only.

17 | Now, whether Parker 1 and Parker 2 aren't sign-posting it clearly enough, that may
18 | be a semantic problem -- and I am sorry it didn't come across at certification -- but at
19 | certification Mr Parker needed to show you that there was a case to answer on
20 | excessive pricing. He didn't need to come up with a calculation for the full damages
21 | amount that would only ever be possible after disclosure.

22 | Now, Mr Beard may chuckle, but it is hard to see what one can do but plead the
23 | infringement and say in terms in the Claim Form there is an overcharge, there is
24 | an abuse here. The abuse is excessive pricing and it is excessive pricing of SFV
25 | services which are made up of two components calls and access. I mean, that has
26 | always been the case and the expert evidence at certification was looking at whether

1 | there was a case to answer.

2 | What I don't think Mr Parker can be criticised for at all is not making clear that he
3 | needed to see all the evidence on calls. And he says in his first report at
4 | paragraph 363, and in his second report, it looks to me like calls are also excessively
5 | priced, but I will need to have a look at the data to see how that plays out.

6 | If I could ask you just to look at page 193 of Mr Parker's report, Parker 1. This is
7 | footnote 268 on page 193:

8 | "I am not able, based on the existing material, to analyse whether calls were also
9 | excessively priced. I would need access to further information. The data I request at
10 | 345.1 to 4 should allow me to make such an assessment."

11 | **MR JUSTICE WAKSMAN:** I follow all of that, but can we just move along in this
12 | sense: your case is he heralded this possibility at the very least, at this stage, but
13 | there is nothing more he could do about it because he didn't have sufficient data;
14 | when did he get sufficient data?

15 | **MS KREISBERGER:** Through this disclosure process --

16 | **MR JUSTICE WAKSMAN:** Yes, but it is a long process, as you explain --

17 | **MS KREISBERGER:** -- so the position on that, sir, is that a lot of data was made
18 | available, and essentially a lot of it was incomprehensible, so the summary tables
19 | are what Mr Parker relied on for the purposes of the refinement of the benchmark
20 | that is in the amendments and for the table that is going to be provided. So it is
21 | a summary table that couldn't be done before.

22 | **MR JUSTICE WAKSMAN:** They came -- we see --

23 | **MS KREISBERGER:** You've got that table and they came in fits and starts, but the
24 | last table was provided in June --

25 | **MR JUSTICE WAKSMAN:** He must have started work on it.

26 | **MR BEARD:** November 2022 is the answer.

1 **MR JUSTICE WAKSMAN:** Well, let's just let Ms Kreisberger finish.
2 He must have been working on this exercise before June of this year.

3 **MS KREISBERGER:** He **was** --

4 **MR JUSTICE WAKSMAN:** And indeed it was on 1 June, I think, that your side first
5 intimated to the other side that they wanted to make this amendment.

6 **MS KREISBERGER:** Yes. He has been working throughout, but he hasn't been
7 able to settle what goes into the benchmark until he received the summary tables.

8 **MR JUSTICE WAKSMAN:** I am just asking when particularly -- I don't want to
9 spend long on this because, at the end of the day, we are not at this stage convinced
10 that it is going to turn on -- whether it could have been done somewhat earlier, but
11 I do need to know when you say there was sufficient information for you, without
12 going into privilege, when you were then able to instruct the expert to work on that
13 data.

14 **MS KREISBERGER:** Yes, sir. If you have the table in front of you --

15 **MR JUSTICE WAKSMAN:** I do.

16 **MS KREISBERGER:** -- it is the 5 May date on page 2.

17 **MR JUSTICE WAKSMAN:** Right. Thank you.

18 **MS KREISBERGER:** Sir, I am going to move to the next part of my submissions,
19 which is the joint expert process. You have seen what Dr Jenkins has to say. I am
20 going to show you that. But to paraphrase, she says she has been taken by surprise
21 and essentially been led up the garden path by Mr Parker in the joint expert process
22 because she says that was on a different premise. So I am going to show you the
23 output of that joint process before I turn to her criticisms.

24 But my submission, so you have it, is that the very things that she complains about
25 were in fact identified as issues for expert evidence, in other words issues in dispute
26 between the parties that expert evidence was to be provided on.

1 If I could ask to you turn up hearing bundle 2, tab 14, and you see on the front page
2 there, 358, that is your order that directed the expert-led process, and if I could ask
3 you to have a look at paragraphs 1 to 3.

4 **MR JUSTICE WAKSMAN:** Sorry, just give me the page again, please.

5 **MS KREISBERGER:** 359.

6 **MR JUSTICE WAKSMAN:** Thank you.

7 **MS KREISBERGER:** The front page is the previous page.

8 **MR JUSTICE WAKSMAN:** Yes.

9 **MS KREISBERGER:** And this directed that the experts meet in June 2022 to agree
10 the scope of issues for economic expert evidence; identify the factual material which
11 goes to that evidence; identify any gaps in the factual material; agree a methodology
12 for addressing the gaps; and to see what disclosure from BT is required.

13 Then paragraph 3, they were directed to produce a joint note setting out the gaps
14 methodology.

15 So that was your order, sir.

16 The experts did meet on 27 June 2022 and they produced a joint methodology note
17 with a gap table annexed to it. The note is at tab 5 of this bundle. Page 49, front
18 page. Page 50, you see the heading "Proposed methodology in relation to
19 disclosure". The note cites the order I have shown you.

20 And on page 52 you see the agreed list of issues for economic evidence,
21 paragraph 6. These issues form the basis for the identification of information
22 requirements and gaps. And you have there the five topics.

23 Then if you go down to the section on abuse on page 53 and paragraph 5, this was
24 the issue:

25 "The appropriate benchmark to assess whether SFV prices [SFV not access] are
26 unfair in the context of the Competition Act section 18 taking account of ...

1 [subparagraph] (a) whether the line rental and/or calls prices charged by BT at
2 different time periods appropriately adjusted could be an appropriate starting point
3 for the construction of such a benchmark."

4 So this is the joint note identifying access and calls for the purposes of asking
5 themselves what is the benchmark.

6 Then (b):

7 "... whether line rental price increases can be explained by reductions in call
8 revenues or margins."

9 That is rebalancing. So that is separate from the overall question in relation to the
10 benchmark, which is access and/or calls. (c):

11 "... whether a price cost benchmark might shed light on whether prices are unfair."

12 (d) is profitability.

13 (e), again:

14 "... whether rivals' prices are an appropriate benchmark for access and/or calls."

15 I mean, it is just absolutely clear.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MS KREISBERGER:** And then we go down to page 54, section 2, "Proposed
18 methodology in relation to disclosure", paragraphs 8 to 10:

19 "For each issue the experts have laid out the relevant factual material required to
20 inform their assessments."

21 Paragraph 9:

22 "They have sought to identify gaps which must be addressed and they have
23 produced proposals to address the missing material. They have explained where
24 their views differ, given a large amount of disclosure is expected ..."

25 It is not expected that they will identify all gaps at once. And for ease of the
26 Tribunal's review, which was prescient for today's purposes:

1 "The experts have consolidated their assessment and findings in a table annexed to
2 this note. The subsections below [this is also a point which is taken against me by
3 BT] describe how the table should be interpreted and set out some general
4 comments in relation to disclosure."

5 So we go down to paragraph 11 on interpretation of the table. I am going to show
6 you the table in a moment:

7 "The table below identifies the factual information required for the expert issues."

8 Mr Parker had already submitted data requests which covered a lot of the
9 information. The scope of these requests is summarised at column E and then there
10 are additional columns:

11 "Additions or extensions of these requests may be desirable for the following
12 reasons ..."

13 Column F sets out additions or extensions of the requests in E, and G and H there is
14 basically a column for each expert. I will show you that in the table.

15 14, I would like to emphasise:

16 "Note that for any specific issue the relevant data could go beyond that which is
17 explicitly mentioned in EFGH [of that issues row] since data presented against other
18 issues in the table may also be relevant for that issue."

19 In other words, quite sensibly, the table doesn't needlessly repeat data requests if
20 they are already captured elsewhere.

21 Now, at this point I would like to turn to the gaps table and I think we have printed
22 off -- I couldn't, myself, read the version in the bundles without a magnifying glass.

23 **(Document handed)**

24 So this is the gaps table and you have "Issue" and then the columns that were
25 introduced and explained in that note, E, F, G, H.

26 If I could ask you to have a look at row 3G. You have the issue is the profitability of

1 BT in the provision of the relevant services. And then I think the best thing is if I ask
2 you to read along, so EFGH, but the reason I am taking you to this is you see both
3 experts are asking for extensive data on costs and margins for calls and access.

4 **MR JUSTICE WAKSMAN:** I think that is your key point here, isn't it?

5 **MS KREISBERGER:** It is.

6 **MR JUSTICE WAKSMAN:** You say you can't say someone is led down the garden
7 path forever, they're only going to use a proxy when both sides are agreeing they
8 should delve into the costs -- I don't think we need to spend too long on this
9 document. We will see what Mr Beard says about it. I have that point.

10 **MS KREISBERGER:** I am grateful. For your note, sir, there is also row 5B should
11 you want to have a look at that, where there are requests -- there are specific frontier
12 requests for BT call volumes, revenues and margin and Oxera's -- BT's experts --
13 Dr Jenkins asks also for costs of sales for calls --

14 **MR JUSTICE WAKSMAN:** Yes. Right.

15 **MS KREISBERGER:** -- in the Oxera column.

16 **MR JUSTICE WAKSMAN:** Yes. Thank you.

17 **MS KREISBERGER:** Again to complete the picture, 5B you will see plenty of
18 requests -- sorry, that was 5B. You also, just to note you see in action paragraph 14
19 that I took you to, it often says nothing specific to this issue because it has been
20 dealt with elsewhere.

21 **MR JUSTICE WAKSMAN:** All right, look, we have those points.

22 **MS KREISBERGER:** I will put that away.

23 **MR JUSTICE WAKSMAN:** Yes.

24 **MS KREISBERGER:** But you see from that table how to construct the benchmark is
25 an issue and both experts --

26 **MR JUSTICE WAKSMAN:** We have seen that. I think what we would like to move

1 on to now because time is moving on is if you could just give us your core
2 submissions as to bits of Dr Jenkins' letter that you say are unjustified -- not
3 necessarily complaints, but things that she says -- we have already expressed a
4 view about the build-up to the figures and the build-up to it, and if necessary we will
5 come back to that one, but insofar as she is talking about something else that she
6 says she needs to see before she can do anything else and you say she is wrong
7 about that, that is what we need to hear you on.

8 **MS KREISBERGER:** Right. That, happily, is my next section. Can I show you --
9 I am in your hands, sir, you may say to me that you are very familiar with her letter --

10 **MR JUSTICE WAKSMAN:** We are familiar with her letter, yes.

11 **MS KREISBERGER:** I was going to take you through it, sir --

12 **MR JUSTICE WAKSMAN:** Don't take us -- I think all you need to do is pick it up
13 where you say, "Look, she says this --", I mean, after all this is a letter from
14 an expert, we have to give it due weight because this is not a lawyer saying what the
15 position is, it is the expert saying what difficulties she might be in.

16 So we have read the letter, why don't you take us to the bits which you disagree with,
17 where she is saying: I need this before I can do anything else?

18 **MS KREISBERGER:** I will do that, sir.

19 So first of all, I want you to note that she says in terms that the infringement is
20 an infringement on access.

21 **MR JUSTICE WAKSMAN:** Yes.

22 **MS KREISBERGER:** That is not the case. I just want you to notice that.

23 **MR JUSTICE WAKSMAN:** Right.

24 **MS KREISBERGER:** Now, going through my points. First of all, point number one,
25 no change in the scope of the alleged infringement. So as I say, she says in terms --
26 and I will just ask my trustee junior to highlight for me where she says that in

1 a moment -- but look, that is a complete mischaracterisation of the claim. I have
2 shown you it's not a claim for overcharge on access, it's access and calls.

3 To recap, I have shown you three key documents. The first is the Claim Form, which
4 alleges calls and access prices together were excessive with access only posited in
5 the alternative. That is definitive.

6 I have also shown you the joint note, which refers in terms to a benchmark covering
7 calls and access, so we now get to the next layer of how you prove it; and I have
8 also shown you briefly the gaps table which requests costs and other data for both
9 calls and access.

10 Now, it is regrettable that what Dr Jenkins does is give partial quotations from the
11 Claim Form. She only quotes 133 that cites -- she quotes the without prejudice
12 paragraph that introduces the narrower benchmark and she omits to cite the
13 passages of the Claim Form that set out what the infringement actually is, in other
14 words overcharging on calls and access.

15 **MR JUSTICE WAKSMAN:** Well, can I try and assist you because a lot of the letter
16 is concerned with effectively wasted time or wasted costs: if we had known this at
17 the beginning, we would have done that; now that we know this, I wouldn't have
18 done this. Which prima facie it may be important on costs or directions, but it is not
19 critical. What is critical are the bits where she says: this is what I now need to know.
20 That is what I need to have your comment on.

21 So for example, if we go to damages estimate, never mind what appeared to be
22 abandoned or not abandoned, she starts at 320 and she says that, and then 321 and
23 then she says:

24 "I cannot provide an opinion ..."

25 At 322:

26 "... and I cannot consider the factors ..."

1 And that she no longer understands the counterfactual.

2 Now, it may be that some of this you now say is cured because you are going to
3 provide this further information, but that is really where she starts and then her
4 summary actually says what she needs to know. What I need to know from you is
5 whether you now agree with any of that.

6 **MS KREISBERGER:** Sir, we don't agree with any of it because she has the detailed
7 pleading that it sets out the cost components and they have our damages estimate --

8 **MR JUSTICE WAKSMAN:** Right.

9 **MS KREISBERGER:** -- let me take you to the letter, that is in the correspondence.
10 I will just put my finger on that. It is bundle 1, tab 63.

11 **MR JUSTICE WAKSMAN:** Yes.

12 **MS KREISBERGER:** Page 583. This sets out you see the table there, sets out the
13 calculation for voice-only and split purchase. So she has the figures.
14 So what she has at the moment is the pleading amendment that sets out precisely
15 what goes into the benchmark and she has the overall damages assessment.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MS KREISBERGER:** And she doesn't need any more.

18 Can we just step back for a moment, sir. The benchmark is built up of BT cost data.
19 I have pointed out that she has been on notice for a very long time that the
20 benchmark will be looking at access and calls data, and she is really proceeding
21 along a misapprehension here.

22 Reading her letter, one is left with the impression that she thinks her first trial report
23 is meant to be a detailed critique of the precertification evidence. She says things
24 like, "I am not able meaningfully to opine if this is different from Parker 1". Of course
25 Mr Parker's evidence at trial is different from Parker 1.

26 Now, let me put it like this, sir. You already have the point that her client's pleaded

1 case is that the 2009 benchmark is wrong, not least because it doesn't address calls,
2 that is what they plead, and that BT will be putting forward its own rival benchmark
3 for testing price in its economic evidence. That is its pleaded case. That is what her
4 report should be directed to and we don't have a hint as matters stand today as to
5 what that benchmark is.

6 Dr Jenkins in her report is not being asked to perform a detailed critique of Parker 1
7 and Parker 2 pre-disclosure. Doctor Jenkins in her report needs to tell us what is her
8 positive case by reference to her own benchmark and comparators to support her
9 client's contention that there was no unlawful overcharging.

10 Now, she will have ample opportunity to address Mr Parker's evidence in her reply
11 report, but the real prejudice here is on the class rep, given that BT has kept its
12 cards so close to its chest. BT has the benefit of Parker 1 and Parker 2, which are
13 very fully developed, a detailed (inaudible) -- a detailed set of amendments and we
14 will provide a table, whereas we have nothing more than a bare denial from BT.

15 Now, the point I really want to emphasise here is, as I said, for both parties this is
16 going to be a benchmark made up of BT's costs. BT is already in the best position
17 vis à vis its own data. That is why we needed the summary tables to understand, get
18 a handle on that data.

19 It is a reasonable to assume -- it is an assumption because her writing this letter we
20 haven't been told, but it is reasonable to assume Dr Jenkins in her evidence will
21 construct her benchmark from BT's cost data. And had Mr Parker said, "Well, I am
22 sticking with my 2009 proxy", no doubt she would be criticising him very severely for
23 that, for not using actual cost data.

24 Now, Dr Jenkins has never had to rely on a proxy projecting forward from 2009
25 because she has long had access to BT's costs, and of course she acted for BT in
26 the various Ofcom investigations.

1 So her cri-de-coeur is not very convincing, actually. She doesn't need anything
2 further from the Class Representative. So when she makes statements like, "I have
3 no clarity on the formulation of Mr Parker's competitive benchmark", and "I am not
4 able to form an opinion on that", she is not being asked to form a opinion on that
5 because her clients say they are going to put forward their own positive case.

6 So I would ask to you take a sceptical eye to what Dr Jenkins says. What is really
7 going on here is that BT has been given a very great amount of information about
8 the Class Representative's case where they have told us really nothing at all.

9 So that is what I say to the requests. We have been very quick to offer up
10 an additional table this week, which we are aiming for Thursday for that. I don't think
11 I need to address you further on the being taken by surprise point on calls.

12 Sir, if I may just go through and check -- I am trying to be as brief as I can -- that
13 I have dealt with all the points I need to before we --

14 **MR JUSTICE WAKSMAN:** Just take a moment to reflect and check that there is
15 nothing else you need to say, of course.

