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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

Friday 8th December 2023

15 Before:  
16 The Honourable Mr Justice Waksman  
17  
18 Eamonn Doran  
19  
20 Derek Ridyard  
21  
22 (Sitting as a Tribunal in England and Wales)

23  
24  
25 **BETWEEN:**

26  
27 Justin Le Patourel **Class Representative**

28  
29 v

30  
31 (1) BT Group PLC  
32 (2) British Telecommunications PLC **Respondents**  
33 **(together, "BT")**

34  
35  
36 **A P P E A R A N C E S**

37  
38 Ronit Kreisberger KC, Derek Spitz, Jack Williams, Matthew Barry and Michael Armitage  
39 (On behalf of Justin Le Patourel)

40  
41 Daniel Beard KC, Sarah Love, Daisy Mackersie and Natalie Nguyen  
42 (On behalf of BT)

43  
44  
45  
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1  
2 **Friday, 8 December 2023**

3 **(10.41)**

4 MR JUSTICE WAKSMAN: Just before we start, some of you are joining us live  
5 stream on our website, so I start with the customary warning. This is an official  
6 recording being made and an authorised transcript will be produced, but it is strictly  
7 prohibited for anyone else to make an unauthorised recording, whether audio or  
8 visual of the proceedings, any breach of that provision is punishable as contempt of  
9 court. Now, we are all very grateful to counsel for their submissions and the agenda.  
10 The one item that seems to be still agreed is about the supplemental expert reports.  
11 Is that right?

12 MS KREISBERGER: Thank you, sir, I am grateful. That is correct. So, we think  
13 that can just be removed from the agenda.

14 MR JUSTICE WAKSMAN: Yes. Right. Now, we have slightly re-ordered the  
15 agenda in this way. So, number two will remain, which is the amendment on which it  
16 appears there is not in fact agreement, unless there has been some further  
17 developments, but I do not want to hear about that now. But that will remain as  
18 number two. Number three, we would now like to put in the question of cross-  
19 examination of Mr Le Patourel. Four will then be the timetable to trial – sorry, four  
20 will be the timetable to trial. Five will be the trial timetable, and then the other  
21 matters can follow as they were before.

22 MS KREISBERGER: I am grateful, sir. So, number one remains as it is?

23 MR JUSTICE WAKSMAN: Yes, as it is. Yes, and number two. Number two is the  
24 amendment. That is what we would like to deal with next.

25 MS KREISBERGER: Sir, I am grateful for that. In that case I can sit down with the  
26 Tribunal's permission, and Mr Armitage is going to address you on that first point.

1 Right, thank you.

2 MR ARMITAGE: Yes, good morning, sir, there are two sub-items under this head.

3 There are the updating amendments to the claim form and methodology annexe.

4 Those are agreed --

5 MR JUSTICE WAKSMAN: Sorry, the updates on methodology.

6 MR ARMITAGE: Yes.

7 MR JUSTICE WAKSMAN: In the claim form.

8 MR ARMITAGE: Yes, so in the claim form and then the accompanying annexe on

9 excessive pricing --

10 MR JUSTICE WAKSMAN: Yes.

11 MR ARMITAGE: There are a series of potentially updating amendments reflecting

12 the closure of the expert evidence process. Those are agreed.

13 MR JUSTICE WAKSMAN: Right.

14 MR ARMITAGE: It is agreed the usual order as to costs.

15 MR JUSTICE WAKSMAN: Right.

16 MR ARMITAGE: So, I do not know if you need to hear from me on the nature of

17 those amendments.

18 MR JUSTICE WAKSMAN: I do not think so.

19 MR ARMITAGES: I am grateful. There is a question of timing. Again, I would be

20 happy to return to that.

21 MR JUSTICE WAKSMAN: Well, is that agreed? Is the timing agreed?

22 MR ARMITAGE: I am not certain about it. I think there is maybe a small

23 discrepancy. Can I show you what we propose in terms of timetable?

24 MR JUSTICE WAKSMAN: Yes. You can.

25 MR BEARD: I think it is agreed, so I --

26 MR JUSTICE WAKSMAN: All right. Well, I will take your word on that.

1 MR BEARD: I do not want to cut Mr Armitage off.

2 MR ARMITAGE: No, no I am delighted.

3 MR JUSTICE WAKSMAN: Right.

4 MR ARMITAGE: Then on the second sub-item, the more substantial one, that that is

5 the question of the variation of the class definition.

6 MR JUSTICE WAKSMAN: Yes.

7 MR ARMITAGE: The Tribunal will have seen, it concerns a proposed adjustment to

8 bring matters into compliance with the Tribunal's recent ruling in the Sony collective

9 proceedings. In a nutshell, the Tribunal held there the collective proceedings under

10 section 47B may only combine existing individual claims under section 47A of the

11 Act, and the Tribunal disapproved a class definition which shared an element with

12 the class definition in the present case. I think the Tribunal will have seen that in the

13 written material.

14 MR JUSTICE WAKSMAN: What, because of effectively new account holders?

15 MR ARMITAGE: Exactly, so the forward-looking element of the class definition in

16 the present case, whereby individuals who have not made purchases at the point of

17 issue of proceedings, would become class members on making such purchases, and

18 that is a feature of both the class definition in the Sony case, and as the Tribunal

19 remarked there, the class definition in this case.

20 MR JUSTICE WAKSMAN: So, it is fixed. The class is fixed at the date of issue of

21 proceedings in that sense?

22 MR ARMITAGE: Yes.

23 MR JUSTICE WAKSMAN: It cannot be added to.

24 MR ARMITAGE: Yes. Certainly, in other words you could only ever combine claims

25 that already exist in collective proceedings. Now --

26 MR JUSTICE WAKSMAN: Right.

1 MR ARMITAGE: -- what we propose, what we have applied for is an order to vary  
2 the class definition so that it complies with the key point in that ruling. In other  
3 words, that it only covers individuals who have made purchases of relevant services  
4 as at today's date because on any view, those individuals do have crystallised -- to  
5 use the language of the Tribunal in the Merricks judgment that is considered in Sony  
6 - claims against BT, and there has been a degree of confusion on this side of the  
7 court room, following the letter from BT --

8 MR JUSTICE WAKSMAN: Yes.

9 MR ARMITAGE: -- late yesterday. Can I attempt to summarise what I think is the  
10 position?

11 MR JUSTICE WAKSMAN: Yes.

12 MR ARMITAGE: -- and Mr Beard will --

13 MR JUSTICE WAKSMAN: Can I just get out the amendment?

14 MR ARMITAGE: Of course, yes. You should have that --

15 MR JUSTICE WAKSMAN: I am afraid we have had a bit of a problem with Opus, so  
16 we are just -- well certainly I am using a hard copy at the moment.

17 MR ARMITAGE: I hope you have an updated PTR order at tab 2 of the PTR bundle,  
18 which we have updated to include the proposed amendments.

19 MR JUSTICE WAKSMAN: Now, let me just -- I have got what I think is the latest  
20 version.

21 MR ARMITAGE: "Draft" in square brackets is in the header.

22 MR JUSTICE WAKSMAN: I have just got one that says PTR order.

23 MR ARMITAGE: So, I fear that may not be the updated version.

24 MR JUSTICE WAKSMAN: Just --

25 MR WILLIAMS: If you turn to the next page, if it is {J/22}.

26 MR JUSTICE WAKSMAN: Yes.

1 MR WILLIAMS: Or 28. I think you have got an underlined --

2 MR JUSTICE WAKSMAN: Yes, I have got an underlined thing. Right. Let me just –

3 right.

4 MR ARMITAGE: I am sorry, no, this is the old one.

5 MR WILLIAMS: Yes, I am sorry, it is – it depends whether you have got 4 lines

6 underlined or two lines underlined.

7 MR JUSTICE WAKSMAN: I have only got two lines.

8 MR WILLIAMS: Yes, you have got the old one. You need to forget that one.

9 MR JUSTICE WAKSMAN: Thank you. I have got it now. Thank you.

10 MR ARMITAGE: We should all have the same number of lines.

11 MR JUSTICE WAKSMAN: Yes.

12 MR ARMITAGE: So, is – and I think Mr Beard has the updated version. So yes, it is

13 paragraph 5, and the underlined text is the proposed amended wording.

14 MR JUSTICE WAKSMAN: (After a pause) Right.

15 MR ARMITAGE: If it is helpful briefly to explain the two elements.

16 MR JUSTICE WAKSMAN: Yes, please.

17 MR ARMITAGE: The first element, that is to bring the case into compliance with the

18 principle from Sony, if you like, that only existing claims as at the present date may

19 be combined in collective proceedings. So, in other words, any individuals who first

20 buy the relevant services after today's date, at present do not have existing claims

21 against BT. They are clients only and cannot be --

22 MR JUSTICE WAKSMAN: Sorry, but the relevant date is not today, it is – the

23 relevant date is the date of issue of the claim.

24 MR ARMITAGE: The relevant date for these purposes is today. So, it may be

25 helpful to take you to the Sony judgment. So, Sony – it is correct that Sony talks

26 about the date of issue so that was a case where this matter was being considered

1 at the point of certification.

2 MR JUSTICE WAKSMAN: Right.

3 MR ARMITAGE: Now, the question is how to deal with that in the context of the  
4 present claim where we are a long way after certification and in the interim a number  
5 of people will have made relevant purchases and therefore will have accrued claims  
6 against BT. Subject to the point I am about to make, I had understood it to be  
7 agreed between the parties that it is permissible to add in such individuals.

8 MR JUSTICE WAKSMAN: Up to today's date.

9 MR ARMITAGE: Up to today's date because --

10 MR JUSTICE WAKSMAN: If they have bought the services after issue but by now.

11 MR ARMITAGE: Precisely, because they have, having made those purchases,  
12 crystallised claims against BT. Obviously, individuals who have not yet done so, but  
13 for who make a relevant purchase tomorrow, applying Sony, and the ratio of that  
14 case being that only extant claims may be combined in a claim.

15 MR JUSTICE WAKSMAN: But they are – the proviso that has been added --

16 MR ARMITAGE: Yes.

17 MR JUSTICE WAKSMAN: Any persons who first bought a BT stand-alone service  
18 after 8 December are not class members --

19 MR ARMITAGE: Yes.

20 MR JUSTICE WAKSMAN: -- and that is agreed, is it not. That is your position, is it  
21 not?

22 MR ARMITAGE: Yes.

23 MR JUSTICE WAKSMAN: Right.

24 MR ARMITAGE: Yes. So, to be clear. This is --

25 MR JUSTICE WAKSMAN: This is all your draft.

26 MR ARMITAGE: This is why we are a little -- Can I attempt to summarise the

1 | agreed position.

2 | MR JUSTICE WAKSMAN: Yes please. All right.

3 | MR ARMITGAGE: -- and the element that is disagreed. I hope this is right. Mr  
4 | Beard, as I say, will correct me if I am wrong. So, at first, having originally taken the  
5 | contrary position in correspondence, BT has agreed in principle that the class  
6 | definition can be varied so as to include individuals who had not purchased services  
7 | from BT at the point of certification, or indeed the point of issue, but has since done  
8 | so. Secondly, and this is where I look sideways at Mr Beard and think about the  
9 | letter from yesterday, my understanding had been that the class representative and  
10 | BT are in agreement as to the appropriate drafting amendment that is required in  
11 | order to reflect the Sony judgment. That is the text we have just been looking at.

12 | MR JUSTICE WAKSMAN: Yes.

13 | MR ARMITAGE: The text we have just been looking at, the original proposal from  
14 | the class representative only went as far as the first roman numeral.

15 | MR JUSTICE WAKSMAN: Okay.

16 | MR WILLIAMS: BT wrote back to us the day before yesterday I believe, and added  
17 | in the proviso at (ii). That is to cover, as the Tribunal sees, individuals who did make  
18 | relevant purchases after the date of issue, but had stopped doing so before today's  
19 | date and the purpose of the drafting, as I understand it, with which we agree, is to  
20 | exclude those who then start making new purchases after today's date, which would  
21 | be the subject of a separate claim is the thinking. Again, applying Sony it seems that  
22 | that would be permissible. So, as I say, that drafting was sent back to us as a  
23 | proposal from BT, with which we agreed, and that is the basis on which we updated  
24 | the Tribunal yesterday.