16 **MS KREISBERGER:** I am very grateful.

17 Yes, there are a couple of specific points. That -- unless you have any further
18 questions --

19 **MR JUSTICE WAKSMAN:** Not at this stage, no.

20 **MS KREISBERGER:** -- that deals with Dr Jenkins' letter, but there are some other
21 points put against me in Mr Beard's skeleton and some quite practical points that
22 I need to deal with. The first is he complains that the Class Representative should
23 have put expert evidence in in support of these amendments, in other words more
24 information about our case, bring forward the detailed economic evidence. I say that
25 would be a completely pointless step, but we will put in that table.

26 **MR JUSTICE WAKSMAN:** Yes.

1 **MS KREISBERGER:** The second point is this point that much of Dr Jenkins' work is
2 redundant and they object to simultaneous exchange of expert reports --

3 **MR JUSTICE WAKSMAN:** Never mind the redundant aspect, you can come back.
4 We have his redundancy point.

5 **MS KREISBERGER:** Okay, but we don't accept simultaneous --

6 **MR JUSTICE WAKSMAN:** I know you don't accept that. Now, sequential or
7 exchanged reports here is an item for discussion --

8 **MS KREISBERGER:** Understood, sir --

9 **MR JUSTICE WAKSMAN:** -- given we are where we are. They say in any event
10 you should provide yours first; what do you say about that?

11 **MS KREISBERGER:** So, we say that is not the way to go about it, given my key
12 submission to you, which is we don't know what they are saying about BT's own
13 costs. So that is not going to work. We are being as helpful as we can. We will
14 provide the table.

15 **MR JUSTICE WAKSMAN:** Right.

16 **MS KREISBERGER:** I don't know if I need to address you -- I have I think dealt with
17 it en passant, as it were, with the point about offsetting. I have answered
18 Mr Ridyard's question that it was a flaw --

19 **MR JUSTICE WAKSMAN:** No, that is fine, thank you.

20 **MS KREISBERGER:** -- no, that is dealt with.
21 Mr Beard says it was imperative -- that is the language in his skeleton -- for
22 Mr Parker to spell out the cost plus benchmark at the outset, he says, at certification.
23 One asks rhetorically: how could he do that before he had the data.

24 **MR JUSTICE WAKSMAN:** Yes.

25 **MS KREISBERGER:** Last point: much is made in Mr Beard's skeleton about
26 blueprints.

1 **MR JUSTICE WAKSMAN:** Yes.

2 **MS KREISBERGER:** And I do want to address on you this point briefly. There is no
3 change in the methodology on which the Class Representative relies because the
4 methodology is limb 1 and limb 2 of United Brands, cost plus and any available price
5 comparators. That is the methodology.

6 Mr Beard relies on recent CPO judgments, in particular McLaren from the Court of
7 Appeal, and has rather latched on to this concept of the blueprint, a concept much
8 en vogue in CPOs, but there is no read-across of that blueprint case law to this case.
9 Now, in McLaren -- I am not going to take you there in the interests of time -- but the
10 Tribunal was faced there with two irreconcilable price theories by the parties.
11 Absolutely no need to get into the detail, but one side argued for silo pricing and the
12 other side overall pricing. The Court of Appeal criticised both sides for advancing
13 these as rigid theories which didn't take any account of the opposing theory; in other
14 words, the Tribunal was confronted by two experts who were like ships passing in
15 the night.

16 The reason why I say there is no read-across here is because we don't have, as far
17 as we know based on what we know from BT, what we know about their economic
18 case which isn't much, but there has been no suggestion that the Tribunal is faced
19 with irreconcilable methodologies.

20 Class representative relies on the United Brands' framework of analysis. Dr Jenkins
21 hasn't suggested that that is a bad framework at any stage and it is not pleaded, so it
22 seems that the parties are aligned on what is a standard methodological framework
23 for excessive pricing cases.

24 The question of which costs go into the bucket, or how to measure them or allocate
25 them, well, that will no doubt be contentious, but that is the normal type of dispute in
26 an excessive pricing case under chapter 2. It has nothing to do with blueprints.

1 So that takes us back to the function of these amendments. They are just the
2 normal updating of approach, which the Court of Appeal said is expected as data
3 becomes available.

4 Now, if I might for your note, having skated over some of my submissions, I would
5 like to give you -- in the interests of time I will give you the reference to the McLaren
6 Court of Appeal judgment. It is at authorities 2, tab 4, page 265, and the Tribunal
7 said this:

8 "Any chosen methodology [that is the class rep's methodology] needs to be adapted
9 as data becomes available."

10 And perhaps if we do just turn it up very briefly --

11 **MR JUSTICE WAKSMAN:** I think we can look at it over the luncheon adjournment,
12 we really do have to move on.

13 **MS KREISBERGER:** I am grateful. The second paragraph is paragraph 47:

14 "If the claim is certified, the methodology offered by the Class Representative will
15 provide an initial blueprint for the parties and the CAT of the way ahead to trial. This
16 is of course not to say that the Class Representative's methodology is cast in stone."

17 So this is the normal updating that one expects to see post-disclosure.

18 Now, Mr Beard says at paragraph 20 of his skeleton:

19 "These claims wouldn't be certified today."

20 Well, that is rather disrespectful, but it is also unconvincing because BT's challenge
21 has gone up to the Court of Appeal, and given its approach in these proceedings one
22 might think that if BT thought it had a slender hope of challenging certification, it
23 would. There is no challenge before on you that, so we say there is no cause here
24 for opening debates about blueprints. You have the blueprint.

25 Sir, that concludes my submissions on why the amendment should be allowed.

26 **MR JUSTICE WAKSMAN:** Thank you very much indeed.

1 Now, Mr Beard.

2 **Submissions by MR BEARD**

3 **MR BEARD:** It is about methodology. It is methodology, methodology,
4 methodology. That is the issue here. It is not about pleading. We have always
5 known that the case was a claim in relation to SFV services. That element of the
6 pleading hasn't changed. The methodology for getting there is radically different.

7 Now, the point we made about certification that Ms Kreisberger has just picked up is
8 that if you have the material from Mr Parker, Parker 1 and 2, which was critical to
9 your assessment as I understand it -- I wasn't here, but my understanding of how
10 you decided certification, and what was in fact being put forward was a completely
11 different methodology, there would have been a significant question you would have
12 asked yourselves.

13 Now the fact that this change comes very late in the process in relation to
14 methodology doesn't change the difficulties we have here because we are dealing
15 with a class claim. And it is worth just turning up McLaren, and indeed Govia, since
16 Ms Kreisberger finished there. So if I may, I will turn to that. It is tab 4 in the second
17 authorities bundle.

18 So, starts at page 254. Ms Kreisberger is quite right that there was an argument
19 here about whether or not there was excessive pricing in relation to the delivery
20 charges for cars, and there was an argument between the experts whether or not
21 you carried out the assessment of the excessive pricing by reference to a siloed
22 separate delivery charge or the total cost of the car.

23 Now, the first observation I make about that, and just referring to what
24 Ms Kreisberger has been talking about, the methodology is not about whether it is
25 limb 1 and limb 2 of the United Brands. Of course it is limb 1 and limb 2 of the
26 United Brands. That is the legal test. That is not the economic methodology.

1 Her starting point in her analysis is just wrong. What is being considered in McLaren
2 is under limb 1 and query under limb 2, what is the economic methodology that we
3 are going to be debating at trial. The concern was that there would be two
4 approaches from two different experts, ships passing in the night.

5 If we pick it up then at page 275, paragraph 44, this analysis of case management
6 issues. Now, the Tribunal will be familiar with these passages no doubt, but what is
7 being emphasised here is that class actions are different. That is why you have the
8 initial certification stage. You are not in the normal inter partes litigation situation
9 where you just have pleadings exchanged; fact witness exchange; expert evidence
10 exchanged. You need to have that methodology. The term used is then "blueprint";
11 how do you ensure there is an efficient process through to trial?

12 What is discussed here is the important roles -- the important role here in relation to
13 the importance of case management issues picked up at 44 and the emphasis to the
14 importance of the gatekeeper role. So I shouldn't have talked about limb 1 and limb
15 2 here because it is in fact a cartel case, as I said, in relation to the matters, but
16 the key point is that is not the issue that goes to the questions here.

17 45:

18 "The duty on the CAT as gatekeeper in collective proceedings is proactive as well as
19 reactive. Once the CAT decided to make a CPO, that is not the end of the
20 gatekeeper role. A CPO is neither the beginning nor the end of measures by the
21 CAT made case managed collective proceedings. A Class Representative might not
22 have to overcome a very high hurdle to obtain a CPO, but the CAT should
23 nonetheless ensure that from the certification stage the case proceeds efficiently to
24 trial."

25 Then there is a reference to Gutmann and a reference to Le Patourel itself.

26 **MR JUSTICE WAKSMAN:** Yes.

1 **MR BEARD:** 47:

2 "In such cases the methodology advanced by the Class Representative at the
3 certification stage will be an important feature of the process. The level of detail of
4 the methodology required by the CAT will always be fact and context-sensitive and
5 will turn upon such matters as the availability of evidence. However, underlying the
6 Microsoft test is the proposition that if a claim is certified, then the methodology
7 offered by the Class Representative will provide an initial blueprint for the parties and
8 the CAT of the way ahead to trial."

9 And it is right to say, as they then go on and say:

10 "That is of course not to say the Class Representative's methodology is cast in
11 stone."

12 We of course accept that, but the key thing is that you do require a clear
13 methodology, not just a statement of the legal case, which can then properly be
14 engaged with.

15 What we have here is a methodology that is put forward referring to a proxy in
16 relation to costs, and now we are moving to an entirely different basis for the
17 assessment of what the competitive level is.

18 **MR JUSTICE WAKSMAN:** You never accepted the proxy was the right basis
19 anyway, so there was always going to be a clash.

20 **MR BEARD:** No, we never did. Yes.

21 **MR JUSTICE WAKSMAN:** Your position presumably -- leave aside what the detail
22 of the figures are here -- whenever it came out was going to be some form of costs
23 plus benchmark, except you would presumably have some case which would be
24 pretty close to actually what the prices charged were.

25 **MR BEARD:** Well, I am certainly not going to assume that that would be the case.
26 Would we consider cost benchmarks? Yes, we would. Would we reject the proxy

1 that was being put in place? We made clear we would reject that. That is entirely
2 clear. But the difference here is the methodology that is put forward by the claimants
3 is important to frame how these matters are dealt with. That is not clear.

4 What this case, and indeed the one in the next tab over the page, the Govia case,
5 made clear is that it is critically important that methodology is maintained. You see
6 that Govia begins at page 337, tab 6. This, again, is a case where there has been
7 certification, so it is like McLaren. So the gatekeeper role is again being
8 emphasised.

9 I am not taking you to the Meta case, we have referred to it in the skeleton, but there
10 are admonitions about the importance of the gatekeeper role in Meta.

11 What has happened in Govia was that rather than a single expert changing their
12 methodology, you had a situation where an expert withdrew from the proceedings.

13 What is interesting here is that the new expert that came in, Mr Davies, he
14 maintained and the Class Representative -- I am sorry, Dr Davies -- maintained that
15 the methodology that was being followed was the same as the previous expert. So
16 that was the contention that was being put forward.

17 And you can see that there was a consideration of this at paragraph 7, page 341,
18 where the emphasis on the importance of the expert and the expert's position of the
19 Class Representative is being explained by the Tribunal. That is in paragraph 7.

20 I just invite to you read through that.

21 **(Pause)**

22 **MR JUSTICE WAKSMAN:** Yes.

23 **MR BEARD:** If we go over the page to 9, the inevitable need to instruct a new
24 expert had certain consequences. So what is being emphasised, I just ask you to
25 read through paragraph 9.1 and through to the end to 3.

26 **(Pause)**

1 **MR JUSTICE WAKSMAN:** Yes. Right.

2 Yes.

3 **MR BEARD:** So what is being said here is, although Dr Davies is turning up and
4 saying, "Don't worry, I am just going to carry on from what Mr Harvey was doing", the
5 concern of the Tribunal at that point was: well, there might be a change in
6 methodology and therefore we need to make sure that we understand what that
7 methodology is as we head through to trial.

8 **MR JUSTICE WAKSMAN:** Yes.

9 **MR BEARD:** And what is important there is, even in the face of the parties saying
10 "We are going to keep it the same", it was important that that methodological change
11 was spelled out, and indeed as you can see what then happened was there was
12 effectively a stay of proceedings in order to enable that to happen.

13 But our position is a fortiori now. We have a situation where you have the same
14 expert, but a very different methodology is apparently being put forward to underpin
15 a very, very different calculation. And in those circumstances we say it is important
16 that that methodology is spelled out, that it is not simply a matter of putting forward
17 a table of numbers at that point.

18 In that regard, it is perhaps important to just look at what Ms Kreisberger has said is
19 it being spelled out in the pleadings, this new methodology. If we could therefore go
20 to volume 1 of the CMC bundle and the re-re-re-amended Claim Form, which is at
21 tab 5.

22 **MR JUSTICE WAKSMAN:** Yes.

23 **MR BEARD:** Now, we pick it up at page 104, paragraph 120. As I say, nothing in
24 our concerns relates to paragraph 120. We know that the claim was based on
25 an allegation of breach in relation to SFV services as a whole, but the methodology
26 for getting there was excessiveness in relation to line rental, which was then not

1 offset by calls.

2 **MR JUSTICE WAKSMAN:** Look, I follow all of that, but is the crux of the matter as it
3 is now developed in argument not this: the Class Representative has now
4 volunteered details of what the figures would be -- are, from their case, in
5 paragraph 133 (b), in other words where it says an estimate of the average cost of
6 sale, what that is; what the cost of wholesale or rental is, what the figure there is;
7 what are the other network costs and what the figure is there; and the same for (b),
8 the same for (c); and then the change which would be required if it is accessed
9 benchmark only?

10 Now, what I would be interested in hearing from you, apart from everything else --
11 and you have just heralded it a bit -- is if supply of those figures is not enough, what
12 else do you say you need and why before you can plead back to this?

13 **MR BEARD:** Yes. Well, it is not just a matter of pleading back, it is -- because there
14 is a danger of lapsing back into the approach that Ms Kreisberger was putting, which
15 is a pleading is enough here.

16 **MR JUSTICE WAKSMAN:** No, no, no, I take the point that you also have to
17 produce an expert report.

18 **MR BEARD:** Yes. So with that caveat, if we are looking at 133(b) -- and we entirely
19 agree the construction of this is around 133(b), no debate about that -- but what we
20 are concerned about is just numbers is not enough because just numbers doesn't tell
21 you where Mr Parker is getting those numbers from. They may be derived from BT
22 data, but this is not a game of 20 Questions where we then go back and say, "Well,
23 which bits of the data have you used for what reason in order to calculate this?"
24 That is in essence the outline methodology that we need to understand in relation to
25 it.

26 So where he is talking about it is less important in relation to wholesale line rental,

1 I completely understand that, but where we are talking, for instance, about other
2 network costs, we don't know whether or not the number that he is producing, or
3 series of numbers it will be that he might produce in relation to network costs, where
4 he is getting those from.

5 Now, if what is being intended to be provided in this table is that sort of explanation,
6 which is signed off by Mr Parker telling us that and telling us what it is that he is
7 identifying here, then that may take us an awfully long way.

8 But I should also emphasise something else. When we get to (b) -- sorry, I should
9 do it in relation to (a) as well -- an estimate of average cost of sales per line, which
10 includes wholesale line rental, other network costs, call termination payments. We
11 have a suspicion here that what Mr Parker is doing is only identifying some form of
12 incremental costs for the particular calls.

13 And of course that is a significant issue in relation to how you understand what
14 a relevant cost measure is because in relation to questions of excessive pricing, it is
15 going to be important also to consider what elements of common costs that BT
16 incurs should be attributed to these various services.

17 **MR JUSTICE WAKSMAN:** We want to see whether he has only direct costs in.

18 **MR BEARD:** That is one way of looking at it -- and what they are.

19 **MR JUSTICE WAKSMAN:** You may say, actually, that is not sufficient and actually
20 you have to have indirect or common costs in as well, in which case you will put
21 them in your version. Got that.

22 **MR BEARD:** We are not trying to resolve the argument now, we are trying to
23 understand --

24 **MR JUSTICE WAKSMAN:** What is in and what is not in.

25 **MR BEARD:** Yes, exactly. That is all we are talking about here, what is in and what
26 is not in, and why he has picked these things is what we would expect in

1 a methodology. Because that is what Mr Parker put forward in Parker 1 and
2 Parker 2. And with respect to Ms Kreisberger, she didn't quite fairly capture what
3 Mr Parker said in relation to Parker 1 in relation to the various different options he
4 had.

5 Because actually, Mr Parker didn't go so far as to suggest that actually he would
6 normally do some sort of cost stack analysis. That wasn't the point that he made. In
7 relation to these matters actually what he said was, "There are a range of these
8 possibilities [this is in section 8] and I would normally pick one of them", not that
9 "I would pick building a cost stack from the bottom". So he actually chose at that
10 point to use a proxy in relation to these matters.

11 If we could it is perhaps just worth keeping our pleading open but I am in Mr Parker's
12 report at volume 1, bundle 3, volume 1, tab 3, at page 173, there you will see:

13 "In the light of the above it is necessary to identify a competitive benchmark to
14 compare against the price in question. As an economist, I would typically adopt one
15 of the following approaches ..."