25 | MR JUSTICE WAKSMAN: Yes.

26 | MR ARMITAGE: But I do not think there is any disagreement as to the – either the



1 principle that this can be done, or the appropriate wording. I think that is agreed  
2 wording. What I think BT's letter yesterday was a reference to was a question of  
3 whether the Tribunal's rules require it to direct a further opt out period and it --  
4 MR JUSTICE WAKSMAN: Why do I not hear from Mr Beard, and then we can find  
5 out the extent of any objection.  
6 MR ARMITAGE: I am grateful.  
7 MR BEARD: We were trying to be helpful by sending the wording across because  
8 we did not think their own wording achieved what they were trying to do.  
9 MR JUSTICE WAKSMAN: Right. Yes.  
10 MR BEARD: So, we thought, let us get that off the table.  
11 MR JUSTICE WAKSMAN: Right.  
12 MR BEARD: So, we sent that wording across, that if it is appropriate to recertify this  
13 case with a different class definition up until today's date, then this wording would be  
14 the appropriate wording.  
15 MR JUSTICE WAKSMAN: Right.  
16 MR BEARD: But there is a question of whether or not that is in fact appropriate and  
17 that does go to what is required to be done here, the rules, and what is said in Sony.  
18 Now, I am very happy to run through that if that is useful to the Tribunal, but that is  
19 the position.  
20 MR JUSTICE WAKSMAN: Well, just give me one second. (After a pause) This is  
21 paragraph 45 of your skeleton argument. Is that right?  
22 MR BEARD: You are probably ahead of me. I will just check.  
23 MR JUSTICE WAKSMAN: But 47 you say, "Given the proximity to the start of trial  
24 [etcetera] BT does not as a matter of principle object to the CR's proposed  
25 procedural shortcut of amending the case". Now, I thought therefore you were  
26 agreeing to the amendment.

1 MR BEARD: No, we are not agreeing to the amendment. We are agreeing to the  
2 procedural shortcut because we need to go back to Sony --

3 MR JUSTICE WAKSMAN: Yes, but you say you agree to their procedural shortcut  
4 of amending the existing CPO.

5 MR BEARD: Yes, rather than starting a new CPO, which is what Sony says.

6 MR JUSTICE WAKSMAN: Right. Well, what is it you think should be done?

7 MR BEARD: So, I am going to have to go backwards if you do not mind, sir, in  
8 relation to this. Can I just go to Sony because I think this clarifies how this debate  
9 has both developed and got confused. So, Sony is {G/12}. Thank you. The relevant  
10 part starts at page 23 in {G/12}.

11 MR JUSTICE WAKSMAN: Yes, but hang on. Just before we do that --

12 MR BEARD: Yes.

13 MR JUSTICE WAKSMAN: I just want to know what it is you say should be done  
14 here. As I understand it, you are not objecting as a matter of principle, to take  
15 account of the Sony point. You say it has got to be done in a different way. What is  
16 it that you are asking the Tribunal to do in order to deal with this?

17 MR BEARD: We are saying that this approach does not work because you do not  
18 have – you have not dealt with the structure of what you need to do as a Tribunal,  
19 which is to decide whether or not this extended class should be certified and in doing  
20 that you need to work out what the notification opt-out period should be for any class  
21 in relation to it.

22 MR JUSTICE WAKSMAN: So, you are saying there has to be a new opt-out period.  
23 Is that right?

24 MR BEARD: There would have to be, yes.

25 MR JUSTICE WAKSMAN: Yes. Right.

26 MR BEARD: You cannot make this amendment on its own because if we go back to

1 the old CPO, which this is an amendment to, you can see that in the bundle --

2 MR JUSTICE WAKSMAN: Just give me one moment, Mr Beard, I just want to....

3 (After a pause) Mr Beard, what we are going to do here is push this down the  
4 agenda otherwise we are going to spend an inordinate amount of time on it now and  
5 we have got much more pressing matters. So, what I am going to do, as it seems to  
6 me that the parties are not exactly seeing eye to eye -- you are saying they should  
7 do something and they are saying, "we do not have to" -- is, later on, or over the  
8 adjournment, the luncheon adjournment, you can see if you can sort it out and if not  
9 we will deal with it at the end of the day.

10 MR BEARD: Absolutely.

11 MR JUSTICE WAKSMAN: Right. Thank you. Then that brings us to item three  
12 which is a question of Mr Le Patourel. Now, this I think, Mr Beard, is really -- I think it  
13 is probably -- we had better understand what your application is.

14 MR BEARD: Well, we do not particularly have an application in relation to it. Sir,  
15 what we have is a situation where we are dealing with a rather remarkable position  
16 where ordinarily you would expect there to be factual evidence being brought in a  
17 claim of this sort. There is not any factual material being put forward. The only  
18 factual material that has been proffered has been that from Mr Le Patourel in his  
19 witness statement. Now, Mr Le Patourel, in his witness statement, talks about things  
20 like the role of Ofcom, what he asserts is the basis for the case, and so on. Indeed,  
21 it was on the basis of that evidence that the certification was made. We say, well, if  
22 you have proffered a witness upon which you are continuing to rely, then in those  
23 circumstances we want the opportunity to cross-examine them. We have not  
24 decided precisely what we are doing and obviously this Tribunal would not be asking  
25 me precisely what the questions were that I was going to be asking him, but the point  
26 is this; it appears to be being suggested by the class representative himself that

1 once he has given evidence for the purpose of certification, that that evidence is no  
2 longer somehow live for the purposes of the trial. We simply do not accept that. I  
3 think it is perhaps useful just to bear in mind what section 47B actually says in  
4 relation to these issues.

5 MR JUSTICE WAKSMAN: Yes. Yes.

6 MR BEARD: Because section 47B, which is in {G/19} in the Opus listing, but you  
7 may have it loose as part of the Competition Act --

8 MR JUSTICE WAKSMAN: Just a second, please. G. Yes. 19. Yes.

9 MR BEARD: Yes, so we know that 47A says that in proceedings before the Tribunal  
10 for claims for damages a person may make a claim to which this section applies, and  
11 then of course 47B brought in the new collective proceedings mechanism, so "...  
12 (subject to the provisions of this Act and Tribunal Rules) bring proceedings before  
13 the Tribunal", combining two or more claims.

14 MR JUSTICE WAKSMAN: Yes.

15 MR BEARD: So, that is section 47A claims. Then (2) is, the commencement of  
16 those claims by someone who proposes to be the representative. Then (4) is  
17 important. It says collective proceedings may be continued only if the Tribunal  
18 makes a collective proceedings order. In other words, you put forward material, both  
19 factual and expert as you wish, in order to seek the collective proceedings order, in  
20 order to proceed with the claims, the section 47A claims that you group together in a  
21 collective action. So, you continue that, and it is of course worth also bearing in  
22 mind that 47B(9) says, the Tribunal may vary or revoke a collective proceedings  
23 order at any time. Now, of course, if you are saying: no, no, I do not rely on this  
24 witness evidence anymore, then there is going to be an issue arising about what the  
25 basis for the continuing certification would be. So, we say, it is plain that if you put  
26 forward evidence in certification proceedings, you cannot say: oh well, I am not

1 relying on it for any other purposes. That is live in the proceedings, and we are  
2 entitled to cross-examine in relation to it, and that is the simple point here. We do  
3 not anticipate there will be lots of cross-examination; there may indeed not need to  
4 be, but the principle that we cannot cross-examine someone in relation to a witness  
5 statement that they put in, in relation to these proceedings, is plainly wrong. In  
6 relation to the materials that he does refer to – I can go to his witness statement –  
7 but as you will recall, he talks about what Ofcom did and did not do, what he did and  
8 did not do at Ofcom, and what his views about various aspects of the case are.  
9 Now, as I say, the importance of this factual evidence may not be enormous, but the  
10 principle that we cannot cross-examine is plainly wrong, and we say therefore, you  
11 just need to accommodate that within the timetable. It is as simple as that. I can  
12 develop it further by going to the material, but you have the point I think.

13 MR JUSTICE WAKSMAN: Well, I would like to know how on earth you think this is  
14 going to be relevant. That is probably a good starting point.

15 MR BEARD: Well, that issue is one that we will obviously consider whether or not --

16 MR JUSTICE WAKSMAN: No, we are not prepared to do it on that basis I am afraid,  
17 Mr Beard, and I will tell you why.

18 MR BEARD: Yes.

19 MR JUSTICE WAKSMAN: Because we are here trying to manage this case, and  
20 manage the timing of this case and if, apart from the question as to whether they are  
21 proffering it in the way that you suggest, and I will have to find out about that, but it is  
22 important for us in managing this case to know whether there is something  
23 substantive here or whether there is not. Whether you want to ask me for five  
24 minutes or not, I am not prepared to just leave that hanging in the air, but I do have a  
25 question which I think we are entitled to ask since we are the ones who have to  
26 decide all of the issues here. It is what possible relevance there could be, assuming

1 | you are not going to start saying that he has somehow got an animus against BT, or  
2 | he is acting in bad faith or something, in which case it is a bit late, how on earth it is  
3 | going to assist us.

4 | MR BEARD: Well, perhaps it is worth turning up {K/1} --

5 | MR JUSTICE WAKSMAN: Yes.

6 | MR BEARD: -- is Mr Le Patourel's statement.

7 | MR JUSTICE WAKSMAN: Right. Just a second, please. Yes. His first statement?

8 | MR BEARD: Yes.

9 | MR JUSTICE WAKSMAN: Yes.

10 | MR BEARD: That is what I focus on here. So, if we just go on to paragraph 16 on  
11 | page 6.

12 | MR JUSTICE WAKSMAN: Yes.

13 | MR BEARD: You will see there, at 16, he explains how these claims rely on a  
14 | factual basis on the material set out in Ofcom's 2017 review, and the effects of the  
15 | commitments. Then you will see, as you turn through this, the extent of reliance in  
16 | relation to the factual evidence that is being put forward in relation to these matters,  
17 | as we work our way through.

18 | MR JUSTICE WAKSMAN: Yes.

19 | MR BEARD: If we go on to paragraph -- say, 44, which is on page 15.

20 | MR JUSTICE WAKSMAN: Yes.

21 | MR BEARD: He makes assertions about BT's treatment and factual assertions  
22 | about what BT relied on in relation to these customers. He then talks about split  
23 | purchase customers, and in particular goes on to talk about vulnerable and older  
24 | customers, and makes very -- a range of assertions about the conduct of BT and the  
25 | make-up of the class, which are the factual assertions that are being made by him,  
26 | and then, when we get into the further part of his statement, and this is particularly

1 significant potentially in relation to cross-examination, we have from paragraph 62  
2 onwards, a description of his role at Ofcom in relation to matters of consumer policy,  
3 protection, and in particular, his consideration of the general conditions on which BT,  
4 and indeed other telecom operators were supposed to operate, which as you know  
5 from the material that we have seen previously include in particular material going to  
6 the notifications that had to be given that were required by Ofcom and indeed the  
7 termination provisions that had to be publicised by Ofcom. All of these are matters in  
8 respect of which he has given evidence. Now, it is correct, of course, that  
9 subsequently, the experts had made assertions differently in relation to certain  
10 aspects of this material and assertions in relation to the nature of the characteristics  
11 of the class and so on, but we are entitled to challenge the basic factual assertions  
12 made here and test, if we so wish, the position that he was adopting and his  
13 experience at Ofcom in relation to these matters which he relies on in relation to  
14 these statements. In those circumstances, we say it will probably be quite brief  
15 because we absolutely recognise that these matters, particularly in relation to the  
16 characteristics of the class, have been developed further in other material, but we  
17 say we are entitled to cross-examine him in relation to those fundamental issues of  
18 reliance on those matters which started this case and we say are fundamentally  
19 wrong, and his approach to matters in relation to Ofcom, which again, we say are  
20 fundamentally wrong.

21 MR JUSTICE WAKSMAN: Right.

22 MR BEARD: So --

23 MR JUSTICE WAKSMAN: I see.

24 MR BEARD: -- I hope that assists.

25 MR JUSTICE WAKSMAN: Thank you very much. Yes.

26 MS KREISBERGER: Thank you, sir. I think the short answer to Mr Beard's point is

1 that we do not rely on any of this evidence for trial.

2 MR JUSTICE WAKSMAN: No. Well, that is what I thought you were going to say.

3 MS KREISBERGER: Sir, it might just help -- I am not sure you need to hear me at  
4 length, but just to --

5 MR JUSTICE WAKSMAN: You are not calling him as a witness.

6 MS KREISBERGER: We are not calling him as a witness, and actually I was just  
7 going to draw to your attention the directions that you gave in July of this year.

8 MR JUSTICE WAKSMAN: Thank you.

9 MS KREISBERGER: That is in the PTR bundle. Bundle 1, tab 10. They begin at  
10 page 117. These were the directions to trial back in July of this year.

11 MR JUSTICE WAKSMAN: Sorry, which bundle are we in?

12 MS KREISBERGER: So, I am in PTR bundle. It is marked 'I'

13 MR JUSTICE WAKSMAN: Yes. Hearing bundle.

14 MS KREISBERGER: I am working on a hard copy.

15 MR JUSTICE WAKSMAN: Yes.

16 MS KREISBERGER: So, you see these were the Tribunal's directions, and the  
17 timetable was set, you see, on page 119.

18 MR JUSTICE WAKSMAN: Sorry, I am just -- sorry --

19 MS KREISBERGER: I am sorry, there are different page numberings.

20 MR JUSTICE WAKSMAN: That is my fault. It is my fault. No. PTR bundle 'I'.

21 MS KREISBERGER: PTR bundle I -- I think I have given you a --

22 MR JUSTICE WAKSMAN: Have we got a divider.

23 MS KREISBERGER: Tab 10, but it is behind C.

24 MR JUSTICE WAKSMAN: That is all right. That is all right. I have got that. Yes.

25 MS KREISBERGER: Slightly confusing. Page -- so it begins on page 117.

26 MR JUSTICE WAKSMAN: Yes.



1 MS KREISBERGER: Behind the tab. That is the front page of the order. Then if  
2 you go to page 119.

3 MR JUSTICE WAKSMAN: Yes

4 MS KREISBERGER: You see, timetable for pleadings. Those are the amended  
5 pleadings, and then timetable for factual evidence, and there is the direction that BT  
6 serves its factual evidence by 3 August.

7 MR JUSTICE WAKSMAN: Yes.

8 MS KREISBERGER: Had the class representative wanted to adduce evidence  
9 himself on behalf of his own case, that would have had to be reflected in that order  
10 and in those circumstances, he would have been tendered for cross-examination,  
11 but Mr Le Patourel did not apply to put in a witness statement, and it would be a very  
12 odd thing for him to do, of course. So, the evidence that Mr Beard took you to was  
13 evidence before the Tribunal for the purposes of certification. It is not – no reliance  
14 is placed on those witness statements. The world has moved on. I will not be taking  
15 the Tribunal to those witness statements at trial.

16 MR JUSTICE WAKSMAN: Thank you.

17 MS KREISBERGER: So, in those circumstances, it is BT that would need to apply  
18 to summon Mr Le Patourel if that is what they wanted to do.

19 MR JUSTICE WAKSMAN: Thank you.

20 MS KREISBERGER: Thank you, sir.

21 MR BEARD: Well, if you put in a witness statement, you do not need further  
22 directions, so we are not sure that that takes matters any further forward. We note  
23 that Ms Kreisberger's position is that she will be adducing no factual evidence in  
24 support of her case. That is a significant matter that we will be coming back to in the  
25 course of our submissions, if the Tribunal – in particular if the Tribunal does not  
26 permit cross-examination, but we emphasise that if the Tribunal does not find it

1 appropriate to do so. There may well be a need to understand whether or not this is  
2 still being relied on for the purposes of the maintenance of certification, because we  
3 do need to understand whether or not this is relied on for certification purposes or  
4 whether other evidence is now relied on for the continuing maintenance of  
5 certification, because as I took you to section 47B, this Tribunal can revisit that issue  
6 and so we just need to understand that position, even if the Tribunal is minded not to  
7 allow cross-examination.

8 MR JUSTICE WAKSMAN: We will make a ruling on this now.

9 (11.11)

10 (Ruling given, see separate transcript)

11 (11.15)

12 MS KREISBERGER: I am very grateful. Sir, I think in that case we move on to item  
13 4 on the agenda, which is the timetable to trial.

14 MR JUSTICE WAKSMAN: Yes.

15 MS KREISBERGER: Now, this is happily the subject of agreement between the  
16 parties, subject to the Tribunal's permission. What we propose jointly is sequential  
17 exchange of skeleton arguments with the class representative's skeleton being  
18 served on 10 January.

19 MR JUSTICE WAKSMAN: Yes.

20 MS KREISBERGER: BT's skeleton a week later, on 17 January.

21 MR JUSTICE WAKSMAN: Yes.

22 MS KREISBERGER: And the parties jointly seek a direction to set aside the usual  
23 page limit of 20 pages. We had originally proposed 60 pages. BT asked for 75. We  
24 would be content with that, as I say, subject to the Tribunal's direction.

25 MR JUSTICE WAKSMAN: Just one moment. (Pause). Yes, 75 is fine.

26 MS KREISBERGER: I am grateful. So that, sir, deals with the timetable to trial.

1 MR JUSTICE WAKSMAN: Yes.

2 MS KREISBERGER: And that is reflected in the draft order which perhaps we could  
3 pick up at the end.

4 MR JUSTICE WAKSMAN: Yes.

5 MS KREISBERGER: So moving along speedily, that takes us to item 5, which is the  
6 trial timetable itself, where there are differences between the parties.

7 MR JUSTICE WAKSMAN: Now, can we just pause there, please, for this reason.  
8 The Tribunal has been carefully considering the whole question of the trial timetable.  
9 Can I tell you and Mr Beard where we are at, at the moment?

10 The first thing is that we think, for reasons we will explain, the trial timetable is  
11 actually quite tight. So far as we and the CAT are concerned, if appropriate, and we  
12 think it will be, we can sit in the week commencing 18 March, although at the  
13 moment the trial timetable is finishing on 15 March. Let me explain where we have  
14 got to.

15 First of all, we agree with BT that there should be a day and a half's opening for each  
16 side in principle, so that there are three days spent in opening. For our part - but we  
17 know this is not accepted by BT and we will hear what they have to say - for our part,  
18 we would find it most helpful to have CR opening, followed immediately by BT  
19 opening, followed by a short opening from the CMA without it being interposed in  
20 some other way.

21 So far as the expert witnesses are concerned, and for these purposes I am not going  
22 to introduce the wrinkle of any cross-examination of Mr Le Patourel, but if they want  
23 to issue a witness summons they can feed that in, but broadly speaking we then  
24 have four days for factual witnesses and, if that is right, then those four days would  
25 start on Day 4, which is 1 February, and they would end on 7 February. We would  
26 then have a day's pause where the court does not sit on 8 February before starting

1 the expert evidence. Now, on our calculations, the CR's provision for expert  
2 evidence is about 11 days, I think, and BT's is about 13 or possibly 13 and a half.  
3 For our part, as I say this is all subject to submissions you may wish to make, but for  
4 our part we think that the right overall period for cross-examination of experts is 13  
5 days.

6 If you did that, and just take the dates from me for a moment, the expert evidence  
7 would finish on Monday, 4 March. There would then be non-sitting/reading days  
8 from 5 to 8 March and 11 and 12 March. We would then propose written closings on  
9 13 March with the oral closings starting on Tuesday, 19 March. We feel we could do  
10 with an extra day in between written closings and hearing the oral closings, which  
11 that would allow for. So that the last event will be the oral closings starting on  
12 Tuesday, 19 March and then ending on Friday, 22 March.

13 I should say that we also consider, but this will be dealt with separately, that this is  
14 a case fit for hot tubbing in respect of all topics. Now, I will hear both of you on this,  
15 but I imagine that the first thing you would need to ascertain is your availability in the  
16 week commencing 18 March and, as we have just gone through this obviously we  
17 have not been able to give you any advance notice of it. One of the factors that we  
18 have taken into account is that, although the class representative said only 11 days,  
19 and although hot tubbing as a process is meant to shorten the cross-examination  
20 that follows, it does not always happen like that, so we have to build in a hot tubbing  
21 element. So before delving any further, that is really where we are at the moment.

22 MS KREISBERGER: I am extremely grateful for that. Might I just take instructions  
23 very briefly?

24 MR JUSTICE WAKSMAN: Yes, yes. (Pause).

25 MS KREISBERGER: Sir, that is extremely helpful. We are content with all of those  
26 proposals. I can confirm availability for that additional last week in March.

1 MR JUSTICE WAKSMAN: Right. Before we do any more, let me just hear what  
2 Mr Beard's side's position is, if he knows. (Pause). It is all down to you, Mr Beard.

3 MR BEARD: Apparently. Yes, we can run into 18 March.

4 MR JUSTICE WAKSMAN: Right.

5 MR BEARD: The only issue I would raise is that experience tells, and obviously this  
6 is a matter for the Tribunal, that sometimes it is useful to have a little bit of spill over  
7 at the end of a week where you have closings in case they run over. Now, the  
8 difficulty is I just wonder whether it might be better to start closings on that Monday.

9 MR JUSTICE WAKSMAN: Right, let me explain to you candidly why we have said  
10 the Tuesday at the moment. The only reason, we entirely agree with you, we would  
11 normally have done that on the Monday. There is an accommodation problem at the  
12 moment. Now, it may be as this is, I mean, this is submissions and not evidence,  
13 that there is a way for us to overcome that.

14 MR BEARD: Right.

15 MR JUSTICE WAKSMAN: We would be very much in favour of that ourselves. So if  
16 you can leave that with us for the moment.

17 MR BEARD: Yes, it is not going to make any difference (inaudible).

18 MR JUSTICE WAKSMAN: No, but we have to make some administrative  
19 arrangements. I think we are hopeful we can do something about it and start on the  
20 Monday. It may be you will not be in the same room as it would be for the rest of it,  
21 but I am not sure that matters.

22 MR BEARD: No. I understand that there are complications when you have the  
23 whole Opus system set up, and so on. But anyway --

24 MR JUSTICE WAKSMAN: We take that very much on board and we will try to --

25 MR BEARD: Experience says otherwise. You end up on the fourth day on the Friday  
26 and everyone is wilting slightly and you are trying to rush things through and it tends

1 not to be such a great (inaudible).

2 MR JUSTICE WAKSMAN: Right.

3 MR BEARD: The other thing is that it's fine for the CMA to come after, but I think it is  
4 sensible - it may not be necessary - but just to have a caveat that if there are  
5 particular observations that either side want to make about the CMA submissions,  
6 they are made at the start. Because otherwise there is a danger that you do not then  
7 come back to those issues until closing. I am not sure that will be necessary, but I  
8 think it is sensible to make a provision of that sort because if the CMA were to say  
9 something that either side strongly disagreed with in relation to the legality, it is  
10 better that the Tribunal knows at the outset before we are into evidence, and so on.

11 MR JUSTICE WAKSMAN: Well, I think that the thing is, we did agree with you that  
12 each side needs one and a half days.

13 MR BEARD: Of course.

14 MR JUSTICE WAKSMAN: Now, the more you break into that three-day period, the  
15 less you are going to have because you are not going to have a day and a half if  
16 there is a provision for CMA and then possibly some comeback on it. So from our  
17 point of view, and not in any way lessening the impact of what the CMA wants to  
18 say, but you are the two protagonists in this case and we will be very much assisted  
19 by an opening of reasonable length on the issues. I mean, what I would propose,  
20 what I would suggest at the moment is that I would not, well, we would not, I think,  
21 see the CMA as having more than two hours.