16 Not, "I would typically adopt the first".

17 Now he refers to it as a costs plus estimate, I am trying to avoid that language
18 because it is to do with the methodology. I know that the Class Representative
19 keeps saying, "Well, this is the costs plus proxy". Okay, fine. I can cope with that
20 language. That is not the question here. When you have a proxy, what you are then
21 arguing about is whether that proxy is sound and whether movements away from it
22 are suggesting excessiveness.

23 When you are building up a bottom-up cost stack, you have to be identifying what
24 measures of costs you are using, what parts of the data you are looking at in relation
25 to these matters. And we are not here saying, "You must tell us everything as if it is
26 your first expert report, but the divergence from where you were is so fundamental

1 you need to tell us that outline", because that is absolutely what this Tribunal is here
2 to do in relation to class actions, to give that sort of steer because otherwise the
3 ships in the night problem gets more and more of a risk.

4 So this is why we haven't turned up saying, "You must decertify". We understand
5 changes can occur, but we need to understand what those methodological changes
6 are; we need to understand them in short order and then we need to consider what
7 the consequences might be.

8 It may well be that having seen what is put forward in the justification and given the
9 work that has been going on, we can say, "All right, with limited modification we can
10 carry on to trial". That is fine, but at the moment we don't understand enough of
11 what is being done here. That is our position.

12 But you see it in relation to 8.2. If we go over the page to 174 there is a detailed
13 analysis of what he considers the best competitive available competitive benchmark
14 is. And when Mr Ridyard said, "Well, when I read this, I didn't necessarily think that
15 there was an alternate possibility", with respect, that is what anyone reading both this
16 and the other report would say, that essentially this was a proxy being chosen
17 because it was the best that could be provided.

18 And then it goes on at 180 to consider benchmarks I consider less suitable for
19 dealing with these matters. Then he goes through certain comparators, but at 138
20 he specifically says, costs plus approaches at 3.15:

21 "In principle one could develop a competitive benchmark by building a bottom-up
22 costs plus model, however my approach of relying on the 2009 benchmark and
23 adjusting for the subsequent cost changes is in substance a costs plus approach."

24 So he is not worried about it there:

25 "I have indicated I would seek data on variable cost changes and line items other
26 than wholesale line rental, although as I set out I think it is likely these are much less

1 material. I am also not aware of any reason to think the appropriate allocation of
2 common costs would have changed over time. This suggests that an approach
3 starting from 2009 price is reasonable".

4 So Mr Parker is not naive. He has been involved in these sort of cost stack-building
5 exercises previously. He knows it is perfectly possible to do that sort of thing. He
6 knows at the time that he is putting in this report that we are pre-disclosure, and of
7 course as it transpired all of that data was provided. At no time in this material does
8 he say, "Well, actually I think the way that we are going to do this is I will start with
9 my proxy, but then we will do something different".

10 What Ms Kreisberger has done is she has touched on various points along the way,
11 odd paragraphs where you could say, "Well, he was asking for data in relation to
12 these issues, particularly on call matters". Well, he was asking for data and we were
13 providing all of that data. And when it comes to the joint expert reports and the
14 various rows, we were providing all of that data. And we were explaining what that
15 data was, and it was in relation to costs of sales, and it was in relation to underlying
16 costs and that was debated.

17 But at no point did Mr Parker say, "Actually, my methodology is different from that
18 which I was putting forward in my report". At no point was that suggested. And that
19 is the difficulty that we are then faced with; we don't have that alternative
20 methodology.

21 So I can continue through the report of Mr Parker in relation to these matters, but it is
22 worth emphasising I think that at 185 it was entirely the position that notwithstanding
23 the pleaded case being an allegation of excessiveness in relation to all SFV
24 services, the only exercise that was being carried out was in relation to a benchmark
25 on excessiveness for the line rental. That is picked up at 185, and there is no
26 suggestion there that the concern is such that in fact the consideration should be

1 a finding some kind of way of assessing the excessiveness of calls.

2 There are occasional references including a footnote -- and I think it is footnote 268
3 as I recall -- that talks about -- and this is, if we pick it up at 191, the exercise that
4 Mr Parker said he wanted to do, which was this question of offsetting effect in
5 relation to calls, a very, very different exercise because what you are asking yourself
6 is: in relation to the calls is there reason to think that prices would actually be lower
7 than a competitive level, is totally different from a situation in relation to excessive
8 pricing.

9 And then it is at 193 you have this footnote:

10 "I am not able to analyse whether the calls were also excessively priced. The data
11 should allow me to make such an assessment, although the primary purpose of this
12 data is to check my preliminary conclusion that there is no offsetting of the calls
13 prices being below the competitive level."

14 So he had these issues in mind at that time. He knew that was a possibility. He
15 knew he was asking for all of this material, because it is listed in 345, but as 346
16 makes clear, he was not suggesting that was an exercise he intended to carry out.

17 Then he goes on and says, well, I have no evidence of competitive rebalancing, so in
18 relation to the excessiveness analysis I carry out on the proxy in relation to line
19 rental, there is no issue.

20 Of course, we see the same again in relation to Parker 2.

21 So, the point is that, at that time, it was evident that there were other methodologies
22 that could be available but he was choosing not to follow them. If he had decided
23 actually, in the alternative, I want to follow this alternative methodology, that should
24 have been spelled out.

25 Indeed, it is striking, of course -- and I am slightly cautious about referring the
26 Tribunal to its own judgment, but it was actually critical, as I understand it from

1 reading this afresh, in the CPO judgment itself how it was that one came to consider
2 whether or not to certify when focussed on the 2009 proxy.

3 If we could just take up authorities bundle 1, tab 9. Obviously, this is a judgment with
4 which you are all very much familiar. If we could just pick it up at page 326. This is
5 the abuse point.

6 So my understanding was, at the time BT was saying, look, the abuse elements are
7 not made out here in relation to United Brands limb 1 and limb 2, and as I say,
8 simply citing limb 1 and limb 2 that is not a methodology.

9 Rather -- this is at paragraph 83 -- he has collapsed limb 2 back into limb 1 without
10 any independent analysis, and that is because the same benchmark is used.

11 Then, 84, the PCR agrees that there are two limbs but then says you can use the
12 single benchmark.

13 At 85:

14 "Mr Parker has clearly proceeded on the basis that the 2009 price may be used, first
15 as an approximation of a cost plus figure [so this is limb 1]. He has also adopted it
16 as the relevant competitive benchmark for the purposes of limb 2. That is because,
17 at least on a prima facie basis, he concluded that the 2009 price was competitive,
18 which is why it removed it from regulation, and because other potential price
19 benchmarks were evaluated and specifically rejected in Mr Parker's analysis. In this
20 case, therefore, the PCR and his expert contend that a suitable competitive
21 benchmark is relatively easy to find."

22 Now, that is not territory we are in any more. And it is certainly not territory, either for
23 limb 1 in relation to excessiveness, but also in relation to limb 2, where of course
24 what was being said then was, we can use this 2009 proxy and that is your proxy for
25 fairness. Now you are in a different world, discussing how it is in relation to limb 2 a
26 cost stack analysis tells you what is and isn't fair. That is a radically different

1 methodology being put forward.

2 So, we understand how the Tribunal rejected the position that was previously being
3 put, but it did so with a very clear understanding as to the importance of role of that
4 methodology.

5 So, we have tried to engage with this process as well. We have not just dug our
6 heels in and said: decertification, we are not going to engage.

7 **MR JUSTICE WAKSMAN:** I follow that.

8 **MR BEARD:** What we tried to do were two things. We tried to get Dr Jenkins,
9 briefly, to articulate what concerns she had and, with respect to Ms Kreisberger,
10 although pressed by the Tribunal, there was nothing in the requests of Dr Jenkins
11 that Ms Kreisberger actually said was not a legitimate concern about methodology.
12 Her answer was, don't worry about it, I have shown you the Claim Form, I have
13 shown you the old reports, you don't need to think about these things and actually, it
14 is terribly unfair that BT haven't set out their benchmarks so far. That is not the right
15 approach in relation to class certification; it is not the right approach in relation to the
16 gatekeeper role after certification either.

17 Ms Kreisberger is trying to fight a different case, or rather a different case in
18 a different forum, effectively, and that is what is wrong with her approach. The
19 concerns articulated by Dr Jenkins are entirely legitimate in that regard.

20 More than that, if we could go to bundle 1, I have it in the second volume, there is
21 an exchange of correspondence which I would just like to take you to in relation to
22 these matters before I move on to anything in relation to procedural issues as well.

23 **MR JUSTICE WAKSMAN:** Yes.

24 **MR BEARD:** Because it is important, perhaps, just to have a little context in relation
25 to what has actually happened here.

26 As you know, what was provided was a draft amended pleading, provided at the

1 beginning of June.

2 **MR JUSTICE WAKSMAN:** Yes.

3 **MR BEARD:** If we pick it up -- it is tab 57, 553. Now, I should say, although it is
4 marked 1 July it isn't Saturday. It was 1 June that this letter was provided.

5 So this is 553.

6 **MR JUSTICE WAKSMAN:** Yes.

7 **MR BEARD:** "In summary, the principal substantive amendments are as follows.

8 Relevant markets ..."

9 Now, I will come back to markets but obviously the focus is on the abuse.

10 3.2:

11 "Abuse [this is over the page]. The Class Representative intends to amend his
12 pleadings in respect of his primary case on the benchmark in respect of the
13 competitive level, following disclosure by BT. The Class Representative's primary
14 benchmark will take into account BT's costs and consider SFV access and SFV calls
15 combined."

16 That is it.

17 Then, we get into the justification on procedure:

18 "It has not been possible to make these amendments until now as a result of a series
19 of delays in BT's provision of the third and fourth tranche disclosure."

20 And then there is a litany of complaint, which I will come back to on procedure
21 because it is unjust and it is wrong.

22 You will see then, in the next tab, at tab 58, page 558, you will see the response
23 from Simmons & Simmons saying:

24 "We refer to your 1 June letter. The proposed amendments are not, as suggested in
25 your letter, uncontroversial."

26 The idea that they could be suggested to be uncontroversial when you are almost

1 doubling the quantum of the claim is, with all credit to the creativity of use of
2 language by litigation solicitors, stretching matters.

3 "By way of the proposed amendments, the CR is in fact seeking entirely to change
4 the basis of his case and these require further consideration."

5 We go on again to tab 60, you will see the comments of Mishcon de Reya in
6 response, indicating their view that:

7 "The market definition has been narrowed and the alleged abuse has not been
8 expanded or entirely changed. The Class Representatives' refinement ..."

9 This is not a refinement. This is not merely a technical change. Ms Kreisberger
10 deployed a whole range of terms about fine tuning in relation to this. This isn't fine
11 tuning. This is changing the instrument and possibly your orchestra.

12 Then, if we go on to tab 62, you will see there at 569 -- this is 13 June, so less than
13 two weeks after this extensive amended pleading has been provided. At 570 you will
14 see the position in relation to market definition and the concerns being expressed,
15 the fact it could all have been done so much earlier, and I will come back to that
16 briefly. But the position is it was clear in our defence what we were saying about
17 price discrimination and the ability to price discriminate. That was made absolutely
18 clear in relation to the evidence served in February of this year.

19 Then we go on to abuse. It articulates the concerns that exist in relation to these
20 matters and then it doesn't just stop there, it says, look, this is the sort of information
21 we actually need and it sets these matters out in the request for information. Over
22 the page, at 572, precisely, sir, as I have already indicated, and sir you have
23 indicated might be perceived as the centrality of the change, we ask specific
24 questions about 133(b).

25 So we are setting out here, two weeks afterwards, look, these are things we don't
26 understand. Are you proposing to exclude other non-network retail costs? These

1 are granular questions, in the sense we are saying, look, we are doing our best to
2 understand what you are doing here but tell us the answers.

3 Then it goes on and raises a series of questions at (c). You will notice that it says,
4 well, look, you have thrown in these quantum figures but they are obviously not right.
5 They don't make any sense. If you go down to 573, you will see at 3, just above (d)
6 we are asking, this enormous change in relation to quantum, essentially the quantum
7 figures didn't have plausible interest calculations attached to them at all.

8 **MR JUSTICE WAKSMAN:** I thought there was some --

9 **MR BEARD:** There is a correction.

10 **MR JUSTICE WAKSMAN:** There is a correction that deals with it.

11 **MR BEARD:** That is now dealt with.

12 **MR JUSTICE WAKSMAN:** Let's not worry about it then.

13 **MR BEARD:** I am not worried about it, what we were doing, though, is we were
14 going through --

15 **MR JUSTICE WAKSMAN:** You were saying that was a fair point to take at the time.

16 **MR BEARD:** We were saying, look, we are trying to identify where the problems lie
17 here. We are not just standing back, we are not digging our heels in, we are trying to
18 understand.

19 **MR JUSTICE WAKSMAN:** I follow all of that.

20 **MR BEARD:** Then we get a response at 63 which simply includes a litany of
21 references in relation to market definition from Parker 1. Then at 580 we have
22 material in relation to abuse. Again, what we have are references back to Parker 1
23 and the paragraphs I have taken you to.

24 If you just look at (b), it is just re quoting what was said in Parker 1, that a proxy is
25 a proxy for a cost plus approach. That is not taking us any further forward here.

26 Then, again, what we get in this letter is what we have heard this morning; lots of

1 citations of pleadings, and back to Parker 1 which are not spelling out the position.
2 What we don't get, strikingly what we don't get, we don't get any engagement with
3 the questions we asked.

4 Then we go over the page on the requests for information and what we get is
5 incredibly limited. Yes, there is a correction in relation to those figures, except of
6 course it is still mystifying what is actually going on here because, in fact, there are
7 two benchmarks being used in the pleading, if we go back to it.

8 **MR JUSTICE WAKSMAN:** One is for both services and one is for one, in the
9 alternative. Is that what you mean? 133 --

10 **MR BEARD:** Yes, we do. But we only get a single quantum correction.

11 **MR JUSTICE WAKSMAN:** Yes, that may need to be dealt with.

12 **MR BEARD:** So even in relation to the basic errors we pointed out, we don't actually
13 get a full response. This is part of the difficulty we have.

14 Then we get, never mind, let's just carry on with the timetable with minor
15 adjustments. We say this is just not right way of dealing with these matters.

16 I am conscious of the time, I do need to deal with some of the procedural matters --

17 **MR JUSTICE WAKSMAN:** We need to stop now for lunch.

18 What I am going to do is suggest something, and I need to discuss it with my
19 colleagues, but in the meantime -- and I am only dealing with the core question here
20 about those figures. I am going to dictate some wording here, because I want both
21 sides to consider this over the luncheon adjournment. We still have questions of
22 dates and directions and all sorts of things, but we are not -- whatever we do today,
23 we are not going to have time for another interlocutory spat on whether something
24 that has been delivered is acceptable or not, so we have to deal with the heavy lifting
25 today.

26 I am just going to suggest some wording, which is, as I say, highly provisional on our

1 part. I am just going to say what it would say if we were minded to grant permission
2 and what one of the conditions of that grant would be. It would be as follows -- and
3 you need to write this down:

4 "The re-amended claim as served shall include the following further information to be
5 incorporated within it:

6 "A) In relation to draft paragraph 133 (b), the figures which constitute, on the CR's
7 case:

8 "(i) the SFV services benchmark figure;

9 "(ii) the estimate of average cost of sales per line;

10 "(iii) the cost of wholesale line rental;

11 "(iv) other network costs, including the costs of call conveyance, identifying each
12 component of those costs;

13 "(v) call termination payments to other operators;

14 "(vi) the estimated long run incremental cost per line for providing non-network retail
15 activities;

16 "(vii) the estimated net margin."

17 I interpose, you will see that that is a line by line reference to 133 (b).

18 Then the order would continue:

19 "And in each case, in the case of each figure, a summary of how each figure is
20 arrived at.

21 "B) The same information in relation to paragraph 133C."

22 And we are throwing that out for your consideration over lunch.

23 **MR BEARD:** I am most grateful.

24 **MR JUSTICE WAKSMAN:** We will resume at 2 o'clock. Thank you.

25 **MR BEARD:** Thank you.

26 **(1.01 pm)**

1 (The short adjournment)

2 (2.00 pm)

3 **MR JUSTICE WAKSMAN:** Yes, Mr Beard.

4 **MR BEARD:** First of all, thank you very much for the indication prior to the short
5 adjournment. That was extremely helpful.

6 We have taken instructions and made inquiries, not comprehensive inquiries, but we
7 think that the explanations that you are indicating should be provided, so numbers,
8 summaries and the breakdown, I think would take us, well, a very long way towards
9 dealing with this methodological issue.

10 **MR JUSTICE WAKSMAN:** Yes.

11 **MR BEARD:** Can I just raise a couple of nuances in relation to it?

12 **MR JUSTICE WAKSMAN:** Of course. Yes.

13 **MR BEARD:** You had rightly identified I think all of these things should be per line.
14 That is obviously right. The other thing is it will need to be per year and it should be
15 by financial year because otherwise you are going to get these aggregated figures
16 that are not going to be that helpful. We think that would be of assistance. And you
17 were indicating before the short adjournment that we want to try and move these
18 things along and we think that providing that breakdown will be helpful. Of course --

19 **MR JUSTICE WAKSMAN:** That is per year of the claim period?

20 **MR BEARD:** Yes, exactly.