22 MR BEARD: I think they have asked for an hour.

23 MR JUSTICE WAKSMAN: They have asked for an hour.

24 MR BEARD: And I think we budgeted for an hour. I think that was what was agreed.

25 MR JUSTICE WAKSMAN: You budgeted for an hour, so half an hour off each.

26 MR BEARD: Yes, half an hour off each. And all I am talking about is ordering

1 effectively, but I think if the CMA have an hour at the end of the openings, fine. All I  
2 am saying is that it is more sensible that if either party has something to say about  
3 the CMA's submissions, that is dealt with by the protagonists before you then  
4 disappear into several weeks of evidence and they only re-emerge in closing.

5 MR JUSTICE WAKSMAN: Yes, I regard this as a matter of trial management.

6 MR BEARD: Yes, fine.

7 MR JUSTICE WAKSMAN: So I think what we will do is it will be one and a half days  
8 each, slightly less, less half an hour.

9 MR BEARD: Yes.

10 MR JUSTICE WAKSMAN: We will have the CMA starting at 3.30 for an hour. If at  
11 the end of their submissions either of you pops up and says, "Look, there is  
12 something here that we really have to respond to", we will work that into the trial  
13 timetable. We will not leave it for six weeks; we can work it in to come forward at the  
14 earliest opportunity.

15 MR BEARD: Yes, absolutely. At the moment you have budgeted four days for fact  
16 witnesses.

17 MR JUSTICE WAKSMAN: Yes.

18 MR BEARD: Now, the Tribunal may have particular questions it wants to ask fact  
19 witnesses. Ms Kreisberger had budgeted three and a half days for her  
20 cross-examination. Now, I am not holding her to that at this stage.

21 MR JUSTICE WAKSMAN: I see. Did she?

22 MR BEARD: Yes. I think --

23 MS KREISBERGER: I think we had an overspill.

24 MR JUSTICE WAKSMAN: I see.

25 MS KREISBERGER: In total it could go to four days. You will see there, there is  
26 provision for preparation for hot tubbing.

1 MR JUSTICE WAKSMAN: Yes.

2 MS KREISBERGER: So we are very happy with four days and, as you have  
3 observed, sir, the concern was it might have been a bit tight. So having the extra  
4 week, it makes sense, four days.

5 MR JUSTICE WAKSMAN: As is sometimes said. I mean, that is your four days.  
6 That is the limit. It does not mean you have to use them and it does not mean that  
7 you will be able to go roaming around on questions you otherwise would not be  
8 entitled to ask. So we will keep it to the four days.

9 MR BEARD: I just wanted to be clear, this is using the timetable not sitting on  
10 Fridays, just to double-check that.

11 MR JUSTICE WAKSMAN: Yes. That is, I hope, what we have done on our  
12 calculations.

13 MR BEARD: Yes, and that was the same maths that we had come to, but I just  
14 wanted to double-check that because it matters in the second week. We will finish  
15 on the Wednesday of the second week and then there will be two days before the  
16 weekend and then we start on the evidence.

17 MR JUSTICE WAKSMAN: That is right. You will have ... Day 8 at the moment is  
18 a pause, just before we start the expert evidence.

19 MR BEARD: Yes.

20 MR JUSTICE WAKSMAN: The court will not sit on that date. And the first day of  
21 expert evidence will be Monday the 12th, yes.

22 MR BEARD: Yes.

23 MR JUSTICE WAKSMAN: Right.

24 MR BEARD: Those were just relatively minor observations, but nonetheless  
25 otherwise we are entirely content and I am grateful to the Tribunal for running them  
26 through. Obviously there are issues about the order in which you will need to deal



1 with things.

2 MR JUSTICE WAKSMAN: Yes.

3 MR BEARD: And the course of, given the indication you have given that hot tubbing  
4 is suitable, obviously there is an extent to which we are in the Tribunal's hands in  
5 relation to this because the hot tub was, but we are more than happy to assist with  
6 proposing agendas, questions, and so on. It depends to some extent how the  
7 Tribunal wants to break these things down and divide labour and we are therefore  
8 slightly in your hands. I can work the topics through if that is of use. But the one  
9 thing we would say is that the proposal from the class representative that  
10 cross-examination of witnesses on topics is left to the end does not work.

11 MR JUSTICE WAKSMAN: Let me cut through that again and say what our  
12 provisional view of that is. We think, and I am going to come to the topics in  
13 a minute, but we think that both the hot tubbing session and the cross-examination  
14 must take place in relation to each topic as that topic is dealt with. Now, unless you  
15 want to object to that, Ms Kreisberger?

16 MS KREISBERGER: We do not have a strong objection to that.

17 MR JUSTICE WAKSMAN: Right.

18 MS KREISBERGER: I think this will fall out in relation to the topics themselves. So  
19 it might just be helpful for me to foreshadow our main concern with BT's approach to  
20 topics and time scheduling it all, which is on their approach, if you take, for instance,  
21 Mr Parker --

22 MR JUSTICE WAKSMAN: Yes.

23 MS KREISBERGER: -- his attendance at trial, on their approach, he attends for 11  
24 days.

25 MR JUSTICE WAKSMAN: Yes.

26 MS KREISBERGER: Whereas on ours he attends for five days. So that largely falls

1 out of how you divide up the topics, but we would really like to avoid a very inefficient  
2 revolving door of experts.

3 MR JUSTICE WAKSMAN: We can see that. We have given some thought to that  
4 as well.

5 MS KREISBERGER: I am grateful.

6 MR JUSTICE WAKSMAN: And we have got in mind what we think would be  
7 a logical division of topics. Now, this will not be agreed by both sides and we will  
8 have to hear from you on it. Our view at the moment is that the topics should be,  
9 and in this order; market definition and dominance, then limb 1, then limb 2, then  
10 class characteristics or behavioural economics, then actuarial evidence, then  
11 quantum. Now, we are very conscious of the fact that there is a regulatory element  
12 in all of this and I will want to hear from Mr Beard about it. At the moment, we do not  
13 think that we would be assisted by an initial topic simply on the question of the  
14 regulatory framework. We understand how it plays into the arguments and we can  
15 see how it can play into both limb 1 and limb 2. But, as the experts who will be  
16 giving the evidence on the regulatory side of things, are going to be giving evidence  
17 on those two matters in any event, we would have thought that a way could be  
18 devised for them to feed in what they want to say on the regulatory framework's  
19 impact or otherwise within those two topics. Because at the moment we do not think  
20 it will be terribly useful, as it were, to have that as some discrete opening topic. Now,  
21 that is probably your position.

22 MS KREISBERGER: That is our position.

23 MR JUSTICE WAKSMAN: So I need to hear from Mr Beard about that.

24 MR BEARD: I will take you very briefly to one or two of the aspects of Mr Matthew's  
25 report.

26 MR JUSTICE WAKSMAN: Yes.

1 MR BEARD: And the response that is given, just to explain why we thought that was  
2 a sensible contextual framing in a second.

3 MR JUSTICE WAKSMAN: Yes.

4 MR BEARD: But let me cut through slightly. We are not disagreeing that those  
5 issues then go to limb 1 and limb 2. Part of the issue is you slightly complicate the  
6 way in which the hot tubs work, whereas if you deal with this as a first issue, what  
7 you end up doing is having Mr Matthew and Mr Parker dealing with those things at  
8 the outset and then you effectively move to topics within limb 1 that will  
9 predominantly be between Mr Duckworth and Mr Parker on one side and Dr Jenkins  
10 on the other. And then in limb 2 you will be predominantly dealing with Mr Parker  
11 and Dr Jenkins. So there was a sense in which we were trying to streamline these  
12 issues. We are not trying to say it is a wholly independent floating issue.

13 MR JUSTICE WAKSMAN: No.

14 MR BEARD: We were thinking about the best way in which you did it. And I think it  
15 probably is - if you will bear with me - if I can just briefly say why we thought in these  
16 terms.

17 MR JUSTICE WAKSMAN: Yes.

18 MR BEARD: And I think it is then just useful looking at the material that we were  
19 focused on and why we thought that it was not a bad idea, to put it first.

20 MR JUSTICE WAKSMAN: Yes.

21 MR BEARD: Actually the way to do it is probably just to go to Mr Matthew's first  
22 report. And obviously this is going to be finally what you have in due course, but if I  
23 could.

24 MR JUSTICE WAKSMAN: Yes.

25 MR BEARD: It is in the inner confidentiality ring, bundle E, tab 19 is where it starts.  
26 That is his first report. And I will not take you through his introduction. If we just pick

1 it up at page 13. There you have the section which then runs for several pages  
2 where he is considering the economics of ex ante regulation and therefore the  
3 significance here of the existence of a sectoral regulator and also the issues that  
4 arise when you are dealing with excessive pricing issues in relation to ex ante and ex  
5 post analysis.

6 And then if we jump forward, as I say, I am not going to take you through all the  
7 details of this, but this is obviously highly significant as to how you think about these  
8 questions in context. Then if we move forward to page 55 in the electronic bundle,  
9 so this is after the section on ex ante analysis, you then have the ex post  
10 consideration of excessive pricing and how one should frame the economic analysis  
11 by reference to that. And you will see, if we go over the page, he just frames that, in  
12 paragraphs 160 and 170, how he is then thinking about those sorts of issues in the  
13 context of the existence of the difference between ex ante and ex post and the  
14 existence of a regulator.

15 The other point that I will just touch on here, I can come back to this later if needed,  
16 but if we then go on to page 69, you then have within this, I am just picking up one of  
17 the issues --

18 MR JUSTICE WAKSMAN: Yes.

19 MR BEARD: -- you have this question about whether, fundamentally, the issue of ex  
20 ante versus ex post analysis means that you have an impact on the way in which  
21 regulation operates and the effects on the market. Now, of course we understand  
22 that you can feed these issues through into limb 1 and limb 2.

23 MR JUSTICE WAKSMAN: Yes.

24 MR BEARD: But if you think about United Brands, you have to be a little bit careful,  
25 but it breaks the question down into limb 1 and limb 2, but there are broader issues  
26 here. And actually you will see that we provided, I am not sure it is actually in the

1 bundle, but I think we provided copies of the AKKA/LAA decision, which is again  
2 a case that we are going to come back to. And I think it is just useful for the Tribunal  
3 to have this handed up, just for the Tribunal. I think you have them.

4 MR JUSTICE WAKSMAN: This is not in the --

5 MR BEARD: No. And this is going to be a decision we come back to. It is  
6 a European decision about excessive pricing. I just want to point you in the direction  
7 of the Advocate General's opinion in relation to it.

8 MR JUSTICE WAKSMAN: Yes.

9 MS KREISBERGER: Sorry, I do not think we have had that.

10 MR BEARD: Have you not had that? (Pause). So, this is Advocate General Wahl  
11 and I am just going to go to that, the opinion, rather than the judgment here.

12 MR JUSTICE WAKSMAN: Yes.

13 MR BEARD: He was the Advocate General, he is now a Judge, I think, in the Upper  
14 Court. But if we just pick it up at paragraph 32, what he is doing is discussing how  
15 you approach excessive pricing cases. Now, I am not going to work through this,  
16 this will be part of submission, but you see under the heading "General Remarks", he  
17 talks about no single method or test, and he works his way through some of the  
18 complications of attribution of costs, and so on, that we will be coming back to.

19 MR JUSTICE WAKSMAN: Yes.

20 MR BEARD: And he also then talks about the benefits or otherwise of combining  
21 different methods. That is from 43 down. But then he also talks about additional  
22 indicators that feed into the analysis. This is within the framework of consideration  
23 under the United Brands.

24 MR JUSTICE WAKSMAN: Yes.

25 MR BEARD: And it is just worth bearing in mind what he says. So 47 and 48 are  
26 about high barriers to entry and then at 49 he is talking about how the existence or

1 otherwise of a regulator will affect the way that you should look at whether or not  
2 there is excessive pricing when you have a competition sector regulator there. So  
3 these are all factors, we accept, that will go into United Brands. So I am not  
4 disagreeing with the position.