21 **MR JUSTICE WAKSMAN:** Right.

22 **MR BEARD:** We are assuming that must have been what was done here anyway in
23 the background.

24 **MR JUSTICE WAKSMAN:** Yes.

25 **MR BEARD:** Otherwise, you are not going to just have a sort of completely smooth
26 profile.

1 **MR JUSTICE WAKSMAN:** No. Right.

2 **MR BEARD:** And it will matter for a whole range of aspects of the case, so I think it
3 is helpful to do that.

4 There was one other query that was raised, which was whether or not the
5 calculations in relation to the damages were being done by reference to actual prices
6 or list prices, but that is effectively just a clarification that can be in the summary on
7 that data.

8 **MR JUSTICE WAKSMAN:** That would need to be -- yes. Well, you could -- just
9 a moment.

10 **MR BEARD:** We could either amend it or my having indicated that that is a concern,
11 I am sure it can be picked up in a summary --

12 **MR JUSTICE WAKSMAN:** Well, it is not picked up in the summary of the wording
13 that I suggested.

14 **MR BEARD:** No, it is not.

15 **(Pause)**

16 But I think that would be useful so we all know where we are in terms of how these
17 numbers are being generated.

18 **MR JUSTICE WAKSMAN:** Bear with me a minute.

19 **(Pause)**

20 Right. It is effectively a breakdown of the damages figures, that is all, by reference
21 to the costs and the lists price being used.

22 **MR BEARD:** Yes, that is all we are doing. We are just wanting clarification of which
23 metric is being used. It is much easier to do that.

24 **MR JUSTICE WAKSMAN:** Yes.

25 **MR BEARD:** Obviously it will need to be in relation to the two benchmarks that are
26 continuing to operate effectively, because you have a call and access benchmark

1 and an access benchmark. We thought that was probably implicit in what the
2 Tribunal was thinking of here, but we thought it was perhaps worth spelling out.
3 The only other issues we had were procedural in some way and I don't mean in
4 terms of timing -- we will come to that -- but that sort of material might sensibly be
5 put in tables in an annexe, which I think is what Ms Kreisberger was positing
6 previously, for numbers rather than in the body of the text, just for clarity.
7 In relation to the summary, we would ask that it is signed off by Mr Parker if he is
8 going to continue to be their expert. We don't anticipate there should be any
9 difficulty with that because we assume it is the product of his work.

10 **MR JUSTICE WAKSMAN:** It is not normally done.

11 **MR BEARD:** No, we understand.

12 **MR JUSTICE WAKSMAN:** There are many, many cases involving expert evidence
13 where, quite rightly, the figures that are pleaded are drawn from the expert evidence,
14 but it is still signed off by a solicitor.

15 **MR BEARD:** No, it's only in relation to the summary.

16 **MR JUSTICE WAKSMAN:** I follow that.

17 **MR BEARD:** It's in the summary material we thought it was sensible because
18 essentially what you are doing is you are short-cutting the need for any further report
19 or whatever, and therefore it seems sensible to us that rather than it being the
20 lawyers who are signing off on that summary, it would in fact be the experts.
21 So we thought those were matters that -- beyond that, actually the Tribunal's
22 suggestions really, so far as we are concerned, cut that Gordian knot and we can
23 proceed on that basis.

24 Now, I understand of course that the desire is that there is not a need for returning
25 further interlocutory exchanges and so on and we hope that won't be the case, but
26 obviously we can't give absolute guarantees in relation to these matters --

1 **MR JUSTICE WAKSMAN:** Well, no one can guarantee they are not going to make
2 an application about something. The desire on the part of the Tribunal, the firm
3 desire is to try and do what we can to avoid that.

4 **MR BEARD:** I am grateful for that. It is in that spirit that we have approached it.

5 **MR JUSTICE WAKSMAN:** Yes.

6 **MR BEARD:** We will need to deal with some of the timing issues because there is
7 one other matter that I think needs to be picked up and the Tribunal should be alert
8 to, which is that, as Dr Jenkins' letter indicated, one of the issues that may arise is
9 actually in relation to pricing methodology in relation to calls and fact evidence in
10 relation to that.

11 **MR JUSTICE WAKSMAN:** We have, just to help you on that, been considering that
12 as well. I mean, obviously if it was simply a matter of factual evidence to assist
13 Dr Jenkins, that is an internal matter, but of course it can't be because there would
14 have to be an evidential foundation laid at the trial. And obviously we need to hear
15 Ms Kreisberger on that, but it seems to me that what you are really saying is you
16 would need to adduce some further factual evidence.

17 **MR BEARD:** That is **precisely it.**

18 **MR JUSTICE WAKSMAN:** And if that is right and if it was done, then that would
19 logically -- should logically precede the expert reports.

20 **MR BEARD:** That is exactly right. And even if we are dealing with a situation where
21 we might move to serial expert reports, we would still think it appropriate that
22 Mr Parker saw that before he serves his report. That seems to us the only fair
23 process to deal with these matters.

24 Obviously we can try and speed the plough in relation to these things, but there is
25 a limit to how quickly those issues can be dealt with going back over the period we
26 are talking about.

1 I just wanted to lay that down because otherwise we thought that the points that the
2 Tribunal have put forward dealt with the issues that we had raised in
3 correspondence, and indeed in Dr Jenkins' letter, and we are grateful for that.

4 I think it is important, just in terms of a number of criticisms that were made in
5 relation to Dr Jenkins and the extent to which --

6 **MR JUSTICE WAKSMAN:** Yes.

7 **MR BEARD:** -- those criticisms are not fair, and in particular assertions for instance
8 that Dr Jenkins was working for BT in relation to the Ofcom inquiry in 2017 is not
9 correct. Ms Kreisberger is making these assertions without a basis. So far as I am
10 concerned, that is not accurate on the inquiries I have made and those sorts of
11 contentions about what has been known by whom and what work they were doing
12 needs to be extremely carefully dealt with. The aspersions being cast on Dr Jenkins
13 because she was only providing a letter and so on are quite unfair. We were trying
14 to react quickly in relation to these matters to try and assist the Tribunal by actually
15 being constructive, and those matters we say are unjust.

16 Now before I move on, I am going to just deal with a little bit very briefly, if I may, of
17 the background to this because points have been made about how early these
18 various changes could be made, which again we say are just not correct and are
19 unsound. So I was going to deal briefly with those matters.

20 I understand in the judicial euphemism we are where we are and therefore we need
21 to move on, but it is appropriate, not least because what we are being faced with are
22 a lot of amendments where the ordinary rule in relation to amendments would of
23 course be that we should have the costs of dealing with those amendments.

24 Now, the protestation no doubt from Ms Kreisberger will be that I was reacting to
25 disclosure and so on. Those ring somewhat hollow in circumstances where some of
26 these issues could have been dealt so much earlier, and that is the point I want to

1 | briefly deal with, if I may, sir.

2 | I think the simplest way to look at it --

3 | **MS KREISBERGER:** Sir, I don't want to take Mr Beard out of his stride at all, I am
4 | just wondering if this is a point on cost, I think we are going to need to deal with
5 | costs.

6 | **MR JUSTICE WAKSMAN:** I think this point about whether it should be the usual
7 | costs or the following amendment that your side will get the costs of and occasioned
8 | by the amendment can be left until we have dealt with the mechanics of it.

9 | **MR BEARD:** Certainly, I am happy to do that. I will just deal with a little of the
10 | chronology then, if I may.

11 | So actually, one can take up Ms Kreisberger's table which we don't think is entirely
12 | accurate, but if you have Ms Kreisberger's disclosure table.

13 | **MR JUSTICE WAKSMAN:** Yes.

14 | **MR BEARD:** The relevant orders in relation to disclosure, so what the claimant
15 | representative knew was coming was back in May 2022 and of course I have made
16 | the point that no indication was made at that time, or indeed subsequently, that this
17 | new methodology was coming forward, whether in relation to market definition or in
18 | relation to abuse.

19 | More particularly, we see that 7 November, third tranche disclosure was provided;
20 | 17 November, summary tables for the third tranche of disclosure were provided; and
21 | 30 November -- this is all 2022 -- various other summary tables were provided. And
22 | indeed more than that was provided.

23 | If we could just briefly turn up the fifth statement of Mr Boylan, which is at tab 2 in
24 | application bundle 2. I will deal with this very briefly, but if we could pick it up at
25 | page 22, "Disclosure". You will see that Mr Boylan provides a brief history of some
26 | of the disclosure, but if we go over the page to 23, 17:

1 "BT then provided a third tranche of disclosure on 7 November 2022. This third
2 tranche comprised raw data from BT's various databases which BT had collated,
3 filtered and mapped so it was in a format disclosable and that only potentially
4 relevant data was disclosed."

5 Then it outlines what that third tranche was.

6 Then at 18:

7 "Alongside third tranche disclosure ..."

8 So this involved disclosure in all of the background material or vast amounts of
9 background material:

10 "... from our billing systems, relationship management systems and indeed from
11 a third party data company, we provided an explanatory document and table
12 schemas enabling the claimant representative to understand and analyse the
13 disclosure. More than that, at the end of November we provided the profitability
14 data."

15 So we have provided vast amounts of material, all of it going to these sorts of costs
16 issues, and indeed profitability material by the end of November, and we had
17 provided summaries in relation to that material.

18 **MR JUSTICE WAKSMAN:** Yes.

19 **MR BEARD:** Now if you then go over the page to 22, you will see that we did
20 provide an update of the third tranche disclosure. That is what is known
21 imaginatively as the "fourth tranche disclosure". And as Mr Boylan explains, that
22 essentially replicated the third tranche, but for an additional 16 months. Well, that is
23 fine. It was appropriate, it was ordered, we are not complaining, but in terms of what
24 you knew you were getting, you knew back in November actually what you were
25 getting in very substantial form. That was on the basis of an order made in May of
26 the same year.

1 Frankly, we do not understand Ms Kreisberger's suggestion that these issues could
2 only have been raised from 5 May of this year where, if we look at her table, it says
3 BT provides updated summary tables in relation to the data requests in F18, F20,
4 H18 and H20 of the updated data schedule.

5 Well, yes, they were updated summaries, but if you want to play the game of tracking
6 through where those data requests were actually met in the original summaries
7 provided, that was back on 17 November and 30 November 2022.

8 So frankly we do not understand this. It is seriously late in relation to all of these
9 matters. They knew what disclosure they were getting. They had an expert on
10 board that knew about how to do cost stack if he wanted to move to these matters.
11 He had vast amounts of material being provided in November. Summaries were
12 being provided that hadn't been ordered, but we did it in order to explain these things
13 and now it is being said that those updating of summaries in May somehow was the
14 first time that these matters can be raised. It is not plausible, with respect to
15 Ms Kreisberger, in relation to these issues.

16 **MR JUSTICE WAKSMAN:** Thank you.

17 **MR BEARD:** In those circumstances, we say this is extremely late, happy to deal
18 with the costs issues later and I don't want to detain you further in relation to it. And
19 I won't deal with Ms Houghton's witness evidence in relation to these issues. I think
20 I have dealt therefore, unless you want me to deal in more detail with the market
21 definition in quantum issues --

22 **MR JUSTICE WAKSMAN:** No, I don't. The one thing I would like you to deal with
23 before I hear Ms Kreisberger is in the light of -- if it turns out that we make the order
24 which I have ventilated --

25 **MR BEARD:** Yes.

26 **MR JUSTICE WAKSMAN:** -- whether you are still saying that there should be

1 sequential exchange of expert reports, because if you are, Ms Kreisberger will need
2 to respond to that. If you are not, and it is a straightforward exchange and the only
3 question is, "What date do we do?", then we can leave that.

4 **MR BEARD:** I am instructed that if we are going to get this full summary, we can
5 work on that basis for simultaneous exchange, but we will need to think about the
6 dates so we have time for digesting these matters.

7 **MR JUSTICE WAKSMAN:** Of course. Thank you. Thank you very much.

8 **MR BEARD:** I am grateful. Unless I can assist further.

9 **MR JUSTICE WAKSMAN:** No, thank you.

10 Now, Ms Kreisberger, what do you want to say in reply?

11 **Reply submissions by MS KREISBERGER**

12 **MS KREISBERGER:** Thank you, sir.

13 Sir, I am going to cut to the chase --

14 **MR JUSTICE WAKSMAN:** Yes.

15 **MS KREISBERGER:** -- which I am sure will be welcome news.

16 The most important point is on the wording that you set out, we are able to comply
17 with that wording --

18 **MR JUSTICE WAKSMAN:** Thank you.

19 **MS KREISBERGER:** -- in an Annex to paragraph 133.

20 **MR JUSTICE WAKSMAN:** Yes.

21 **MS KREISBERGER:** And we heard what Mr Beard had to say about nuances to
22 that per line, per year and whether it is actual prices or list prices, we have all that
23 and we will plead that information in an annexe.

24 Now, in the light -- that deals with much of --

25 **MR JUSTICE WAKSMAN:** Then there is no question of sequential exchange, so
26 you don't have to deal with that.

1 **MS KREISBERGER:** Well, I am grateful.

2 **MR JUSTICE WAKSMAN:** There is the question about then, if so advised, putting
3 in some further factual evidence.

4 **MS KREISBERGER:** Yes. Could I just make one point before that, sir, which is we
5 are obviously going to need to see a properly pleaded amended defence.

6 **MR JUSTICE WAKSMAN:** Yes, of course.

7 **MS KREISBERGER:** Not along the lines of bear denials that we have seen. At the
8 moment there is a risk -- I hope it won't materialise -- that we have a non-level
9 playing field with lots of information on our side. But no, I am grateful for that. That
10 then facilitates simultaneous exchange of expert reports; it is right that the focus of
11 each report be the parties' own case, their posited case and their benchmarks.

12 Now, on factual evidence on calls, one doesn't want to keep anyone out of putting in
13 the evidence they want to put into, but I do have to rehearse the point that there has
14 always been a case on overcharge on calls. And I understood from Mr Beard's
15 submissions just now that they have dropped that part of their submissions. You will
16 recall in the skeleton there is a whole section that is called "new case on calls price
17 excessiveness".

18 **MR BEARD:** No, we haven't dropped that.

19 **MS KREISBERGER:** I understand that has now been dropped.

20 **MR JUSTICE WAKSMAN:** I am not -- just a moment before we get sidetracked.
21 I am not quite sure what bit of something may or may not have been dropped, but
22 the up-shot of our helpful discussions has been that there is only one -- apart from
23 timing, there is only one other procedural consequence which may flow from this,
24 which is they say they at least wanted to have the right to put in some further expert
25 factual evidence.

26 **MS KREISBERGER:** I understand that, but it is right, sir -- trying to be as helpful as

1 we can -- there has always been a case on call overcharges, so it is an oversight --

2 **MR JUSTICE WAKSMAN:** All right, I have heard what the arguments are about all
3 of that, so the point is unless you are positively objecting to this --

4 **MS KREISBERGER:** I think we just need to look at the timetable, sir, but we won't
5 proceed with a firm objection as things stand now.

6 There was this point about the statement of truth, sir, I don't know if you wanted me
7 to --

8 **MR JUSTICE WAKSMAN:** I am not -- I have heard what Mr Beard has said about it.
9 Just gave me one moment.

10 **(Pause)**

11 We are of the clear view that the expert does not need to sign the pleading. It is
12 a statement of truth by the solicitor. It is perfectly obvious, as in any case, that the
13 solicitor couldn't have devised those figures themselves and it is properly a matter for
14 expert evidence. It would obviously have to be based on the information and
15 opinions provided by the expert.

16 If when the expert report is served, there is some departure from the figures pleaded,
17 there will be a lot to be said about it to your side and on your side and I don't expect
18 that to happen, all right, but it will be by a solicitor.

19 **MS KREISBERGER:** I am grateful.

20 **MR JUSTICE WAKSMAN:** Right.

21 **MS KREISBERGER:** I don't think then I need to address you on the timing of how
22 this came about. I think we will want to do that on costs.

23 **MR JUSTICE WAKSMAN:** You can do that on costs but --

24 **MS KREISBERGER:** Can I suggest that perhaps we do costs in written
25 submissions following this hearing?

26 **MR JUSTICE WAKSMAN:** Let's wait and see. At the moment, unless there is

1 something else you want to draw my attention to, the next question is the procedural
2 timetable here.

3 **MS KREISBERGER:** Yes, sir.

4 **MR JUSTICE WAKSMAN:** Now, on the basis of that wording, you said you could do
5 it later this week. Thursday, 4 pm on Thursday? That will be your revised formal re-
6 amended claim.

7 **MS KREISBERGER:** Yes.

8 **MR JUSTICE WAKSMAN:** 4 pm on Thursday.

9 **MS KREISBERGER:** 4 pm on Thursday, which I think is --

10 **MR JUSTICE WAKSMAN:** Which would be 6 July.

11 **MS KREISBERGER:** So it might be helpful to have the revised Annexin front of you
12 with some dates, would that assist? And that is at -- was it replaced?

13 **MR JUSTICE WAKSMAN:** I am not sure we need to.

14 **MS KREISBERGER:** It is annexed to our skeleton, if that is helpful. It just gives you
15 the table.

16 **MR JUSTICE WAKSMAN:** Yes, I have the Annex there. The next point we then
17 need to deal with is the service of the re-amended defence. I think is re-amended --
18 yes, re-amended defence. That is coming on 6 July and I need to hear from
19 Mr Beard about when he says he can put the amended defence in.

20 **MR BEARD:** Can I just confirm that 5 July for the amended -- 6 July, I am sorry --
21 for the re-re-re-amended Claim Form, that will include all the summary material?

22 **MR JUSTICE WAKSMAN:** Oh yes, because the order is that when it is to be served
23 it has to include this information.

24 **MR BEARD:** Fine.

25 Let me take instructions in relation to that because obviously we will need to digest
26 that and take instructions in order to plead back to it.

1 **MR JUSTICE WAKSMAN:** Yes.

2 **(Pause)**

3 **MR BEARD:** I think there are a number of logistical difficulties, but I think the issue
4 is that if we get it on the 6th, including this further material, we need to take
5 instructions on our side in relation to these matters. I think we are looking at
6 between two and three weeks being needed, so I think we are looking towards the
7 end of July in order to be able to provide --

8 **MR JUSTICE WAKSMAN:** Well, on that basis, you could have the amended
9 defence by 4 pm on 27 July, but on that basis since you are going to be taking
10 instructions, that is really at least in part the same thing as dealing with the factual
11 evidence, should we have the same date for your factual evidence if so advised?
12 You don't have to serve anything further, but if you want to. You are going to be
13 dealing with the same things.

14 **MR BEARD:** Yes, I understand. We are just confirming. We see the point and we
15 can see the desirability.
16 Would it be sensible --

17 **(Pause)**

18 I think the answer is it is going to be tight. We can try and aim for best endeavours
19 by 27 July.

20 **MR JUSTICE WAKSMAN:** We're not doing best endeavours, we have to have
21 a date --

22 **MR BEARD:** I think we should have another week --

23 **MR JUSTICE WAKSMAN:** -- but I will hear what Ms Kreisberger says, but we are
24 fixing dates for everything.

25 **MR BEARD:** If we are fixing dates, we need to fix another week in relation to factual
26 evidence.

1 **MR JUSTICE WAKSMAN:** Right. Just a minute.

2 **MR BEARD:** Providing them simultaneously, we will provide them simultaneously,
3 was that the Tribunal's intention?

4 **MR JUSTICE WAKSMAN:** That was the idea. It seemed to me you are going to be
5 speaking at least part of your pleading exercise is going to involve consulting the
6 same people --

7 **MR BEARD:** We don't have an objection to that. We can certainly do that, but in
8 order to accommodate the factual evidence I think we need to look at 4 August for
9 those.

10 **MR JUSTICE WAKSMAN:** 3 August.

11 **MR BEARD:** I am sorry, 3 August.

12 **MR JUSTICE WAKSMAN:** Right. Let's just pause there. Let me go back to
13 Ms Kreisberger now, please. Is there anything you wanted to say on those dates
14 and then we need to do a reply, leaving aside the other bit of the reply we are
15 coming to later.

16 **MS KREISBERGER:** Well, sir (inaudible) a lot of indulgence for BT. I mean, it is not
17 that we take objection to the timing per se, but I do need to ensure the integrity of the
18 timetable going forward, as it were.

19 BT have had the draft amended Claim Form since 1 June and what one is really
20 asking for is a denial that is not a bare denial, which is another way of saying they
21 need to plead out their benchmarks, and they have been working on that for months
22 and months. This is their data. So I am a little troubled by these dates. I am in the
23 Tribunal's hands, but I would have thought two weeks is more than ample for the
24 amended defence from 6 July.

25 **MR JUSTICE WAKSMAN:** Well, I take your point insofar as they will be expected to
26 put their own positive figure in, but on the other hand, part of the defence is going to

1 be dealing with the case that has now arisen in relation to the new costs plus figures,
2 which are now two bases, the calls and the access charges. And notwithstanding
3 that they have had it since 1 June, it has come along relatively late and I think it is
4 unnecessary tinkering to say it should be two weeks rather than three. So I am
5 going to leave 27 July as it is.

6 **MR BEARD:** I thought we had moved to 3 August, sir.

7 **MR JUSTICE WAKSMAN:** 27 July for the defence.

8 **MR BEARD:** Ah right.

9 **MR JUSTICE WAKSMAN:** That is staying where it is. You wanted another
10 week for the witnesses.

11 Ms Kreisberger, is there anything you say about another week for the witnesses?

12 **MS KREISBERGER:** Sir, I am in your hands really on that.

13 **MR JUSTICE WAKSMAN:** I am going to leave that as it is.

14 So now the question is: reply?

15 **MS KREISBERGER:** Well, we hit the summer vacation, which is going to cause
16 difficulties on my side, so it will have to be a date in September.

17 **MR JUSTICE WAKSMAN:** Well, you can have some point in September, but the
18 world doesn't disappear altogether in August and September, so what about the
19 beginning of September? What about four weeks after the factual evidence?

20 **MS KREISBERGER:** Which would take us, sir, to -- if we say 11 September?

21 This is the problem, sir, and this is really my objection to the end of July.

22 **MR JUSTICE WAKSMAN:** There is nothing that can be done about it. This hearing
23 originally was nothing to do with this application and we have managed to
24 accommodate it all and --

25 **MS KREISBERGER:** Sir, I should then say I haven't addressed you on chronology,
26 but it is our position that these amendments were dependent on the summary tables

1 that came across in May.

2 **MR JUSTICE WAKSMAN:** I understand that. I understand that, but it doesn't really
3 matter at this stage who is responsible for what because what is still the question is
4 when people can do the responsive things by practical particularly and fairly.

5 So Friday 8 September.

6 **MS KREISBERGER:** Yes. Thank you, sir.

7 **MR JUSTICE WAKSMAN:** Friday, 8 September, 4 pm. All 4 pm these dates, for
8 the reply.

9 Now, the next thing we get to will be the date for the exchange of the expert reports,
10 which can fit in now quite reasonably within the period running up to the trial.

11 I wanted to canvas with counsel one thing. I don't now think there is a risk of ships
12 passing in the night, but given that there has been one joint meeting, as sometimes
13 is done is there a sense in the light of this case now being advanced for another joint
14 meeting, even not quite as structured as the one you have had before, with lists of
15 gaps and issues and all the rest of it, but is there a sense in which the experts could
16 meet prior to them exchanging their reports?

17 **MS KREISBERGER:** Might I take instructions?

18 **MR JUSTICE WAKSMAN:** We have time -- yes, take instructions. We have time to
19 do it.

20 **(Pause)**

21 **MS KREISBERGER:** Sir, we are grateful for the suggestion, but the feeling on my
22 side is that it would be better to have the reports first before that meeting takes
23 place.

24 **MR JUSTICE WAKSMAN:** Any observations on your side, Mr Beard?

25 **MR BEARD:** Not off the cuff because I'd want to speak to Dr Jenkins, so it may well
26 that be that is actually a very useful suggestion and in part it will depend on what we

1 get in terms of the summary material, so it might be something that we should
2 sensibly revisit. I can't say one way or another now.

3 **MR JUSTICE WAKSMAN:** I think the sensible thing is we will fix a date now for
4 when the experts' reports are to be exchanged.

5 **MR BEARD:** Yes.

6 **MR JUSTICE WAKSMAN:** There is not a lot of point in it if both sides don't
7 positively support it. If it turns out that both sides positively support it, they can
8 actually make an arrangement themselves as long as they let the Tribunal know
9 what is going on.

10 **MR BEARD:** Yes. I think the indication from the Tribunal that it is possible there
11 may be benefits, I think we will take away and we will communicate to Dr Jenkins.
12 When Dr Jenkins has seen the material that is coming this week, it may well be that
13 she thinks: actually, it would be very sensible for me to sit down with Mr Parker and
14 discuss some of this stuff; in which case we will come forward on that basis.

15 **MR JUSTICE WAKSMAN:** Yes.

16 **MR BEARD:** If not, then we have a default date for expert reports set today.

17 **MR JUSTICE WAKSMAN:** Right. Now, so looking at expert reports, the last thing,
18 subject to any meeting, that is happening is the reply on 8 September. The factual
19 further factual evidence which may affect the experts will have been in since
20 3 August, so what about -- and the figures will have been in from 27 July, so what
21 about another month? What about Friday, 6 October for exchange of expert
22 reports?

23 **MR BEARD:** From my point of view, that is eminently sensible as a date, subject
24 only to one point, which is there is going to come a point in this exercise where we
25 are going to need to start working back from the date of the trial to make sure things
26 aren't squashed. But perhaps if we start working this way and then --

1 **MR JUSTICE WAKSMAN:** I have got the trial date very much in mind here.

2 **MR BEARD:** All good. Well, yes, if that is the way -- if we think we can
3 accommodate things and let's see where we get to with the other stages, then
4 6 October will work, yes.

5 **MS KREISBERGER:** We were going to suggest end of September, sir, which is not
6 far removed, but as you say, it is not really the reply date that one is taking as one's
7 casting off point. So we would suggest 29 September to give a little more flex, given
8 Mr Beard's concern as well about the trial date --

9 **MR JUSTICE WAKSMAN:** I don't think -- all right, thank you. No, I think we are
10 going to stick with 6 October and that just makes sure that there is plenty of time for
11 a full report, but what that also allows for then is expert reports in reply, which I think
12 we should have here.

13 **MR BEARD:** Yes.

14 **MS KREISBERGER:** Absolutely.

15 **MR JUSTICE WAKSMAN:** And I would --

16 **MS KREISBERGER:** Sir, sorry to interrupt you, but I am working from the annexe,
17 so I assume you are looking at the economic and actuarial expert reports.

18 **MR JUSTICE WAKSMAN:** Yes.

19 **MS KREISBERGER:** But we should probably also move the -- well, we may need to
20 look at -- you still have my application on the behavioural evidence.

21 **MR JUSTICE WAKSMAN:** I haven't -- to be honest, I am not now looking at your
22 annexe, I am simply looking at dates.

23 **MS KREISBERGER:** Fine. I suggest let's park behavioural evidence.

24 **MR JUSTICE WAKSMAN:** Well, obviously we will do that. I think 6 October. Then,
25 do you need -- how long do you need for reply reports, more than 21 days?

26 **MS KREISBERGER:** Yes.

1 **MR JUSTICE WAKSMAN:** Right. Well, if you need more than 21 days, I don't think
2 it should be more than a month and I would suggest now looking ahead to the trial
3 date, 3 November. Let me just check that I have the right dates here. Just
4 a moment.

5 **MR BEARD:** I think we had put in -- I think the original thinking was that there would
6 be six weeks for reply reports because they tend to be -- I am sorry, 12 weeks for
7 reply reports was the original estimate.

8 **MR JUSTICE WAKSMAN:** No, you are not getting that, I am afraid.

9 **MR BEARD:** I got that sense from your initial indication, sir, but I do think less than
10 a month is not going to work. These reports can be substantial and notwithstanding
11 the benefits of having some summary material, I don't imagine experts on either side
12 would welcome undue compression in relation to that.

13 **MR JUSTICE WAKSMAN:** If that is the case, then there may be something in
14 Ms Kreisberger's point about bringing the exchange forward a bit because, as I have
15 indicated, the real thing that the experts need to see -- your experts need to see the
16 figures which are coming on 27 July -- so far as facts are concerned, it is your own
17 witnesses, so that doesn't really matter too much --

18 **MR BEARD:** I am not objecting to 29 September --

19 **MR JUSTICE WAKSMAN:** Right, 29 September, thank you. Then --

20 **MR BEARD:** Looking at 10 November --

21 **MS KREISBERGER:** We are on the same page on that date.

22 **MR JUSTICE WAKSMAN:** 10 November, then I am going to say by 24 November
23 experts to meet; do I need to include the actuarial experts?

24 **MR BEARD:** Yes, I think it should be both sets of experts, not all together.

25 **MR JUSTICE WAKSMAN:** Obviously, yes, experts in both fields is what we have at
26 the moment, to meet to consider -- to meet for the purposes of a joint statement of

1 | agreed and not agreed issues and then I will say that the joint statement should be --

2 | **MR BEARD:** I think we have it down as 21 December.

3 | **MR JUSTICE WAKSMAN:** That is too late. It needs to be earlier while it is still
4 | fresh in their minds. I would have thought the 15th -- or the 8th, which is two
5 | weeks afterwards, actually.

6 | **MR BEARD:** Experience tells that beautiful though those processes are between
7 | experts, resolving the joint statement takes longer than anticipated. Putting in two
8 | weeks I think is going to be too short. So I would say 21 December as an early
9 | Christmas present for all concerned, but if the Tribunal is concerned, then it should
10 | be a week before --

11 | **MS KREISBERGER:** Sorry, I am so sorry, sir, I was just being told about my
12 | expert's availability in November. He does have some difficulty -- he is actually in
13 | a trial up to 10 November and -- but I think we are going to make it work otherwise
14 | the suggestion was we go for 15 November for the economic reply reports.

15 | **MR JUSTICE WAKSMAN:** 15 November, well, I think that is sound. That is three
16 | weeks and it is too late to do it any later because it allows no slippage at all. And it is
17 | very important, not least for counsel in my judgment, who will by then be preparing
18 | for trial to have the expert process finished before Christmas.

19 | **MR BEARD:** Sorry, I just wonder whether there was a discussion at slight
20 | cross-purposes. I think Ms Kreisberger was talking about moving 15 November, not
21 | --

22 | **MS KREISBERGER:** The reply report date, that is what I am looking at, but my
23 | instructions are we will live with the 10th. My expert is in a trial --

24 | **MR JUSTICE WAKSMAN:** Let's leave it with the 10th. Then the 24th will be the
25 | meeting and the 15th December will be the joint statement.

26 | **MS KREISBERGER:** We are -- well, we are concerned about the PTR and the trial

1 date.

2 **MR JUSTICE WAKSMAN:** The PTR has been listed, I think, hasn't it?

3 **MS KREISBERGER:** Yes, 24 November.

4 **MR BEARD:** But it will need to shift.

5 **MR JUSTICE WAKSMAN:** That is in principle not a difficulty. Although by then, you
6 will have had all the evidence in, it will simply be the question of the meeting with the
7 experts.

8 **MR BEARD:** Yes, joint statement, so lots of issues. There are two views on PTRs.
9 Earlier -- one would be holding around that date or we move it into the new year, with
10 the trial back in that window.

11 **MR JUSTICE WAKSMAN:** No, that is too late. I think what we should do is, let us
12 say let us move it -- I will have to check on this, but why don't we move it to
13 8 December because the 15th is, I think, too late in case there are problems that
14 arise which have nothing to do with this.

15 **MS KREISBERGER:** So that would be before we have the joint statement.

16 **MR JUSTICE WAKSMAN:** I know, but it's too late to leave it until 15 December
17 because there could be other things arising which have nothing to do with this, but
18 for which time needs to be built in. I hope not, but at any rate, even if the joint
19 statement hasn't been produced by then, it will be a week after the meeting. Both
20 sides will no doubt have spoken to their experts and asked how it has gone, insofar
21 as any of that affects the PTR.

22 Was it originally listed for one day?

23 **MS KREISBERGER:** I think that is right, sir.

24 **MR JUSTICE WAKSMAN:** All right. Put that in the order, but I will need to check on
25 that.

26 Right.

1 **MS KREISBERGER:** Then we get to the trial window. I don't know if you wanted to
2 revisit that, sir, it is quite a big window.

3 **MR JUSTICE WAKSMAN:** I wanted to ask about that because I don't know whether
4 the parties have actually worked out how long this trial is actually going to be.

5 **MS KREISBERGER:** We haven't corresponded on that, but we have certainly
6 looked at it on our side and back of the envelope, based now that we know how
7 many witnesses and experts are in, six weeks was our best estimate.

8 **MR JUSTICE WAKSMAN:** Right. Any views on your side?

9 **MR BEARD:** I think we are not miles away from that. We were working on the basis
10 of broadly six weeks as well.

11 **MR JUSTICE WAKSMAN:** Is that six working weeks where it's five-day weeks or
12 four-day weeks?

13 **MS KREISBERGER:** I was operating on the basis of four-day working weeks
14 because it is a six-week trial.

15 **MR BEARD:** We were too, but we weren't including reading week.

16 **MR JUSTICE WAKSMAN:** No, that I understand.

17 **MR BEARD:** Obviously one of the issues that subsists at the moment is what the
18 nature of the expert evidence is and how that is going to be dealt with. Obviously,
19 we have a number of fact witnesses that will need to be dealt with, but one
20 anticipates that the experts' examination is going to be fairly extensive and that may
21 dictate, broadly speaking, how long the trial is going to be.

22 **MR JUSTICE WAKSMAN:** Does that -- if it is six weeks, six working weeks?

23 **MS KREISBERGER:** Sir, if it assists, my suggestion was going to be the start
24 of February.

25 **MR JUSTICE WAKSMAN:** To start the trial?

26 **MS KREISBERGER:** To start the trial and we could have six weeks with a week

1 held in reserve.

2 **MR JUSTICE WAKSMAN:** Just a minute. Just one second.

3 **MR BEARD:** I am just going to take instructions.

4 **(Pause)**

5 Might I suggest in relation to this that it would be sensible if, having had this
6 discussion and having had a potential list of other timings, that we take these matters
7 away and come back to the Tribunal with some suggestions in relation to the timing
8 of the trial and the start date for the trial? Because we see Ms Kreisberger's
9 suggestion, it may well be a very sensible one, but I need to check availability of
10 various people on my side for various dates. They should be available, given that
11 the window has been drawn, but nonetheless it seems to me sensible that we revert.
12 It doesn't sound like the two sides are miles apart in terms of duration. I imagine
13 both sides would be keen not to start immediately on 22 January from --

14 **MR JUSTICE WAKSMAN:** I think this much can be said, because there has to be
15 reading in time as well.