5 MR JUSTICE WAKSMAN: No.

6 MR BEARD: But the reason we say this is important is because we think that these  
7 are salient issues which have effectively been intentionally downplayed by the class  
8 representative in relation to this and we can see that if we then skip across to  
9 Mr Parker's report, the reply report, because he just lives in denial about these things  
10 broadly speaking in his first report. But if we go to inner ring E, tab 5, at page 180.

11 (11.41)

12 MR JUSTICE WAKSMAN: Inner ring E, yes.

13 MR BEARD: He deals very briefly at paragraph 8.27 where he is making his  
14 references to Mr Matthew's evidence, and if we go over the page, he is just very  
15 dismissive of these issues at 8.3.1, if we go down the page, where he just says: "I  
16 don't consider that the existence of a...regulator to be relevant to the question"  
17 essentially. There is clearly a big issue here about the role of the regulatory  
18 framework and how that fits into ex-post/ex-ante. Mr Matthew provides quite a full  
19 account of these issues. We understand the class representative is trying to side  
20 step a number of these things, but that was part of the reason why we thought it was  
21 important in terms of identifying this as an issue, that it was seen as part of the  
22 context. As I say, in terms of streamlining the process, because we have got  
23 someone different dealing with these issues, essentially Mr Matthew could be  
24 dealing with Mr Parker in a hot tub on that on its own, otherwise Mr Matthew will join  
25 the Limb 1/Limb 2 hot tubs with the others, and we will have to make sure there are  
26 agenda items covering this and framing it. Of course, we recognise that is entirely

1 possible, but that was the reasoning behind our suggestion that these broader issues  
2 in terms of framing these questions are dealt with first.

3 MR RIDYARD: Mr Beard, I think you already had Mr Matthew in the Limb 1 and  
4 Limb 2.

5 MR BEARD: We had.

6 MR RIDYARD: In a way, I think we can certainly understand this is a relevant and  
7 interesting issue, but having it integrated within the discussion of Limb 1/Limb 2 in a  
8 way might enable us to engage Mr Parker more than he would otherwise do.

9 MR BEARD: I completely understand. As I say, I was trying to explain why we have  
10 come up with this approach, why we think it is important. If the Tribunal say,  
11 notwithstanding that, we would much prefer it to be dealt with as part of the agenda  
12 in Limb 1 and Limb 2, we completely understand.

13 MR RIDYARD: What I am saying is we understand that, and we thought about it,  
14 and we thought this was the better way of doing it.

15 MR BEARD: We understand there are two ways of doing this, we appreciate the  
16 Tribunal is thinking about these things.

17 MR RIDYARD: We appreciate that BT has obviously given very careful thought to  
18 this and wants to employ, as it were, Limb 1 and Limb 2, or however you slice it up,  
19 but I think we are all very clear that we would actually benefit from hearing about the  
20 regulatory impact in context.

21 MR BEARD: That is absolutely understood.

22 MR JUSTICE WAKSMAN: You would have to split that up.

23 MR BEARD: That is fine, we can deal with that. One other thing, as I say, I do not  
24 know if the Tribunal does want our suggestions on agendas for the hot tubs if we are  
25 going through those topics, or how you want to deal with what can be a substantial  
26 burden for the Tribunal.

1 MR JUSTICE WAKSMAN: Thank you. Just give me one moment on that.

2 (Pause)

3 We think actually it would be a good idea to have suggested agenda items from the  
4 parties first. Obviously we would drive the final agenda as far as that is concerned.

5 Can I just check, what is the date for the final joint statements of the experts?

6 MS KREISBERGER: 15 December.

7 MR JUSTICE WAKSMAN: That is obviously quite important in terms of agenda  
8 items, but then I think we would not expect your suggestions this side of Christmas,  
9 but then they would have to come in fairly early in the new year. We will obviously  
10 be thinking about it once we receive the joint statements, but in order for us to get a  
11 final agenda out sensibly before the trial begins, we will need to have your suggested  
12 agenda items fairly early in January.

13 MS KREISBERGER: Did you have in mind a joint document or one from each party  
14 because we are alert to the problem of --

15 MR JUSTICE WAKSMAN: I think we are capable of discerning what we want to  
16 extract or not from each side's suggestions. Both parties have plenty of other things  
17 to do. Put your suggestions, if you want to try and agree it, that is fine, you will  
18 obviously have to copy each other in on your suggested agenda items, but just  
19 provide them individually.

20 MR BEARD: I am sorry, I was not suggesting --

21 MR JUSTICE WAKSMAN: No.

22 MR BEARD: Can I just clarify one issue in relation to that, neither of the proposed  
23 timetables actually have hot tubbing for class characteristics or actuaries. I am just  
24 double checking that that is what the Tribunal wants to do in relation to those topics.  
25 As I say, no objection, but I just wanted to confirm.

26 MR JUSTICE WAKSMAN: I think the answer is that at the moment it will be hot



1 | tubbing for all. We can see that it is possible that in relation to those two disciplines  
2 | it might change, but, if so, we will let you know in good time.

3 | MR BEARD: That is absolutely fine, I just wanted to clarify just because of that.

4 | Can I just double check one thing, which is the approach to purdah in relation to  
5 | these issues.

6 | MR JUSTICE WAKSMAN: Yes.

7 | MR BEARD: The approach that has been adopted previously is that once the hot  
8 | tub is closed, and you will then have the serial cross-examination, all of the  
9 | witnesses, except for the one that happens to be consecutive, are released from the  
10 | ordinary rules of purdah, so that they can be talking to their clients whilst the  
11 | cross-examination of the first person is going on, because otherwise you get a  
12 | slightly odd situation whereby the first person that is cross-examined is then released  
13 | from purdah on the topic, because I am assuming that we would release from purdah  
14 | after each topic, you end up with a slightly odd situation where it depends on who is  
15 | effectively cross-examined first, which does not happen in other circumstances  
16 | because of course someone has not been sworn in at that time. The way we have  
17 | worked it previously is everyone is sworn in, then people are released from purdah  
18 | during any residual cross-examination so that they can talk to their respective teams.

19 | MR JUSTICE WAKSMAN: You mean you are released from purdah immediately  
20 | after the hot tubbing session stops?

21 | MR BEARD: Yes, exactly, rather than at the end of the topic, because otherwise you  
22 | get a slightly arbitrary effect as to who can talk to whom on either side, depending on  
23 | the order of calling, and that only arises because you have the hot tub first, and  
24 | people have been sworn in for the hot tub, whereas in normal cross-examination that  
25 | does not occur because people have not been sworn, that is the way we have  
26 | worked it previously, and I think that is fine. I am not sure if there is any objection,

1 | but I just wanted to clarify that was how we were going to work.

2 | MS KREISBERGER: We do not have any objection to that point. There is one other  
3 | point, if I might just raise that now in relation to the hot tub, we raised it in our  
4 | skeletons, it is in a footnote for the beady eye, footnote 62, PTR bundle 1, tab 1,  
5 | page 20. I do not understand this to be opposed. In other cases, such as Churchill  
6 | Gowns, which was a hot tub run by Mr Ridyard, there was a direction that counsel is  
7 | not required to put the client's full case to the other side's experts in  
8 | cross-examination by virtue of the fact there is a hot tub procedure, and we would be  
9 | asking for the same direction here, otherwise you get a very overly long process.

10 | MR BEARD: That has to be the way it is dealt with, otherwise the hot tub becomes a  
11 | waste of time.

12 | MR JUSTICE WAKSMAN: We agree with that, we will agree with the purdah  
13 | suggestion. I need to give the transcriber a break, so we will take our break now.

14 | (Short break)

15 | (11.50)

16 | (after the break)

17 | MR JUSTICE WAKSMAN: Ms Kreisberger, subject to any other points you want to  
18 | raise, it seems to me that the only other thing that we would quite like to have done  
19 | or agreed in the very near future is the actual breakdown of the number of days per  
20 | topic of the cross-examination of the experts because you were not completely ad  
21 | idem about that anyway.

22 | MS KREISBERGER: Yes.

23 | MR JUSTICE WAKSMAN: You have got --- and we have mentioned on our  
24 | calculation - we have got a total of 13 days and we have got the regulatory element  
25 | blended into limbs 1 and 2.

26 | MS KREISBERGER: Yes.

1 MR JUSTICE WAKSMAN: I do not know whether that is something you think you  
2 can agree or whether I need to hear submissions on it or ----

3 MS KREISBERGER: Sir, I was going to propose that we take that away ----

4 MR JUSTICE WAKSMAN: Right.

5 MS KREISBERGER: -- and perhaps have a tentative agreement but doing it on the  
6 hoof in this way may be a little challenging ----

7 MR JUSTICE WAKSMAN: Right.

8 MS KREISBERGER: --- because we did not account for hot tubbing on the non-  
9 economic issues.

10 MR JUSTICE WAKSMAN: No.

11 MS KREISBERGER: So I think it needs a little thought and it will be more efficient to  
12 write to the Tribunal in the next few days and that will turn it around very quickly.

13 MR JUSTICE WAKSMAN: Yes.

14 MR BEARD: We are certainly happy to try and discuss it ----

15 MR JUSTICE WAKSMAN: Yes.

16 MR BEARD: And, as Ms Kreisberger says, trying to do it now is probably going to  
17 be quite hard.

18 MR JUSTICE WAKSMAN: Can we, therefore, have proposals agreed if possible on  
19 --- if I just put on the split of the 13 days into the different topics by four pm next  
20 Friday?

21 MS KREISBERGER: Yes, sir, that is ----

22 MR JUSTICE WAKSMAN: By four pm on Friday 15 December.

23 MS KREISBERGER: By four pm on Friday, that is achievable, thank you very much,  
24 sir.

25 MR JUSTICE WAKSMAN: Right, okay. Now, on your side, first of all, Ms  
26 Kreisberger, is there anything else we need to deal with now on timetabling?

1 MS KREISBERGER: No.

2 MR JUSTICE WAKSMAN: Right. Mr Beard?

3 MR BEARD: No, nothing, sir, thank you.

4 MR JUSTICE WAKSMAN: Can I just --- it is a very small point but on 22 February, I  
5 have to --- I have an engagement which means that we need to finish at 3.30, so we  
6 will certainly start at least at ten o'clock on that date.

7 MR BEARD: Yes. Ironically, we had that as a spill over into the afternoon.

8 MR JUSTICE WAKSMAN: Ah, well, that is --- that works very well.

9 MR BEARD: It is not that we are stalking your diary or anything!

10 MR JUSTICE WAKSMAN: No, now, we have dealt with the topics, we have dealt  
11 with the order of the topics, if there is nothing else on the order of topics, if there is  
12 nothing else on trial timetable, then we are then into the next agenda item.

13 MS KREISBERGER: That is "list of issues."

14 MR JUSTICE WAKSMAN: Yes, list of issues. We appreciate the efforts that the  
15 parties have made to do combined lists. We were not in the end sure whether you  
16 were agreeing on anything at all in the list of issues or whether you have ----

17 MS KREISBERGER: I can show you ----

18 MR JUSTICE WAKSMAN: Can you take us ----

19 MS KREISBERGER: I will take you to ----

20 MR JUSTICE WAKSMAN: I will hear from Mr Beard in a moment but let me have  
21 Ms Kreisberger's take on this first. I know they have been revised.

22 MR BEARD: Yes, we find it easier if you have them in a single list with who is saying  
23 what, so if you go to {H/110/2} you will see that ----

24 MS KREISBERGER: I am not going to take you to that document. We received  
25 that, I think this morning.

26 MR BEARD: Yes, it is the same wording, it is just easier to read because it is just a

1 list of issues.

2 MS KREISBERGER: If I might just take you to the document in the bundle, sir ----

3 MR JUSTICE WAKSMAN: Right.

4 MS KREISBERGER: Just so that you have it, in supplemental PTR bundle, tab 2, it

5 is page 9 and I have been told off, quite rightly, for not reading out the Opus number

6 which is {J/3.3/1}. This is our summary of what is and is not agreed and you see that

7 the green highlighting relates to issues which are agreed.

8 Just so you have it, if it is helpful to look back at the class representatives' list of

9 issues, just in a clean format --- I do not think it will be necessary but just so you

10 have it, that is at tab 7 of the first PTR bundle.

11 MR JUSTICE WAKSMAN: Is that the same as what is in the left hand column in this

12 ----

13 MS KREISBERGER: Yes, so in the left hand column is what we agree, yes --- sorry,

14 the class representatives' positions.

15 MR JUSTICE WAKSMAN: Yes, that is right.

16 MS KREISBERGER: And the right hand column is the areas of disagreement so I

17 personally find this the easiest document to refer to ----

18 MR JUSTICE WAKSMAN: Yes, so do I.

19 MS KREISBERGER: And I will take you to this ---

20 MR JUSTICE WAKSMAN: Right.

21 MS KREISBERGER: --- to this comparison table. I think it is worth, given some of

22 the points on which we disagree, taking you to a document that you, sir, will be very

23 familiar with which is the Commercial Court Guide on how a list of issues should be

24 prepared or looked at. That is also in the supplementary bundle and that is at tab ---

25 I think it is C, yes, C3 of the supplementary bundle, {G/16} of Opus and if you go

26 forward to page 130 to 131 or {G/16/10}, it is obviously not applicable in this tribunal

1 but it is certainly instructive.

2 MR JUSTICE WAKSMAN: Yes.

3 MS KREISBERGER: The guidance provides that the list should include the main  
4 issues of both fact and law, and this is at D.5.1A, it should identify the principal  
5 issues in a structured manner such as by reference to headings or chapters, long  
6 lists of detailed issues should be avoided, sub-issues should only be identified when  
7 there is a specific purpose in doing so and then on to the next page, A, it is intended  
8 to be a mutual document and of course that is common sense, to be used as a case  
9 management tool. Neither party should attempt to draft the list in terms which  
10 advance one party's case over that of another and it is unnecessary therefore for  
11 parties to be unduly concerned about the precise terms in which the list of issues is  
12 put, provided it presents the structure of the case in a reasonably fair and balanced  
13 way and above all the parties must do their best to spend as little time as practicable  
14 in drafting it and it should be concise.

15 I have to say that we have failed to meet some of those strictures. It has regrettably  
16 become something of a recreation project and I will take you now to the specific  
17 points if I may.

18 So turning up the list of issues, again the supplementary bundle tab 2, page 9,  
19 {J/3.3/1} --- yes, it is on the screen, so the first disagreement brings it back to this  
20 issue of regulatory context.

21 MR JUSTICE WAKSMAN: Yes.

22 MS KREISBERGER: So can I just address you very briefly on number 1?

23 MR JUSTICE WAKSMAN: Yes.

24 MS KREISBERGER: It is in the left hand column, we have let it in.

25 MR JUSTICE WAKSMAN: Yes.

26 MS KREISBERGER: I am surprised that this is an issue in dispute ----

1 MR JUSTICE WAKSMAN: I am sorry, you have just said that you have let it in?

2 MS KREISBERGER: We have let it in. Question 1 is a point that BT seeks to add --

3 --

4 MR JUSTICE WAKSMAN: But to what extent can the findings be evidence?

5 MS KREISBERGER: Yes. This is ----

6 MR JUSTICE WAKSMAN: So you mean that all of this has come from BT?

7 MS KREISBERGER: 1, 2 and 3, all of which are on regulatory context.

8 MR JUSTICE WAKSMAN: Yes, but you have still got on the right-hand side BT's

9 position --- I see, so you have let some of it in but not all of it?

10 MS KREISBERGER: Yes, it is BT's drafting.

11 MR JUSTICE WAKSMAN: It is points 1, 2 and 3 and you have let in point 1?

12 MS KREISBERGER: Precisely. We have let it in because if it is BT's position that

13 this is a matter in dispute, then, okay, it can go on the list.

14 MR JUSTICE WAKSMAN: Yes.

15 MS KREISBERGER: It is a little odd, I just want to flag for you now, it is settled law

16 that, in the Tribunal, findings of competition authorities are admissible evidence and

17 the question which is in the Tribunal's discretion is a question of weight.

18 MR JUSTICE WAKSMAN: Weight, yes. I follow that but what is your problem with 2

19 and 3?

20 MS KREISBERGER: 2 and 3 are --- it is the same objection as we made in relation

21 to the trial timetable, having it as a discrete issue. Let me just summarise crisply the

22 objection; the class representative does not accept that there is a discrete issue as

23 opposed to an evidential question and a disputed issue in the case as to the

24 regulatory context, as BT calls it, of Ofcom's conduct in intervening, monitoring the

25 market. We certainly accept that the evidence is relevant and it is relevant to the

26 question, as you observed, and Mr Ridyard --- it is relevant evidence in relation to

1 the question of unfairness. It is not a discrete issue which arises for determination,  
2 so the first problem is that if we start getting into categories of evidence that are  
3 relevant to unfairness, then a balanced list of issues would require reference to all  
4 sorts of categories of evidence that are relevant on our case and BT's case to  
5 unfairness. It does not merit special treatment and it is not what a list of issues is  
6 intended to achieve. So we think that this is too granular for a start.

7 The second point is that these topics have not been neutrally drafted, it is BT drafting  
8 their arguments into the list. So number 2, to what extent, if any, is the absence of  
9 price intervention relevant? Well, there was not an absence of price intervention.  
10 Ofcom reviewed this market and produced materials and gave conclusions. It did  
11 not impose price caps because BT gave undertakings.

12 MR JUSTICE WAKSMAN: Right.

13 MS KREISBERGER: So it is just not neutrally put.

14 MR JUSTICE WAKSMAN: Just bear with me one moment, please. [After a short  
15 pause] Do you want to say anything more about 2 and 3?

16 MS KREISBERGER: Sir, that --- I would just draw to your attention perhaps helpfully  
17 number 7 ----

18 MR JUSTICE WAKSMAN: Yes.

19 MS KREISBERGER: -- which is on page 13 of tab 5 of Opus. That is where the  
20 unfairness is dealt with and consistently you see on the right hand column we have  
21 taken out the other granular point which also encapsulates BT's case, BT's  
22 arguments on unfairness. We have suggested that they stay out as well if they are  
23 not neutrally put --- it is again slightly too granular. What I am proposing is that we  
24 stay with question 7 on unfairness and we do not have all these sub-evidential  
25 issues going into this list. If we did want to go down a different approach, say, from  
26 the Commercial Court Guide, then the class representative in fairness would need to



1 put in his points on unfairness and then it is not a useful --- it is not a useful exercise.

2 MR JUSTICE WAKSMAN: Where would --- if you say --- we have already said that

3 we can see that contextually the regulatory framework might be relevant to limb 1

4 and limb 2 but just focusing on limb 2 for a moment, for example, if you say that you

5 can quite see that an argument may be made and indeed is made that the question

6 of regulatory framework or the absence of prices eventually is relevant on the

7 question of unfairness, where does that get picked up in 7?

8 MS KREISBERGER: It would be in the headline question about unfairness at 7

9 rather than going through all the points of evidence but there is a range of evidence,

10 economic evidence and other evidence, that goes to the question of unfairness. I

11 think it might just be helpful to make this point; it is not a question of BT relying on

12 Ofcom and the class representative does not; on the contrary, as you will recall from

13 certification, the class representative relies positively --- he makes positive reliance

14 on Ofcom's findings on the excessive price and you are quite right to pick me up, sir;

15 Ofcom found that BT's SFV prices were excessive as well and we rely on that. The

16 problem is that this has not been neutrally put ----

17 MR JUSTICE WAKSMAN: Can I just --- so that we are absolutely clear about it, can

18 we just move --- the stuff in green is all meant to be agreed, is it?

19 MS KREISBERGER: Yes.

20 MR JUSTICE WAKSMAN: What about when we come to item 2(e)? Is that

21 something, as it were, that you have added because they wanted you to add it or ---

22 that is in white?

23 MR BEARD: I am sorry, just to be --- green is actually supposed to be --- not only do

24 we agree on the wording but we actually agree on the substance.

25 MR JUSTICE WAKSMAN: Yes.

26 MR BEARD: Now, actually --- in other words, we agree on the answer ----

1 MS KREISBERGER: Yes, that is right, that is right.

2 MR JUSTICE WAKSMAN: I see.

3 MR BEARD: And we do not agree with all of those greens, which was part of the  
4 reason why we do not like this table version very much. In relation to the white, we  
5 agree broadly with the wordings, except for the small caveats that we have put in.  
6 That is why we have produced the other version of the table because we find this  
7 one actually quite hard to follow, because most of the white --- we decided we are  
8 not going to take issue with it, we have been following the Commercial Court Guide  
9 approach and he--- the class representative- has added all sorts of sub-issues and  
10 we just said, "All right, we are not going to fight about it, just put them in," but there  
11 are one or two where we think he has missed stuff which is what the additions are,  
12 and then we have got the points on issues 2 and 3 which I will come back to.

13 MR JUSTICE WAKSMAN: Right, thank you. So, just to be clear about it ----

14 MS KREISBERGER: The green is not in dispute, so that follows the guidance.

15 MR JUSTICE WAKSMAN: And then item 3 is not in dispute and item 4, dominance -  
16 -- we are talking about the issues now.

17 MS KREISBERGER: So (e) is a disputed issue and there is no disagreement on the  
18 wording.

19 MR JUSTICE WAKSMAN: Yes, you disagree as to what the answer to the question  
20 is.

21 MS KREISBERGER: Yes.

22 MR JUSTICE WAKSMAN: Yes, that is fine, it is entirely up to you to do that but ----

23 MR BEARD: Just to be clear, we do not agree with all the green.

24 MR JUSTICE WAKSMAN: No, fine. I am not going to make any distinctions there,  
25 but then the next item that there is an issue about --- there is a question about what -  
26 -- how the issue should be formulated, is (g). Is that right, 4(g)?

1 MR BEARD: Yes.

2 MR JUSTICE WAKSMAN: So there is a question there. I just want to run through  
3 this.

4 MS KREISBERGER: Yes.

5 MR JUSTICE WAKSMAN: Then we have got wording debates on issue 6.

6 MS KREISBERGER: Yes.

7 MR BEARD: Yes.

8 MR JUSTICE WAKSMAN: Right, and in fact --- yes, so that is --- those are all  
9 wording points and then on limb 2 ----

10 MS KREISBERGER: Limb 2 that is ----

11 MR JUSTICE WAKSMAN: We are back to ----

12 MS KREISBERGER: --- the seller points.

13 MR JUSTICE WAKSMAN: You have those other points.

14 MS KREISBERGER: Yes. Generally, the sub-headings all came from BT, so the  
15 class representative --- I can take you to it but the class representative proposed a  
16 higher level list of issues and BT wanted to add in these granular sub-headings.

17 MR JUSTICE WAKSMAN: All right. Let me hear then --- let me go back to the  
18 beginning. I think we just work our way through this.

19 MS KREISBERGER: Yes.

20 MR JUSTICE WAKSMAN: Because there is no point giving you more time to agree  
21 it, right. [12:31:07]

22 MS KREISBERGER: I think you have my submissions on 2 and 3.

23 MR JUSTICE WAKSMAN: Yes.

24 (12.31)

25 MS KREISBERGER: So, to sum it up, not neutrally stated points of evidence being  
26 separately highlighted when there is a range of evidence against one's (inaudible).

1 It is not a high level issue, in the wording of the Commercial Court Guide.

2 MR JUSTICE WAKSMAN: Right. Let me hear from Mr Beard on that then, please?

3 MR BEARD: Not a high-level issue when you are talking about regulatory context,  
4 framing the way that you consider all of these issues. It just is not a tenable  
5 submission on the part of Ms Kreisberger. I took you briefly to parts of the expert  
6 reports when we were discussing the question about how we should deal with these  
7 issues through the perspective of different batches for different experts. Now, we  
8 are fine with these issues being dealt with in the limb 1 hot tub --

9 MR JUSTICE WAKSMAN: Yes.

10 MR BEARD: -- in the limb 2 hot tub.

11 MR JUSTICE WAKSMAN: Yes.

12 MR BEARD: It does not stop them being issues.

13 MR JUSTICE WAKSMAN: It does not.

14 MR BEARD: They are obviously issues. If, in fact, Ms Kreisberger's concern is that  
15 the words "absence of price intervention" which we were meaning, aside from the  
16 commitments being made, is not neutral enough, fine.