16 **MR BEARD:** Yes.

17 **MR JUSTICE WAKSMAN:** And I would have thought that there is no way we can
18 start the trial on 22 January.

19 **MR BEARD:** No.

20 **MR JUSTICE WAKSMAN:** There may be some reading time made available to us
21 before 22 January, but for sure we would need the week of 22 January. I think, for
22 the purposes of discussion, we should say that the trial should start not before -- not
23 making this an order, but we won't be looking to start it before 29 January.

24 **MR BEARD:** I think that is helpful. Thank you.

25 **MR JUSTICE WAKSMAN:** Just one moment, please. Something else I need to
26 consider here.

1 **(Pause)**

2 Yes, for my part this six weeks is including opening, but it may not include closings.

3 **MS KREISBERGER:** That was the intention. Our suggestion is a start date of
4 5 February and that would allow, as I say, based on our back-of-the-envelope
5 calculations, that would allow the best part of a week for preparing written closings
6 as well. If we reserved that whole period from the 5th to the end of March, which is
7 the window, that would allow eight weeks.

8 **MR JUSTICE WAKSMAN:** Well, it is not -- the end of -- this is the CAT period, but
9 you are in fact already into vacation by the end of March. And I know that -- and
10 I have forgotten the precise date, but there is not going to be much time after, if any,
11 the week ending 22 March that I can be available.

12 So my suggestion was that -- and there may be some time to put in your -- do your
13 written closings and come back after -- but it is early, I think, Easter is early that
14 year -- so I would say that the trial shouldn't start any earlier than 29 January and
15 must finish, that is the evidence, by 15 March.

16 Now that, on my calculations, is actually seven weeks, so you can play around with
17 that a bit -- yes, because Easter is in fact on 31 March, so Good Friday is 29 March.
18 So in fact the High Court stops sitting on 27 or 28 March. I would have thought you
19 don't want the evidence finishing later than the 17th, that's seven weeks. It shouldn't
20 go more than seven weeks. You will still have some time in the following week either
21 to go off and do written submissions, or to have some housekeeping with the
22 Tribunal or whatever we need to do.

23 **MR BEARD:** I think one would anticipate the normal CAT trial process to have
24 an oral and a written closing and I think we need to timetable for that, but all that the
25 Tribunal is saying, sir, fits with that approach.

26 **MR JUSTICE WAKSMAN:** Yes. I mean, I don't think you are going to be able to

1 | prepare written submissions and then speak to them before the other side of Easter.
2 | It doesn't sound like, on this basis.

3 | **MS KREISBERGER:** The normal program is that we would close orally, so we had
4 | in mind that we would close by the end of the week beginning 18 March. Is the
5 | Tribunal not available that week?

6 | **MR JUSTICE WAKSMAN:** No, we are available on the week of 18 March.

7 | **MS KREISBERGER:** And then we bring matters to a close on this side of Easter
8 | which --

9 | **MR JUSTICE WAKSMAN:** You can have, at least as far as I am concerned --
10 | I have to just check my diary, I think that I would have the 25th and 26th available.
11 | I will check, but that is it. Anything else would have to be after Easter --

12 | **MR BEARD:** -- any communications that suggest that we try to timetable a gap for
13 | preparation of written closings and timetable all the closings within that framework
14 | very helpful.

15 | **MR JUSTICE WAKSMAN:** Within that framework. Yes.
16 | Right.

17 | **MS KREISBERGER:** I am very grateful for that, sir.

18 | **MR JUSTICE WAKSMAN:** Just one moment.

19 | **(Pause)**

20 | Yes, the gap will work assuming that we can then do other -- the gap would work. It
21 | depends when you want the week off to write, but that will all work if the trial period is
22 | six weeks --

23 | **MS KREISBERGER:** Yes, and then we have --

24 | **MR JUSTICE WAKSMAN:** -- otherwise you are squeezing it a bit more. There is
25 | still time, particularly if you wanted to do your oral closings before Easter.

26 | **MS KREISBERGER:** Yes.

1 **MR BEARD:** I think that is imperative. I think there are significant availability
2 difficulties.

3 **MS KREISBERGER:** I think we are in the same boat.

4 **MR JUSTICE WAKSMAN:** You will just have to work with that. Okay.
5 What I will say now, just to remind you, is on any view come the PTR, we will expect
6 to see an agreed trial timetable in terms of order of witnesses, how long they are
7 going to be cross-examined for and all the rest of it, all right?
8 Now, subject to any questions of costs, I think that deals with the amendment
9 application.

10 **MS KREISBERGER:** Yes. I would suggest, given that I still have two applications,
11 that we park costs. We would be very happy to put written submissions in --

12 **MR JUSTICE WAKSMAN:** Yes, I am not going to deal with costs -- either way I'm
13 not dealing with costs of this application now, I want to move straight on to reply
14 behavioural evidence.
15 In order to get some continuity here, let's give the transcriber an early break and then
16 we will go straight through on the remaining matters.

17 **MS KREISBERGER:** I am grateful.

18 **MR BEARD:** Just in relation to that, can I add to the list, just for completeness, and
19 mention in relation to Qualcomm issues as well as the notification and -- but I will
20 pick that up --

21 **MR JUSTICE WAKSMAN:** We will have to see -- the notification and the
22 behavioural evidence, you have linked the two issues, so I have to deal with both of
23 those in the next session.

24 **MR BEARD:** Yes, and then we have the business issue --

25 **MR JUSTICE WAKSMAN:** Then we will have to see where we are at the end of
26 that.

1 **MS KREISBERGER:** Sir, I think we are having a prompt finish at 4.30 pm?

2 **MR JUSTICE WAKSMAN:** We have to have a prompt -- because one of the
3 members has to leave pronto at 4.30 pm.

4 All right. We will take a short break now.

5 **(2.53 pm)**

6 **(A short break)**

7 **(3.05 pm)**

8 **MR JUSTICE WAKSMAN:** Just before you start, Ms Kreisberger, we should say
9 that we obviously know the background to this because we had to deal with the
10 original expert evidence application. We have seen the skeletons, but most
11 importantly perhaps we have seen the introductory further report from Mr Loomes,
12 and also the report in draft which was served on 23 June, which is a preview of his
13 actual report.

14 **MS KREISBERGER:** It is.

15 **MR JUSTICE WAKSMAN:** That is helpful to see the shape of it and what it would
16 cover --

17 **MS KREISBERGER:** We would hope so --

18 **MR JUSTICE WAKSMAN:** -- if he was permitted to deal with all of the matters, yes.

19 **MS KREISBERGER:** I am grateful for that --

20 **MR JUSTICE WAKSMAN:** I think that do it in the way that you want, but what we
21 are -- we are familiar with the law, what we are really keen to hear you on are the
22 objections which have been articulated by BT.

23 **MS KREISBERGER:** Got it. Thank you, sir. Very grateful.

24 **Application by MS KREISBERGER**

25 **MS KREISBERGER:** I just want to begin with one point that I hope is helpful in the
26 light of that. I am not going to trawl through the amends and the report, but just to

1 remind you that we of course began with the Tribunal's ruling last time and just to
2 remind you that in that ruling you alighted, members of the Tribunal, on two particular
3 passages in the defence. One was paragraph 80 -- we don't need to look at that --
4 but that was the paragraph in the defence which denies a relationship between the
5 specific characteristics and the ability to make informed choices, and you alighted on
6 that. So that was an issue which arose for determination and that is addressed, you
7 see, in section 8 of Professor Loomes -- that goes to that point.

8 You also alighted on defence paragraph 57(a)(iii). I will just show you this very
9 briefly.

10 **MR JUSTICE WAKSMAN:** Yes. Well, you can take us through the material of what
11 is in your skeleton argument because --

12 **MS KREISBERGER:** We have. We have set it out. I am very happy to do it that
13 way --

14 **MR JUSTICE WAKSMAN:** -- a very helpful section where you have quoted all the
15 different bits.

16 **MS KREISBERGER:** The reason why I refer to the ruling, sir, is your reasoning
17 there was based on a lacuna in our pleading. That was the point.

18 **MR JUSTICE WAKSMAN:** Yes.

19 **MS KREISBERGER:** And you pointed out that the denials in the reply were tied to
20 the particular characteristics and that is the point I want to draw out. So it was never
21 in doubt that what we have called simply by way of shorthand the informed choice
22 averment, it's slightly too short because being informed isn't the whole story. But
23 you accepted last time that that appears in BT's defence and the problem that
24 needed curing was the reply that pleaded to it.

25 With that, sir, you have seen my skeleton. Unless you would find it helpful, I don't
26 think I need to put the particular passages from the defence before you. It is at

1 paragraph 15 of the skeleton.

2 **MR JUSTICE WAKSMAN:** I don't think so because --

3 **MS KREISBERGER:** It was helpful to note that one of those is in the ruling.

4 **MR JUSTICE WAKSMAN:** Sure.

5 **MS KREISBERGER:** So we avoid ground hog day by not going through them.

6 At 52(d), which is on page 11 of the skeleton, is the one --

7 **MR JUSTICE WAKSMAN:** Page 6 --

8 **MS KREISBERGER:** Sorry, page 11 of the bundle hearing, bundle 1.

9 **MR JUSTICE WAKSMAN:** I see, yes.

10 **MS KREISBERGER:** Sorry, I am in the hearing bundle, but yes, internal numbering
11 6. That is where BT say that they are going to adduce factual and/or expert
12 evidence on the level of customer switching. Now, that is the objective question that
13 an orthodox economist can look at, how many customers have switched away, and
14 then it is (ii) there that customers who didn't switch were actively engaged in the
15 market and made conscious and informed choices not to switch, as a large number
16 of VOCs were both informed and engaged to a degree similar of SPEs and
17 customers buying bundles.

18 So that is the core. They say this is how you need to understand their behaviour.
19 This is how to interpret the low levels of switching. By definition, if you are a class
20 member, you haven't switched and -- the way I would put this for the period whilst
21 you are buying SFV services.

22 BT is really saying that class members were voting with their feet, expressing a clear
23 preference for the service they were taking from BT, and that is where I used the
24 shorthand of ICA, informed choice averment.

25 Mr Beard, if I may say so, puts the point very well in his skeleton at paragraph 73.

26 He says the informed choice averment is a disagreement about the inference to be

1 drawn from the fact that these class members didn't switch away. So that much is
2 common ground and it was established in the Tribunal's last ruling. Because the
3 problem that needed curing was the lacuna in the Class Representatives' reply, that
4 is what you now have and that is how we got here today. We took the Tribunal's
5 criticisms on board.

6 **MR JUSTICE WAKSMAN:** Yes.

7 **MS KREISBERGER:** I am not going to take to you the reply amendments, you have
8 seen those.

9 In terms of Professor Loomes' report, I just want to show you -- I am certainly not
10 doing a trawl through -- I just want to show you two things briefly. It is at tab 26 of
11 bundle 1. I just wanted to show you the question he has been asked to address.
12 That is at page 290.

13 The question is:

14 "To what extent is it likely that in buying these services class members were making
15 an active, informed and/or deliberate choice to purchase BT SFV services in
16 preference to any other alternative services or tariffs which might have been
17 available to them?"

18 That is the question for which I am seeking permission today. The second question
19 refers to the particular characteristics, so we have permission for that.

20 Professor Loomes' conclusions on that question are at 7.169. I am not going to read
21 them out. Just so you have it for your note. These are the core passages where he
22 responds to that question.

23 And at 7.174:

24 "Returning to the question I have been asked to address, it is my opinion that the
25 majority, possibly the great majority, who continued to purchase SFV services are
26 likely to have done so by default after minimal deliberation with little information or

1 evaluation of alternatives."

2 Then the last point I want to show you in the report is actually in section 8. That's
3 a section for which we have permission. That is on the characteristics. You have
4 seen Professor Loomes has some difficulty actually with the way the issue is put,
5 and he says:

6 "I can't say whether it is caused by the characteristics, but I can look at correlations."
7 He also says at 8.2 on page 331 that everything he sets out in section 7 -- and I just
8 showed you very briefly his conclusion on that, that is the first order question or he
9 says first order driver of why many class members buy the status quo product, the
10 SFV services from BT, and why switching rates are lower. So it is a first order
11 question.

12 He said:

13 "I consider the particular characteristics may be associated with being more or less
14 likely than the general population to switch, that the primary explanation is section 7."
15 So then turning to the reasons why I say the tests are met and picking up BT's
16 objections, I have three principal reasons. The first is the obvious one: the amends
17 and the evidence is necessary to enable the Class Representative to give his full and
18 accurate rebuttal to the informed choice averment.

19 Without the amends, what you have is, as the Tribunal ruled in terms at the last
20 hearing on this, that the pleaded response of the Class Representative is tethered to
21 the special characteristics. But that is not the Class Representative's case, so it
22 wouldn't capture it. The case is that the wrong inference is drawn for the class as
23 a whole.

24 And just so you have it, what is being said and is pleaded in the amends is the likely
25 inference is that class members either didn't pay attention to the problem of rising
26 prices, or if they did, they just didn't get to the stage of taking action because of the

1 | psychological barriers that exist as part of the human condition. That is the case.

2 | So that is my first point. It is a fairness point.

3 | My second reason is, well, if you accept the amendments need to be made, then the
4 | evidence ineluctably follows and the amends cite the evidence in terms, so they
5 | really go hand in hand. So the lacuna you identified is plugged by the amendments
6 | and the behavioural evidence is reasonably required in support.

7 | And then the third reason is the one I foreshadowed when I took you to section 8,
8 | and that is that section 7 of Professor Loomes' report which answers the first
9 | question is necessary context for section 8.

10 | Now, I know you have been through the report, so you have seen that
11 | Professor Loomes sets out the four stages of cognition that related to switching.
12 | That, he says, is the principal explanation for consumers sticking with the default.
13 | And if Professor Loomes doesn't answer that question which he regards as the
14 | principal driver for this decision-making or lack thereof, then the Tribunal would be
15 | missing the bigger picture because he would only be asked question 2, the question
16 | at 3.9.2 of the report. The first question at 3.9.1 of the report, that that is the main
17 | show.

18 | **MR JUSTICE WAKSMAN:** Yes.

19 | **MS KREISBERGER:** Now, as I said, question 2 is not how Professor Loomes,
20 | based on his expertise, thinks about the issue, how he thinks about what inference is
21 | to be drawn from non-switching by class members. Now, because that is not the
22 | way that he thinks about the issue, in practice -- let's look at the practical
23 | consequence were in application not upheld -- in practice some version of section 7
24 | will still need to be included in the final report, but it will be somewhat unsatisfactory
25 | because you wouldn't be looking at his final conclusions on that.

26 | Now, just so that the Tribunal is aware, BT asked the Class Representative to

1 identify precisely which sections of Professor Loomes' evidence are the subject of
2 the application. It is a fair question, but we are not here applying a blue pencil to
3 a contract.

4 So Professor Loomes of course has a duty to ensure that his evidence is accurate
5 and relevant to what he is being asked. The current draft sets out his evidence if he
6 is asked both questions. If only the second question is maintained,
7 Professor Loomes will revisit the report as a whole.

8 Just for your note, the Class Representative's response to Simmons is at HB4, tab 9,
9 page 165. And we can turn to it if helpful, but we have identified certain paragraphs
10 that are likely to go if the application were not upheld.

11 In practice, Professor Loomes, very responsibly, will revisit section 7 as a whole and
12 see what needs to be preserved. It is not simply a deletion task.

13 **MR JUSTICE WAKSMAN:** No.

14 **MS KREISBERGER:** It is evidence.

15 Now, with that, I am going to turn to three objections advanced by BT.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MS KREISBERGER:** The first, they say that the behavioural evidence is not
18 reasonably required because the question of what inference should be drawn from
19 the fact that class members stayed on BT SFV services, they say that question
20 doesn't engage behavioural economics.

21 And Mr Beard's skeleton then breaks down the informed choice averment into its
22 various components, and he says, well, none of these components involve
23 behavioural (inaudible). That is wrong. I showed you the defence that pleads low
24 switching rates and that is one of the points he makes. Low switching rates can be
25 addressed by the traditional economist.

26 But the Tribunal has already determined in these proceedings that the informed

1 choice averment is properly addressed by evidence from a behavioural economist.
2 Sir, that is why I was careful to start with the ruling, which made very clear that that
3 was not the issue, the lacuna was the pleading.

4 **MR JUSTICE WAKSMAN:** Yes.

5 **MS KREISBERGER:** The question of what inference -- using Mr Beard's language,
6 what inference the Tribunal should draw from consumer behaviour, he says that is
7 a matter of law or orthodox economics. It is not. It is behavioural economics which
8 explains how people take decisions and why they often fail to act even when acting
9 would be in their own self-interest. So the inference is asking why do people behave
10 in this way and the science is the science of behavioural economics.

11 Now, the second point BT makes -- and I confess I found this one a little hard to
12 follow, but they seemed to be saying that the reply amendments are inadequate
13 because they don't deal with BT's amendment to its defence, which prays in aid the
14 fact that BT was subject to certain unspecified general conditions imposed by
15 Ofcom.

16 **MR JUSTICE WAKSMAN:** This is the notification point.

17 **MS KREISBERGER:** This is the notification point. And BT says it is not clear
18 whether Professor Loomes' evidences assists on this point.