17 MR JUSTICE WAKSMAN: The easy way to deal with that is, "is the absence (if  
18 any)" --

19 MR BEARD: Yes.

20 MR BEARD: Or the relevant section or regulation.

21 MR JUSTICE WAKSMAN: Yes.

22 MR BEARD: All we are trying to do is capture that high-level context, but it is not to  
23 do with evidence. Ms Kreisberger keeps talking about evidence. It is not an  
24 evidential issue; it is actually a framing issue here and so if neutrality is no issue, we  
25 will happily play with wording. We are not bothered about that. It is not an evidential  
26 issue. Yes, it is precisely a high-level issue. We explained earlier how the class

1 representative is systematically trying to downplay this issue. We understand that is  
2 their case, but it does not make it less of an issue, and so we do not actually care  
3 where it goes in. We thought it was sensible at the front. That is why we put it there,  
4 and the same is true of the issue to do with the Ofcom material as well.

5 MR JUSTICE WAKSMAN: Can I just ask you, on 3, where does that go to? Is that a  
6 background point to a limb 1 argument?

7 MR BEARD: Well, it will go to both, actually. It will go to both because it will go to  
8 what criteria you suppose you should use as the relevant benchmarks depending on  
9 whether you are doing ex tempore or ex post-consideration and it will also go to  
10 issues of fairness, so it actually goes to both. That is the reason why we put these  
11 things at the front, because it is easy. You end up with repetition if you try and put  
12 them in the abuse section, in 1 and 2.

13 MR JUSTICE WAKSMAN: Then I think we then need to look at what goes – there is  
14 a separate debate about these other points you put in 7.

15 MR BEARD: 7?

16 MR JUSTICE WAKSMAN: You have some other points –

17 MR BEARD: Yes. 7 was only because – Ms Kreisberger keeps saying that we have  
18 inserted the granularity. All of these sub-issues on the left-hand side were put in by  
19 the class representative. All that 7 is trying to do –

20 MS KREISBERGER: I am sorry, that is just not the case.

21 MR JUSTICE WAKSMAN: Presumably it is possible to ascertain which side put  
22 these issues first?

23 MR BEARD: Yes, that is fine. The point with 7 BT's (d) was if you look at 7, it is  
24 about unfairness in themselves and then 7(a) is "Did BT prices for SFV services bear  
25 a reasonable relationship to economic value". The next is, "Unfair having regard to  
26 the level and rate of price increases", and the other point in 7 BT's (b) was simply an

1 attempt to capture what had been identified as key issues in the expert reports and  
2 other criteria that goes to that question of fairness in themselves. So, the first one is  
3 about links between services. The second one is about consumer benefit and the  
4 third is about the decline in fixed voice call revenues. Now, if the Tribunal thinks that  
5 is unhelpful to list those things, okay, fine. They will still be in play with the experts  
6 but we thought it was actually sensible, given that there was a price level indication  
7 point in 7(b) but we are not pressing for those sorts of things if the Tribunal does not  
8 want them in, but we will still take those points.

9 MR JUSTICE WAKSMAN: Of course.

10 MR BEARD: So, that is what we are trying to be helpful on.

11 MS KREISBERGER: We thought it would be helpful to show you –

12 MR JUSTICE WAKSMAN: Well, hold on. Given what Mr Beard has said, and  
13 bearing in mind that we will see what the granularity of the analysis is from the  
14 experts, do you need on 7 – I know I am jumping ahead, but do you need on 7  
15 anything other than ‘were the prices unfair in themselves?’ I appreciate that that is  
16 just a restatement of the limb.

17 MS KREISBERGER: No – yes, I am very grateful for that.

18 MR JUSTICE WAKSMAN: But do you need anything else?

19 MS KREISBERGER: No –

20 MR JUSTICE WAKSMAN: Why do we not just cut all of that out?

21 MS KREISBERGER: Yes, that would –

22 MR JUSTICE WAKSMAN: Very good.

23 MS KREISBERGER: That is what we propose.

24 MR BEARD: I am perfectly happy with that.

25 MR JUSTICE WAKSMAN: Then in that case, I cannot see why you need two and  
26 three on number one?

1 MS KREISBERGER: That is also our position.

2 MR BEARD: I am sorry, but two and three on number one are different issues  
3 because one is to do with what relevant findings --

4 MR JUSTICE WAKSMAN: Well, no, that one I see. That one I see, but --

5 MR BEARD: But two and three are then about regulatory context and differences of  
6 role and (inaudible)

7 MR JUSTICE WAKSMAN: Yes, but number two says, "Is that relevant to the  
8 assessment of whether it is unfair or not?" Well, that just comes under item 7 now.  
9 That is your case. Your case is it is relevant to unfairness.

10 MR BEARD: Well, if you then put it under limb 2, that is the point we were making  
11 about having this upfront because point 7 is under limb 2, but if the Tribunal  
12 understand that these issues come up in both limb 1 and limb 2, fine, but we thought  
13 the idea of the list of issues was to specify where these issues arose and that was  
14 why we were doing it as we did, because if you go on to 7, it is just under the  
15 heading of "Abuse limb 2" and we do not want that to be suggested that we are just  
16 dealing with it --

17 MR JUSTICE WAKSMAN: Well, I think in that case, in one sense the broader the  
18 better. There is nothing to indicate that those factors cannot come into limb 1 and  
19 indeed we have accepted, on the face of it, that at least from your perspective, they  
20 do because we have put in -- a bit of limb 1 is going to be dealing with the regulatory  
21 expert evidence in our trial timetable.

22 MR BEARD: Yes. The alternative actually is to put issue two and three that we  
23 have identified under what is currently issue five, which is the abuse heading. That  
24 is the alternative place they could go if the real concern is having them at the front,  
25 because under the abuse heading, you then have those contextual issues  
26 highlighted and they apply both to limb 1 and limb 2. As I say, we are not wedded to

1 any particular order.

2 MR JUSTICE WAKSMAN: No. Let me just check on that. (Pause) I think we are  
3 all of the firm view that for these purposes we should keep it broad because  
4 otherwise there is a danger of giving undue prominence to one issue or another  
5 issue, which is not how we really want to operate. So, you are right in that one  
6 strictly is a sort of separate threshold question.

7 MR BEARD: Yes.

8 MR JUSTICE WAKSMAN: Anyway, the class representative is content that it should  
9 stay in and I do not have a problem with where it stays in --

10 MR BEARD: Yes.

11 MR JUSTICE WAKSMAN: -- because it is a thing on its own, but I think we are all of  
12 the view that your two and three and 7(a) to (b) in the class representative's draft  
13 and (b) to (d) of your draft can all come out.

14 MS KREISBERGER: Sir, I should say we have never had drafting there --

15 MR JUSTICE WAKSMAN: Yes.

16 MS KREISBERGER: So, we are content with taking all of that out.

17 MR JUSTICE WAKSMAN: Right. No one is suggesting that the experts cannot give  
18 the evidence that they want to give. It is simply a case here of ensuring that you  
19 avoid too much granularity which can sometimes be a distraction.

20 MR BEARD: Yes, again we do not have any opposition to that.

21 MR JUSTICE WAKSMAN: And indeed, when we are formulating, after your  
22 suggestions, the agenda for the hot tubbing, all of this will play out.

23 MR BEARD: Yes.

24 MR JUSTICE WAKSMAN: Right. So, that then has dealt with one, two, three.  
25 There is a drafting -- the next thing I've got then is a drafting point on 4(g).

26 MR BEARD: If we are going to take a (inaudible) --



1 MR JUSTICE WAKSMAN: Yes.

2 MR BEARD: I mean, actually you could get rid of a lot of (a) to (h) in 4 because  
3 actually those are all sorts of granularity that you do not actually need.

4 MR JUSTICE WAKSMAN: You could but you are all agreed on them.

5 MS KREISBERGER: We are agreed on them all, sir –

6 MR JUSTICE WAKSMAN: Apart from (g)

7 MS KREISBERGER: Not its conclusion, but BT wants to alter the wording.

8 MR JUSTICE WAKSMAN: What do you say about BT's wording?

9 MS KREISBERGER: So, BT's wording says - our wording is neutrally put.

10 MR JUSTICE WAKSMAN: Yes.

11 MS KREISBERGER: "To what extent, if any, were the prices constrained by supply-  
12 side barriers to entry".

13 MR JUSTICE WAKSMAN: Yes.

14 MS KREISBERGER: It is a neutrality issue, whereas BT's wording is, "were those  
15 barriers sufficiently low".

16 MR JUSTICE WAKSMAN: Yes, we are going to trot through these quite quickly.  
17 What is your answer on that one?

18 MR BEARD: It should not be to do with prices. That is the problem with the class  
19 representative's approach because barriers to entry are not just constraining prices;  
20 they are constraining entry and so we were just trying to come up with a formulation  
21 that captured that, so that is the neutrality concern.

22 MS KREISBERGER: Just so that you have it, BT's wording refers to constraint on  
23 the prices that BT –

24 MR JUSTICE WAKSMAN: Yes.

25 MS KREISBERGER: -- (inaudible) services so that did not seem to be the objection.

26 MR BEARD: No, that was our concern about it, because the entry and the

1 expansion to the supply of services. That is why it was worded as it was.

2 MR JUSTICE WAKSMAN: (After a pause) No, I think we are going to leave it as  
3 the class representative's. Right. At six we have some drafting points.

4 MR BEARD: Yes, this is a minor issue.

5 MS KREISBERGER: It looks a lot worse than it is.

6 MR BEARD: Yes, it is just reasonably attributable. What was suggested by BT was  
7 that whereas in the class representative's sub-heading they all have costs, given that  
8 all the experts talk about reasonably attributable costs, the suggestion was that that  
9 was the language that should be used but again as long as we know that reasonably  
10 attributable costs is the way that the experts are dealing with it, again it is not a big  
11 issue. We just say that that was a more accurate way.

12 MR JUSTICE WAKSMAN: What is the problem with this then?

13 MS KREISBERGER: Our wording does not include the words, "reasonably  
14 attributable" in case there is an issue between the experts as to whether it was costs  
15 which were actually incurred rather than costs that were reasonably attributable.  
16 Now, we are not expressing a view on that. We just did not want any constraint on  
17 the experts. So, the general rule on all of these issues is to draft them in a high-level  
18 way that does not present constraint to any argument or evidence that might be  
19 brought forward and that is all it was. So, our wording is simpler.

20 MR JUSTICE WAKSMAN: Just a second. (After a pause) Item (b), (c) is the same  
21 kind of thing. Item (c), what is the relevant methodology for determining the  
22 reasonable rate of return?

23 MR BEARD: "The reasonable rate of return" because that is the language used by  
24 all the experts.

25 MR JUSTICE WAKSMAN: Well, does anybody say there is not a reasonableness  
26 requirement here?

1 MS KREISBERGER: I think the language is appropriate and (inaudible) rather than  
2 reasonable. So, it is really marginal.

3 MR JUSTICE WAKSMAN: Just a moment, (d)?

4 MR BEARD: These are all just about –

5 MS KREISBERGER: It's the same point.

6 MR BEARD: It is the same as reasonable rate of return.

7 MR JUSTICE WAKSMAN: And then finally on this bit –

8 MS KREISBERGER: This point is a different point.

9 MR JUSTICE WAKSMAN: “Are BT’s actual prices significantly and persistently  
10 above the benchmark” and you have got, “Are BT’s actual prices” – no, these are  
11 different questions.