19 So I have two short responses. First of all, BT's case on the general conditions is
20 not pleaded in relation to the informed choice averment, so there is no reason why
21 the Class Representative would plead back to the notification point in reply, where
22 he is replying, where he is rebutting the informed choice averment case, when there
23 is nothing there on the general conditions. In fact BT is saying: we oppose your
24 amendments because you failed to plead to a case that we haven't pleaded. It is
25 a really odd submission, actually. I am going to show it to you --

26 **MR JUSTICE WAKSMAN:** They are pleading back to your bit where you say that

1 BT haven't been transparent.

2 **MS KREISBERGER:** Correct. And we plead to that and they don't like that pleading
3 either, but I will deal with that at the end.

4 But they are also saying that the -- so we need to be careful here. There are the
5 reply amendments which rebut the informed choice averment case, and then there is
6 a separate reply amendment at 23A, which directly pleads to the general conditions.

7 And I am very happy to address on you that before I sit down, but that is distinct.

8 So what they are saying is: why don't you plead to the general conditions in relation
9 to the inference to be drawn? But they haven't pleaded that. Let me just show you
10 that.

11 Hearing bundle 1, tab 6, page 167. Sir, you have it, so I am just showing you the
12 right passage. It is 59A of the defence and it is denying Claim Form 136A, which is
13 now 136(b). Can I just show you that. Just have it open. So that is the previous tab
14 at page 115.

15 **MR JUSTICE WAKSMAN:** Yes.

16 **MS KREISBERGER:** So 136C at the bottom of the page, that is where you see the
17 allegation that prices are unfair under the second limb and the first particular is lack
18 of transparency about price rises. So that is what they are pleading to, and then
19 there are some other particulars and that is also relevant, obscuring price rises and
20 not giving enough information. So there are a number of supporting particulars.

21 We go back to 59A and you see that BT's argument here is that there was no lack of
22 transparency relevant to the pricing on fairness allegation because they notified
23 customers about price rises. Sir, you have had an opportunity to read this, I don't
24 need to take you through it.

25 **MR JUSTICE WAKSMAN:** No, I spent some time reading this particular section and
26 then what people said this section was about or not about.

1 **MS KREISBERGER:** So then, sir, you will have seen that this is essentially
2 an evidential battle for trial. The Class Representative's case is that there was a lack
3 of transparency in the way BT handled price rises, and BT says: no, there wasn't
4 because we sent letters about price rises.

5 **MR JUSTICE WAKSMAN:** Yes.

6 **MS KREISBERGER:** Now, coming back to my first point in response, none of this is
7 about informed choice averment, it is about limb 2 of United Brands. So what BT
8 hasn't said -- and it is a familiar problem now, we had the same problem on the
9 benchmark -- we don't know much about what they are going to say. It hasn't
10 pleaded that consumers exercised informed choice because of those letters. That is
11 not what they say.

12 As I said, we have responded in the reply to this, we will come back to that.

13 Second point in response, BT complains they don't know what Professor Loomes
14 thinks about their reliance on notification letters in relation to pricing unfairness and
15 in his skeleton at paragraph 78 Mr Beard says that Professor Loomes' report will
16 need a complete restructuring. Fortunately, no restructuring is required. He deals in
17 terms with the notification letters. That is at his reports back at tab 26, page 313,
18 paragraphs 7.67 to 7.71. These are marked as "confidential".

19 **MR JUSTICE WAKSMAN:** Yes.

20 **MS KREISBERGER:** I confess I don't know why, but they are marked as
21 "confidential", but you can see there at the top of 7.67 he deals with the notification
22 letters. Would you like a moment to read that? I am happy to paraphrase.

23 **MR JUSTICE WAKSMAN:** You can paraphrase.

24 **MS KREISBERGER:** So the brief paraphrasing is that Professor Loomes has
25 looked at these letters and he regards them as rather weak triggers. So it is BT's
26 complaint that the position isn't clear, is not right, he has addressed it, and it is going

1 to be a battle for the trial. It is going to be an issue.

2 Now, BT's third complaint is about business customers and to the extent it has
3 a broader significance beyond these amendments, Mr Spitz is ready to address the
4 Tribunal on this if there is time. But the point I want to make for these purposes is
5 that the reply amendments and Professor Loomes' evidence is about consumers, not
6 businesses. They are expressly confined to consumer behaviour.

7 I don't think we need to go back there, but if you look at paragraph 7C(a) it refers to
8 individual consumers. That is the pleading. And Professor Loomes, for example, as
9 we are in the report, paragraph 3.6 on page 289 also refers to consumer behaviour.

10 These amendments are not addressing businesses and nor is Professor Loomes'
11 evidence.

12 Now, sir, that concludes my submissions on the ICA, the informed choice averment.
13 I am in your hands as to whether you would like me to address reply paragraph 23A.

14 **MR JUSTICE WAKSMAN:** I think you might as well do that now as it has been
15 raised.

16 **MS KREISBERGER:** As I am up.

17 **MR JUSTICE WAKSMAN:** Yes, please.

18 **MS KREISBERGER:** So then we go back to defence paragraph 59A(a), tab 6,
19 page 167 of bundle 1. You have seen this, so just to remind you this is the
20 notification pleading and it is responded to in the draft reply at the next tab at
21 page 187. That is paragraph 23A.

22 Now again, in the interests of time, paraphrasing, what the Class Representative
23 pleads there is that BT's defence is vague. And I addressed you on this -- sorry, not
24 on this point. Here, the issue is, just turning back to 59A, you don't see any
25 identification of the actual general conditions in issue. It is just put as a broad
26 assertion.

1 So the response from the Class Representative is: look, this is pretty vague stuff.
2 And his response is therefore to put BT to proof because the Class Representative
3 doesn't know if BT complied with these general conditions or not.

4 So again, you see this simply arises as an issue for determination. There is going to
5 be a battle about it.

6 Now, what BT has said, so this is distinct, just unpacking it, you have the point about
7 they don't like our reply amendment, they also -- on the ICA, they also don't like this
8 one. They say you have to admit it or deny it, and we say, no, this is properly a non
9 admission, we put them to proof.

10 Now, Mr Boylan complains that Mr Le Patourel must know whether BT complied or
11 not and that is why we have to admit or deny BT's case. It is what I call the theory of
12 omniscience in relation to Mr Le Patourel. He is regarded -- and this has come up
13 a few times in BT's skeleton -- as an all-seeing and all-knowing being when it comes
14 to matters telecoms-related.

15 **MR JUSTICE WAKSMAN:** Yes.

16 **MS KREISBERGER:** My submission is it is perfectly proper for the Class
17 Representative to put BT to proof for three reasons. The first reason is it is BT's
18 case on the general conditions, they have to make the point good on the evidence.

19 The second point is Mr Le Patourel is not in fact omniscient. He hasn't seen the
20 evidence, so he cannot admit or deny BT's averment.

21 Now, it is not far-fetched to say that BT may not have complied with the general
22 conditions given that, as we speak, Ofcom is investigating BT's compliance with
23 general conditions -- and we have given you the reference in the skeleton -- it is not
24 a far-fetched assertion. We are not making the allegation, we don't know.

25 **MR BEARD:** Sorry, that is not right, it is EE and Plusnet. They are subsidiaries, it is
26 not BT and it is not in relation to land lines.

1 **MS KREISBERGER:** The third reason, if BT did comply with the general conditions,
2 as BT alleges, it is still not a silver bullet. It doesn't simply knock out the Class
3 Representative's allegations --

4 **MR JUSTICE WAKSMAN:** I follow that --

5 **MS KREISBERGER:** -- but there was a lack of transparency in all of the
6 circumstances and I have shown you what Professor Loomes has to say.

7 So, with that, unless there is anything else I can assist on.

8 **MR JUSTICE WAKSMAN:** Thank you.

9 Now, Mr Beard.

10 **Submissions by MR BEARD**

11 **MR BEARD:** I will go back. Since we have just been dealing with 23A, the issue
12 here is one of trying to resolve that is being alleged as amounting to a breach of
13 fairness and a lack of transparency, essentially. That is what we are interested in
14 and that is what the Tribunal is going to be interested in.

15 And what we have highlighted is the fact that these pleadings, both the claim and
16 indeed the reply, are striking in the fact that they don't take any recognition of the fact
17 that BT was under obligations with Ofcom to notify all individual customers of any
18 potential price increases they would face and give them the opportunity to terminate.
19 And indeed it did so.

20 Ms Kreisberger says: well, you have not spelled out the specific general conditions in
21 your pleadings. And we say: well, actually we have provided witness evidence that
22 does that and sets out how those conditions applied.

23 So that is not a fair criticism and if all that is required is our confirmation that what we
24 have put in the witness statements confirms the position, then happily we will amend
25 to clarify it. That is not a good point.

26 What we see in 23A is effectively a form of evasion in relation to a class action

1 because if we were dealing with a claimant, an individual claimant coming along and
2 saying, "I had no idea", that claimant would have to admit or deny in the face of this
3 pleading whether or not they have received notification.

4 **MR JUSTICE WAKSMAN:** I follow that, but how are they meant to know precisely
5 that you have complied with the general conditions in the case of 2 million
6 customers?

7 **MR BEARD:** Well, they don't have to assert whether or not we have complied in
8 relation to 2 million customers, and in relation to those, plainly what is said in the
9 skeleton that somehow we should be disclosing every notification letter --

10 **MR JUSTICE WAKSMAN:** -- if I may say so, I am not sure that is the issue. The
11 point that you have taken against them is that they can't not admit this. That is what
12 you have said.

13 **MR BEARD:** Yes.

14 **MR JUSTICE WAKSMAN:** If they do not admit it, they are not entitled to put
15 a positive case saying you haven't, it is just they are not admitting that you have. If,
16 at the end of the day, with the documents that you have put forward, there is a pretty
17 powerful inference, absent any evidence to the contrary, that you have in fact
18 followed the conditions, then that is likely to be something that the Tribunal is going
19 to accept.

20 There is then the sort of so-what question, which is: well, even if you have complied
21 with all of the conditions, does that get rid of any lack of transparency arguments?
22 Which I suspect is the real battleground here.

23 **MR BEARD:** Sir, you are cutting through to exactly what we are concerned about.
24 What we actually want is not so much whether or not they are not admitting, denying,
25 admitting, what we are actually interested in is if we did comply with these general
26 conditions, are you still saying it is unfair and not transparent? Because their

1 pleading is unclear about that. That is the real issue we have here. And that is what
2 we actually care about.

3 We want to know, and we assume the Tribunal wants to know: what is your case if in
4 fact BT, on the balance of evidence, was complying with these general conditions,
5 and we were individually notifying everybody and we were giving them the
6 opportunity to terminate early? We want to know what the case against us is on that.
7 That is actually what we care about. We don't actually care about the precise
8 wording of this.

9 It goes back to much more a gatekeeper issue, what are the issues we are going to
10 have to deal with at this hearing? If we complied with general condition 9.6, sent all
11 this material out, are you still saying this? That is what we care about. And that is
12 the issue here. We simply say: don't allow these amendments unless that is spelled
13 out.

14 And by just not admitting issues, that is not an adequate approach. That is what we
15 want crystallised and that is the short point on 23A.

16 **MR JUSTICE WAKSMAN:** Thank you.

17 **MR BEARD:** So I think that probably deals with where we are. I don't want to get
18 tangled up in those points about pleading because they are not what we care about.

19 **MR JUSTICE WAKSMAN:** No.

20 **MR BEARD:** Then I think we need to deal with the other amendments to the reply.
21 If we go back, I don't know if you have it open, tab 7, page 177.

22 **MR JUSTICE WAKSMAN:** Yes. Thank you. Got that.

23 **MR BEARD:** This is all under the nature of the class heading, and this is important
24 and this really goes to what we care about in relation to all of this. Again, our
25 concerns are about substance here.

26 You have this story about the averment and I think it is very, very important, and it

1 will be something we will reemphasise many times no doubt over the coming
2 months, our case is not based on everyone being an e-con, as Mr Loomes put it.
3 We deal with humans; our customers are humans. That is how we deal.

4 Ms Kreisberger made that wonderful, but revealing mistake when she said class
5 members are the people that didn't switch. That is not correct because of course
6 across the period lots and lots and lots of them did switch and that is going to be
7 very, very important. But they are all humans.

8 **MR JUSTICE WAKSMAN:** Yes.

9 **MR BEARD:** Although, as Ms Love points out, they are all humans except the
10 businesses and we will come back to them in a minute.

11 So nature of the class, BT's averment is set out and this is supposed to be the
12 informed choice averment. We are not saying everyone is fully active and involved
13 every time they make a choice, including staying with us on a default basis. That
14 isn't our case and it never has been. But if we go on and look at the nature of the
15 class discussion here, 7C, 7D it says:

16 "In the premises the Class Representative will say to be addressed in expert
17 evidence [bear in mind this all under the nature of the class] you work your way
18 through principles and matters set out in 7C. Further or alternatively many class
19 members would have conducted themselves according to a human, not an e-con
20 model of decision-making."

21 Well, that is not deeply interesting.

22 C:

23 "Further or alternatively there are particular features of the relevant markets or
24 surrounding circumstances in respect of the supply of SFV services to class
25 members likely to inhibit them".

26 Then you go down and it says, well, it was a default service for class members?

1 Yes. Insufficient information to trigger? Well, we say we provided lots of
2 information. And then 3:

3 "BT took positive steps to minimise publicity or reduce chances of attention of class
4 members. Re-re-amended Claim Form paragraph 136A is repeated."

5 That of course is also carried further through into other passages here where you
6 have got these references to 136A in the re-re-amended Claim Form. And of course
7 136A is precisely what we were pleading back to at 59A in our defence; in other
8 words, we were trying to say: look, we were transparent, this is material to the way in
9 which you look at the class.

10 Essentially, what we are dealing with here is the extent that these new averments in
11 the reply, which reflect the new Loomes' material, should they be allowed in in
12 circumstances where they are talking generally about matters, when in fact this is all
13 about the nature of the class.

14 What we have explained in relation to the nature of the class is the extent to which
15 they were able to have access to relevant information and the process was
16 transparent.

17 **MR JUSTICE WAKSMAN:** Yes.

18 **MR BEARD:** That is all that we were saying in relation to this, and when it comes to
19 Loomes' report itself it is instructive, because although Ms Kreisberger says, "Well,
20 section 8 has been admitted because it is the role of particular characteristics",
21 actually when you look at section 8 it is not about particular characteristics at all, it is
22 to do with our own Solus churn data.

23 What is instructive about the end of it -- not all of -- my marked-up version is just
24 marked generally confidential, but if we go to the conclusions you will see there that
25 the first part of this is just in relation to churn and that is not to do with an analysis of
26 behavioural characteristics. That is to do with the data we have provided in relation

1 to churn.

2 Then 8.46 gets into speculation about these matters and says:

3 "One implication is that the high base line propensity not to switch that we find even
4 in high deciles is better accounted for by the behavioural factors affecting the great
5 majority of class members."

6 But with respect this is just speculation here. So the problem we have is that when
7 we are looking at how the detailed material in relation to class characteristics fits with
8 the broader story that Professor Loomes has set out in section 7, actually we find it is
9 speculative.

10 So the point we are making here is we have explained how we deal with things
11 transparently. We have explained how we provide information to these people.

12 In section 7 of his report Professor Loomes then talks generally about characteristics
13 of humans, but the question for this Tribunal and the reason that we focus on this is:
14 what is it about the characteristics of this class that under limb 2 of United Brands
15 means that conduct was unfair?

16 What we don't get from Loomes, and we don't get from section 8 and we don't get
17 from section 7 linked to section 8 is a proper indication of why the characteristics that
18 in here in general humans that he puts forward are particularly represented in this
19 class.

20 So it goes back to the problem that we had previously. One can talk generally about
21 the way in which people engage and this isn't progressing the debate.

22 I focus my submissions now -- I am not resiling from the skeleton, but I am focusing
23 on the report because this is what we are going to have to deal with. The test that
24 this Tribunal has to apply, is this reasonably necessary in order to determine and the
25 point we make is: what you have here in relation to particular characteristics is
26 material related to our Solus churn data, which can be the subject of submissions

1 without the behavioural evidence. You then have an attempt to tie the two things
2 together, which is speculative. And then when you go back to the point about the
3 general characteristics of humans, that is supposed to be imported, either to support
4 this class characteristic or to rebut the informed choice averment, which is not us
5 saying everyone is an e-con.

6 At which point, how is this evidence actually helping; how are these pleadings that
7 are supposed to bring it in of real assistance here?

8 We recognise that if this material was admitted, we will deal with it through
9 behavioural evidence; we will have a dispute about the relevance of all of this
10 material. We see that, but the Tribunal needs to assess these issues in relation to
11 the concerns we have about notification, the overall position in relation to the case,
12 which is not about e-cons, it is about humans and how this fits with the
13 characteristics of the class, which is what matters for limb 2.

14 Now, I don't know whether at that point it would be useful for me to pick up some of
15 the issues in relation to further points on businesses that are not directly linked to
16 this because as --

17 **MR JUSTICE WAKSMAN:** I think not because I want to make sure we deal with this
18 point first and then we will see where we go.

19 **MR BEARD:** Just one point to emphasise. It is important by reference to our
20 skeleton argument. Because Ms Kreisberger said if we turn up our skeleton
21 argument at paragraph 73 to page 19 of the internal numbering, we did try to unpack
22 this informed choice averment as one of the bases for importing this material and
23 importing the pleadings. We explained why that wasn't what we were saying, why it
24 didn't assist in relation to class characteristics. And then we went on in the
25 explanation and we did accept that class characteristics, specific class
26 characteristics does raise an issue of behavioural economics. We haven't disputed

1 that.

2 It is just that when you come and actually look at section 8 of Professor Loomes'
3 report, you are not looking at behavioural characteristics there, you are looking at
4 Solus churn and then a speculation about how those figures are to be accounted for
5 by reference to the behavioural evidence. That is our concern, not that behavioural
6 evidence is inherently unrelated to class characteristics analysis.

7 Unless I can assist further.

8 **MR JUSTICE WAKSMAN:** Thank you.

9 Ms Kreisberger, I would just like to you deal with only two points. First, is a matter of
10 substance. On 23A the suggestion that you have not really explained what your
11 case on lack of transparency is, if it is not completely answered by the point that they
12 have relied on their general conditions; and then secondly, can you remind us of the
13 particular order that you are seeking on this application.

14 **Reply submissions by MS KREISBERGER**

15 **MS KREISBERGER:** Thank you, sir. I will deal with your first question first.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MS KREISBERGER:** So I want to turn up paragraph 23A again. It is worth
18 reiterating that this is a reply, so it is an appropriate reply response. We could have
19 just stayed silent actually because everything that is not covered in a reply is
20 covered by the general non-admission.

21 The reason -- Mr Beard is quite right, let me just check the -- yes, it is at paragraph
22 3, the general denial.

23 The reason why the Class Representative has highlighted paragraph 59A in the
24 defence is that it is so vague. It is so vague. So it was necessary to set out for BT
25 that we just don't understand what is being alleged.

26 Now, I hear Mr Beard saying that they are prepared to amend and make this

1 averment specific and we look forward to receiving that.

2 Now, Mr Beard's position is this was adequately covered in our witness evidence. It
3 is right that we have an idea from the witness evidence which general conditions
4 Mr Bunt is talking about, it hasn't been pleaded.

5 It is also right that we have been very clear in Professor Loomes' draft evidence as to
6 what we say about these price notification letters, which is that they are a weak
7 trigger for attention.

8 So it is very clear that to the extent that BT rely on the fact that they sent letters to
9 customers, the Class Representative's response through the expert behavioural
10 evidence is that that was not enough to draw their attention to the problem and it was
11 not enough to trigger them to take action.

12 **MR JUSTICE WAKSMAN:** Thank you.

13 **MS KREISBERGER:** Now, sir, you asked me to show you the order.

14 **MR JUSTICE WAKSMAN:** Yes.

15 **MS KREISBERGER:** The order is at tab 4 of the hearing bundle 1, so could I ask
16 you to turn that up.

17 Now, that just provides for permission as we are dealing with the timetable
18 separately. So this order provides that each party has permission to adduce
19 behavioural evidence, and that is the order we seek. Of course timetabling needs to
20 be accommodated.

21 **MR JUSTICE WAKSMAN:** Thank you. Just a moment. Thank you very much.

22 **(Pause)**

23 **(3.54 pm)**

24

25 **[Ruling given, Extracted]**

26 **(4.08 pm)**

1 **MR JUSTICE WAKSMAN:** Now before we turn to any question of costs, Mr Beard,
2 is there still a freestanding point about business customers? If so, how long is it
3 going to take to deal with it?

4

5 **Submissions re businesses by MR BEARD**

6 **MR BEARD:** Let me outline what the issue is.

7 **MR JUSTICE WAKSMAN:** Yes.

8 **MR BEARD:** And then the simple point is this. If we could just take up the hearing
9 bundle 1 at 581, please.

10 **(Pause)**

11 Let me outline it and I will track down the reference. It is a simple point. The terms
12 and conditions under which all customers dealt made it clear that you could only take
13 these products.

14 **MR JUSTICE WAKSMAN:** If you are not a business?

15 **MR BEARD:** If you are not a business.

16 **MR JUSTICE WAKSMAN:** Yes.

17 **MR BEARD:** The issue then is that there is a question about how many people were
18 actually taking them as businesses. You will have seen in the amended pleadings,
19 just for example in relation to some of the quantum calculations, that there was
20 a separating out of businesses and non-business customers, that there are a series
21 of issues that arise in relation to this that the Tribunal is going to have to grapple
22 with.

23 It is to some extent an open question how we best deal with it, but there is a question
24 as to whether or not there is any scope for a claim by a business customer when
25 essentially they are not entitled to do services at all.

26 There are further problems with the quantification of that. There are some

1 indications as to the quantification of volume of business customers. The problem is
2 business customers don't come along and hold their hand up because of course they
3 are dealing with matters on a much cheaper basis.

4 This has ramifications not only for the size of the class and any potential claim, but it
5 also has ramifications for issues to do with the market definition assessment and so
6 on because of course if you are a business customer and you shouldn't be there,
7 even if there was a price hike in relation -- a hypothetical price hike in relation to the
8 personal service, you ain't going anywhere if you can avoid it. So we have a series
9 of problems to deal with in relation to this and we think that there might actually be
10 a relatively significant number of these people.

11 Now --

12 **MR JUSTICE WAKSMAN:** There was some talk about this a long time ago about
13 how did you identify and could you tell -- for example, if they had a company name,
14 that might be a clue, but I can't remember.

15 **MR BEARD:** They don't do that. We have some vestigial references and there were
16 some ways you could tally up company addresses with names, but you could only do
17 it on a sample basis.

18 So there are techniques that can be used to grapple with it. But that is a quantum
19 issue, but you have these prior questions about whether or not there is any
20 legitimacy to their claim.

21 At the moment the Class Representative is saying, "I don't care, I am bringing claims
22 on behalf of all of these people", and we see that in relation to the amended
23 pleading. We say we don't understand the basis on which that comes forward.

24 Now, there are various ways. We have suggested that they need to be clear about
25 whether or not they are contending that there is a basis for business customers to
26 bring the claim and then we will have to grapple with quantum issues in the expert

1 reports. But if they are not going to be willing to do that because we have raised this
2 repeatedly, we have seen all these amendments but it is not grappled with. So it is
3 in the same sort of category about some of the concerns of notification.

4 That is outlining the issue. It is not providing the Tribunal with a solution. One
5 solution would be to say, "You need to plead your position in relation to the terms
6 and conditions", because they would remain the same throughout the period.

7 Just for your notes, it is in bundle 3, tab 12 at 581, and the relevant clause is
8 clause 6 in that version of 586.

9 This is just not anything that would surprise you. It says, "Look, you can't use this for
10 business purposes". So these are people that are not legitimately taking the service.
11 At the moment the claim is made against us in relation to these people, but we do
12 not see the legal basis for it at the moment. So that is the problem. It has various
13 ramifications because it impacts on different aspects of the case, some of which
14 I have just outlined, but we don't want this case just to cruise forward without
15 engaging with it.

16 **MR JUSTICE WAKSMAN:** No.

17 Well, let me just get a brief response from Ms Kreisberger just so I can see what the
18 shape of this issue is. We can't resolve it today, but we need a little bit of forward
19 planning in relation to it.

20 **MR BEARD:** Can I just raise the other issue that hangs out there, which is
21 Qualcomm.

22 **MR JUSTICE WAKSMAN:** Yes.

23 **MR BEARD:** I mentioned it in passing because again there is a danger that we are
24 storing up difficulties for ourselves. I could go to the judgment, do you want me to
25 take you to --

26 **MR JUSTICE WAKSMAN:** Just paraphrase, if you don't mind.

1 **MR BEARD:** So paraphrasing -- for the lawyers, it's the ruling in Hollington v
2 Hewthorn, although it doesn't formally bind the CAT applies here it, and it means
3 decisions of other courts, Tribunals or regulators are not binding in relation to their
4 findings.

5 It is right that in various places in the pleaded case against us what is referred to are
6 the Ofcom decisions or regulatory findings just because of what has happened, for
7 instance the price reductions. Well, there is no issue with that. But in other places in
8 the pleadings essentially what is pleaded is reliance on the findings made by Ofcom
9 in the 2017 decision.

10 Now, we have raised this. The claim representative has come back and said they
11 think this is baffling, "We don't understand what is going on". We set out a list of
12 paragraphs we thought were potentially relevant here in Boylan 4 at paragraph 52.
13 Just for your notes, that is in appeal bundle 2A.

14 **MR JUSTICE WAKSMAN:** What is the up-shot of this debate? You say they are
15 not binding.

16 **MR BEARD:** Yes.

17 **MR JUSTICE WAKSMAN:** Right? Okay --

18 **MR BEARD:** So they can't be relied on as support.

19 **MR JUSTICE WAKSMAN:** So what are you asking them to do --

20 **MR BEARD:** We are alerting them to the fact that these Qualcomm points exist in
21 relation to all of these pleadings and it is not legitimate to rely on these matters. We
22 said, "You are repleading all of these documents, you should actually do
23 a Qualcomm audit on what you are doing". If they don't do it, this issue is not going
24 to go away --

25 **MR JUSTICE WAKSMAN:** Bit I think we addressed this, albeit very briefly because
26 we had to look at the status of Qualcomm report on the certification decision, and

1 I think we said something along the lines, "Well, it is not binding, but it is material
2 which the Tribunal is entitled to look to".

3 **MR BEARD:** Yes. But no reliance can be placed on findings made by that
4 Tribunal -- that was a pre-Qualcomm ruling and the decision is Qualcomm is that no
5 weight can be afforded to the findings made. So, unfortunately, the holding the ring
6 position that was made in that ruling is now not sufficient, given the Qualcomm
7 decision.

8 That is why we are raising it. Because, pre-Qualcomm, one could understand the
9 hold the ring decision that was taken. That is not now the case.

10 Ms Kreisberger will say, maybe I will tough it out, but we say that there is a problem
11 here, because you look through the pleading at various of the paragraphs and it
12 says, "we rely on", "it is supported by the findings of", and that is not consistent with
13 Qualcomm.

14 **MR JUSTICE WAKSMAN:** Okay, thank you.

15 Let me get an initial response so that I can see the shape of any issue we may have
16 to deal with obviously before the trial.

17

18 **Reply submissions re Qualcomm by MS KREISBERGER**

19 **MS KREISBERGER:** Thank you, sir. I will deal with the Qualcomm point and then
20 Mr Spitz is going to say a few words on businesses very briefly.

21 Just on Qualcomm, I mean, it is -- I hear what you say about ventilating issues but
22 this isn't a therapy session. There is no application before you.

23 **MR JUSTICE WAKSMAN:** No, there is no application, but it is part of our job as
24 gatekeepers proactively to manage this case. If there is something rumbling that
25 could turn into a big spat, then we would like to know about it.

26 **MS KREISBERGER:** Well, so would we. I think we need to see what they have to

1 say, which is why it is not terribly useful at this stage to raise it in these general
2 terms. We don't accept what they say about Qualcomm.

3 It was initially -- well, it has only ever been raised in writing as an issue in relation to
4 our amendments and we just couldn't understand that at all because none of our
5 amendments related to this point.

6 If BT want to set out an actual concern in relation to the pleadings, the logical
7 conclusion of which would be they are applying to strike out parts of our pleading,
8 well, we will look at that. We don't agree with their interpretation of Qualcomm but
9 I am not about to start addressing the Tribunal about that at 4.20 pm without any
10 proper --

11 **MR JUSTICE WAKSMAN:** Right. Let me hear from Mr Spitz then.

12
13 **Reply submissions re businesses by MR SPITZ**

14 **MR SPITZ:** Thank you very much. It will be very brief indeed, particularly at this
15 time of the afternoon.

16 The point really follows on from what Ms Kreisberger was saying. This point about
17 breach of contract is a new point. One will search the pleadings in vain to find it
18 anywhere in the defence, so while it has been floated in Boylan 4 and in Boylan 5
19 that there is an issue because of the question of compliance with the contractual
20 terms, it is simply not a pleaded point. So it doesn't work, with respect, to say, well,
21 we have serious concerns about this and can we please have the Class
22 Representative address the point. We will address it in full when the point is
23 pleaded.

24 The reason that is important is that we don't know whether the point goes to
25 causation. Is the argument from the Defendants that, because of this question of
26 contractual terms there is a causation issue? Does it go to quantum? Does it go to

1 the composition of the class? The answer to all of those is we simply don't know. If
2 we are provided with a pleading where it is set out, we will address it in full.

3 That is the short point and I probably don't need to take to you anything to make that
4 good.

5 **MR BEARD:** Can I offer a solution. If that is the concern, we will plead it. We are
6 putting in an amended defence in any event. It is not going to be a massive issue for
7 us to put that in and then it can be dealt with. Fine.

8 In relation to Qualcomm, we will refer them back to the paragraphs where they
9 specifically refer to and rely upon Ofcom's findings and we will remind them of these
10 matters.

11 We have set it out in Boylan 4. That might be the most sensible way.

12 **MR JUSTICE WAKSMAN:** I think, it doesn't seem to me that there is in principal
13 a difficulty with you putting it in your amended defence, even though it is not there so
14 far.

15 Secondly, so far as Qualcomm is concerned, you say you have already written to
16 them about it. I haven't seen anything. It seems to me this is -- you say they are in
17 difficulties about it because of Qualcomm, it seems to me either you may or you may
18 not want to write a further letter saying -- because you have to say what you want
19 them to do about it. If you are going to say, well, what we want you to do about it is
20 remove all the references to the findings of Qualcomm, then that is what you have to
21 invite them to do. If you don't get the response you want, you will have to make
22 an application to strike out.

23 It is worth ventilating these things now, because you are not going to get very far
24 with a strike out application in December.

25 **MR BEARD:** That was rather our thinking.

26 **MR JUSTICE WAKSMAN:** That is fine. All right, that is all we are going to say

1 **about that.**

2 Did you wanted to say something else, Ms Kreisberger?

3 **MS KREISBERGER:** I just don't want to lose sight of the fact that we haven't set
4 a timetable for the behavioural economic evidence.

5 **MR JUSTICE WAKSMAN:** Should that go in at the same time as the others?

6 **MS KREISBERGER:** That was my suggestion. 29 September.

7 **MR JUSTICE WAKSMAN:** It could go in earlier.

8 **MS KREISBERGER:** I think we need pleadings to close.

9 **MR BEARD:** I think they are supposed to be serial exchanges of these reports, that
10 was the structure that was in place. And I think, therefore, since Professor Loomes'
11 report, for the reasons articulated, is rather far advanced, I think we should be setting
12 a date when we get that. I don't mind --

13 **MS KREISBERGER:** Sir, I am suggesting 29 September because it has to come
14 after the close of pleadings. We can't have a report before the pleadings have
15 closed.

16 **MR JUSTICE WAKSMAN:** Well, that is the reply. The reply we have catered for
17 on -- because it goes to your reply.

18 **MS KREISBERGER:** I just can't say whether --

19 **MR JUSTICE WAKSMAN:** The reply has to be by 8 September.

20 **MS KREISBERGER:** That is right. **So that is why 29 September --**

21 **MR JUSTICE WAKSMAN:** But you don't need that much time. He has written his
22 report. Why can't he produce his -- you don't have to have everything at the same
23 time. Why can't he produce his report at the same time as the reply?

24 **MS KREISBERGER:** Yes, okay.

25 **MR JUSTICE WAKSMAN:** After all, it is your pleading. You have seen it already.

26 **MS KREISBERGER:** We are happy with that.

1 **MR JUSTICE WAKSMAN:** Right. 4 pm on 8 September will be Loomes. And then
2 response to that?

3 **MR BEARD:** We will serve ours with the other reports then, at that point.

4 **MR JUSTICE WAKSMAN:** You can serve it on 29 September.

5 **MR BEARD:** Working on the basis it is going to stay -- not with every full stop and
6 word the same -- but if it is going to stay the same, then 29 September, yes.

7 **MR JUSTICE WAKSMAN:** Look, you have had the draft report for some time now.
8 You have your behavioural expert economist. I have no doubt you have had some
9 preliminary discussions. The only reason I am giving you some time after the 8th is
10 because you haven't seen the final version of it. It seems to me it is hardly likely to --

11 **MR BEARD:** No. That is the only caveat.

12 **MR JUSTICE WAKSMAN:** If there is a problem with that --

13 **MR BEARD:** Yes. We will make an application.

14 **MR JUSTICE WAKSMAN:** 29 September.

15 **MR BEARD:** Understood. I think we all understand where we are on that.

16 **MR JUSTICE WAKSMAN:** Just give me one moment.

17 **(Pause)**

18 I think that, in the light of the time, we are not going to be able to deal with questions
19 of costs, even questions of costs in principle. Even though you have succeeded in
20 both of your applications, it doesn't necessarily follow you are going to get your
21 costs, and Mr Beard will be arguing that you shouldn't.

22 So, submissions on costs, 7 days?

23 **MR BEARD:** Certainly. Those costs -- because obviously we are dealing with case
24 management matters here, but our concern is relating to the subsequent
25 amendments obviously.

26 **MR JUSTICE WAKSMAN:** Yes, I follow all of that.

1 **MS KREISBERGER:** 7 days. Thank you, sir.

2 **MR JUSTICE WAKSMAN:** Right. Good. Thank you all very much indeed for your
3 assistance. The Tribunal will conclude the hearing now.

4 **(4.25 pm)**

5 **(The hearing concluded)**

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