12 MS KREISBERGER: Shall I lay the issues out for you, sir, if I may?

13 MR JUSTICE WAKSMAN: Yes.

14 MS KREISBERGER: Again, I don't want to overstate the point.

15 MR JUSTICE WAKSMAN: Yes.

16 MS KREISBERGER: The topic here is what differential, how much does the excess  
17 need to be above the benchmark to qualify as excessive for the purposes of limb 1.  
18 The idea, the basic concept, is that not every excess which nudges above the  
19 benchmark in an inconsequential way or for a very short period of time – not every  
20 excess can be assumed to be excessive within the meaning of limb 1. Now, our  
21 pleading does refer to the threshold, the label attached as being significantly and  
22 persistently above the benchmark, but law is the living topic, which makes all our  
23 lives challenging, interesting, and recent caselaw does not refer to that language.  
24 Now, as I said, I do not want to overstate the point because it must be right that  
25 inconsequential excesses above the benchmark are not unlawful. They do not  
26 infringe but there is a question about what do you call – what is the language you

1 use to label what is an excessive excess. For instance, you see in the caselaw  
2 references to “materially above the benchmark” and it will be the class  
3 representative’s case that it all comes to the same thing. Inconsequential excesses  
4 are excluded and whether you call it significant or material does not matter much.  
5 Those are going to be matters of legal submission. For that reason we propose a  
6 neutrally worded issue that does not adopt the language of “significantly and  
7 persistently” because the purpose of these issues is not to shut down our ability to  
8 make legal submissions.

9 MR JUSTICE WAKSMAN: Right.

10 MR BEARD: I can take you to it. It is a pleaded case – that is the language they  
11 have used and if Ms Kreisberger is moving away from that standard, then she needs  
12 to amend her case. If she is saying, “Oh well, significant and persistently can be a  
13 various range of things”, then fine, but that is still the test and so obviously that is an  
14 issue, the one that they have pleaded which is consistent with the case law. I can  
15 take you to the pleadings and so on, but that is the simple point here. The language  
16 of “sufficiently above a selected benchmark for a sufficient duration” does not appear  
17 anywhere in pleadings or so far as we are aware in any of the materials or case law,  
18 so we say go back to the pleaded case and if they are going to change it then they  
19 do need to change their pleaded case. Do you want me to provide the reference?

20 MR JUSTICE WAKSMAN: (After a pause) Right. Let me try some suggestions for  
21 both of you. I think that (a) and (b), which are the same thing, you can amalgamate  
22 them and then each side can decide what they want to say about them or not. “What  
23 is the relevant methodology or methodologies for determining the costs of and the  
24 costs reasonably attributable to”. Since each of you want all of them, I cannot see  
25 there is any objection to that.

26 MS KREISBERGER: I am looking for instructions, sir.

1 MR BEARD: As long as these things are left open –

2 MR JUSTICE WAKSMAN: Yes. Right. (b) is the same thing. “What were the costs  
3 of and what costs can be reasonably attributable to” and then, “What’s the relevant  
4 methodology for determining the reasonable (or, if relevant, appropriate)”, and then  
5 you can say, “Well, that’s not appropriate” and you can say, “Well, it is appropriate.”  
6 Right. (d) is the same. Right? The same thing in there.

7 MS KREISBERGER: Yes.

8 MR JUSTICE WAKSMAN: Then the final one because I can see that this may be or  
9 may not be explored and it may be a legal issue, this well-known phrase,  
10 “significantly and persistently”, so what I am going to say here is you split that and so  
11 we say, or rather we put it in this way. Leave it as it is as BT propose it. (b) “What in  
12 this context is the meaning of significantly and persistently” and if you want to say,  
13 “Well, all that means is in this context that just means sufficiently, for sufficient  
14 duration”, you can say that.

15 MS KREISBERGER: I am grateful, sir.

16 MR JUSTICE WAKSMAN: All right? Then, that is that. We have dealt with seven.  
17 We have dealt with – ah, now. 8(d), “BT’s residential SFV Services prices unfair by  
18 reference to” – yes, I see.

19 MR BEARD: We were just saying are there any relevant comparators because at  
20 the moment (a) to (d) is limited.

21 MR JUSTICE WAKSMAN: Yes, well what is wrong with that?

22 MS KREISBERGER: It is a bit late but if there are – the four comparators are then  
23 identified. It sounded an alarm bell to have BT suggesting there might be other  
24 comparators now that the expert evidence is concluded and we are weeks away  
25 from joint statements.

26 MR JUSTICE WAKSMAN: Is there going to be some other relevant comparators put

1 forward?

2 MR BEARD: Well, I am not sure that Ms Kreisberger is quite right that (a) to (d)  
3 actually do cover all the comparators that are in the experts' materials. She may be  
4 right; we do not know. Obviously, we cannot just magic them out of the air in terms  
5 of the evidence that we put forward but whether or not the Tribunal might think when  
6 it is going through that these four were not the only relevant comparators – that was  
7 the only reason it was in there.

8 MR JUSTICE WAKSMAN: Why do we not say “any other comparators” and then  
9 “(insofar as identified in the expert reports)”?

10 MR BEARD: Fine by us.

11 MR JUSTICE WAKSMAN: All those concerned about it.

12 MS KREISBERGER: We are not aware of any others –

13 MR JUSTICE WAKSMAN: Right, okay. There we are. That has dealt with that.

14 MS KREISBERGER: We are happy with that wording, sir. I am grateful.

15 MR JUSTICE WAKSMAN: 9(a) “Should test accounts be excluded? If so, how  
16 many? BT’s position not agreed.” I need some help on that one, I think.

17 MR BEARD: Yes, I think this is actually just the question of whether it is de minimis  
18 – whether we go back to the commercial criteria.

19 MR JUSTICE WAKSMAN: Yes.

20 MR BEARD: This one felt like it was not really warranting the granularity. Honestly,  
21 if it stays in and we save 10 minutes’ discussion on these issues, we do not mind.

22 MR JUSTICE WAKSMAN: Right, it stays in. Right. (e) – no, that is all on that one.

23 MS KREISBERGER: That is that, yes.

24 MR JUSTICE WAKSMAN: “Characteristics of the class”. Now – I am just trying to  
25 find BT’s revised wording.

26 MR BEARD: It is over the page.

1 MS KREISBERGER: Yes, it is on 11, on page 15, on the left-hand side of the class  
2 representative's wording, on the right-hand side is the granular point.

3 MR JUSTICE WAKSMAN: So, that is under question 11?

4 MR BEARD: Yes. I think the suggestion that was made by BT under 11 covers 10  
5 and 11.

6 MS KREISBERGER: It rides on.

7 MR JUSTICE WAKSMAN: I am sorry.

8 MR BEARD: Ms Kreisberger is right. That was the suggestion. And it does break  
9 things down further. We thought that was useful. One thing that it does highlight is  
10 that the issues from the class representative - because nothing in their version of 10  
11 and 11 asks the issue of whether or not the characteristics of the class membership  
12 are different from the general population, which was one of the issues that has been  
13 debated on a number of occasions. So, we think that that needed to go in.

14 MR JUSTICE WAKSMAN: Yes.

15 MR BEARD: And we were just trying to break it down so that it was actually more  
16 navigable rather than having just two compressed questions.

17 MS KREISBERGER: Sir, can I address you on that point?

18 MR JUSTICE WAKSMAN: Yes.

19 MS KREISBERGER: I am grateful. We say that wording – and I am grateful to Mr  
20 Beard for putting that up. So, just to be clear, it is the second sentence in (a) – “To  
21 what extent if any does the proportion of class members with these attributes differ  
22 from the general population (or other relevant benchmark groups)?”

23 MR JUSTICE WAKSMAN: Yes.

24 MS KREISBERGER: I do not think I need to show you the evidence but the reason  
25 we say this is inappropriate, for the same reason as many of the other amendments  
26 sought by BT. Whether or not benchmarking is an appropriate way of assessing the

1 class is itself a matter in dispute between Dr Hunt and Professor Loomes so this  
2 issue reflects BT's case. It assumes that you do need to compare the class against  
3 a benchmark. So, it is not a neutral wording –

4 MR JUSTICE WAKSMAN: What about the first sentence in (a)?

5 MS KREISBERGER: We do not object to that neutral question.

6 MR BEARD: Sir, I do not really understand the criticism of the second sentence of  
7 (a). We are not saying that they agree with this. We are saying that it is an issue  
8 that is missed in the list of issues. We understand there is a dispute between the  
9 experts and we were trying to be neutral to say to what extent if any, but if there is  
10 some other phraseology that they want to capture, then fine.

11 MR JUSTICE WAKSMAN: Is your problem about relevant benchmark groups?

12 MS KREISBERGER: It is assuming –

13 MR JUSTICE WAKSMAN: Well, why do you not say, "To what extent, if any, does  
14 the proportion of", blah, blah, "differ from the general population or other relevant  
15 benchmark groups, if any?"

16 MS KREISBERGER: Fine.

17 MR JUSTICE WAKSMAN: Right. Now, Mr Beard, just trying to get through the rest  
18 of it, for my part, I do think (b), (c) and (d) are a bit argumentative in the way that  
19 they are phrased and I do not think we need them. Good, you are agreeing. Right, I  
20 think we are done on list of issues, in that case.

21 MS KREISBERGER: I am very grateful.

22 MR JUSTICE WAKSMAN: Now, can I just get to this stage: does that mean that  
23 effectively the last substantive matter is the question of the amendments and Sony?  
24 Right? Anything else?

25 MS KREISBERGER: We do have one point on bundles, sir, that can be addressed  
26 very briefly before lunch.



1 MR JUSTICE WAKSMAN: Let us do that then.

2 MS KREISBERGER: If I may, I will ask Mr Armitage.

3 MR ARMITAGE: Yes, if we are discussing variation over the adjournments, we  
4 could discuss it.

5 MR JUSTICE WAKSMAN: Yes.

6 MR ARMITAGE: I do not know if you have seen the draft order. We sought a  
7 direction requiring BT to tell us any documents within the record it proposes to add to  
8 the trial bundles, documents it currently knows it may rely on at trial, in the same way  
9 we have done with them.

10 MR JUSTICE WAKSMAN: Yes.

11 MR ARMITAGE: I am not actually sure of BT's position.

12 MR JUSTICE WAKSMAN: That sounds reasonable.

13 MR ARMITAGE: It is not intending to shut them out from coming up with documents  
14 later.

15 MR BEARD: I am slightly confused. I thought we had agreed to this.

16 MR ARMITAGE: I am sorry –

17 MR BEARD: On the basis that it was not a sort of absolute shut-out, I have been  
18 preparing –

19 MS KREISBERGER: No, no, no, well obviously

20 MR JUSTICE WAKSMAN: Have you got a date where each side has to say to the  
21 other what they want in the trial bundle?

22 MR ARMITAGE: We have done it already.

23 MR JUSTICE WAKSMAN: You have done it? And when can you put in what you  
24 say should go in then?

25 MR ARMITAGE: We agreed 15 December.

26 MR JUSTICE WAKSMAN: 4 p.m. 15 December. We will break for lunch. If you

1 cannot agree the Sony amendment issue we will deal with it after lunch.  
2 (The Luncheon Adjournment)  
3 (1303)  
4 (14.02)  
5 MR BEARD: I think we are going to be able to spare you, so I will hand over to Mr  
6 Armitage.  
7 MR JUSTICE WAKSMAN: Yes.  
8 MR BEARD: There will be various residual issues, but we think we have found a  
9 practical way through.  
10 MR JUSTICE WAKSMAN: Good. Thank you.  
11 MR ARMITAGE: So, I think the nub of the issue concerns this question, Not whether  
12 variation is a possible procedural short cut, I think that is agreed.  
13 MR JUSTICE WAKSMAN: Yes. Yes.  
14 MR ARMITAGE: The question is what follows from that.  
15 MR JUSTICE WAKSMAN: Yes.  
16 MR ARMITAGE: So, there is a – BT takes the view that you are required to order a  
17 further opt-out window to cater for those that have not had the opportunity.  
18 MR JUSTICE WAKSMAN: Yes.  
19 MR ARMITAGE: We say the clear wording of 85.4, it is actually a discretion when  
20 you vary a class definition in this way, makes for discretionary provision for a further  
21 opt-out. But we have no objection if the Tribunal considers it appropriate.  
22 MR JUSTICE WAKSMAN: We do consider it appropriate. We have thought about it.  
23 MR ARMITAGE: I am grateful. So, what we would propose, and we can snap into  
24 gear quite quickly, because we have, in advance of this hearing, been having  
25 discussions with our expert claims' administrators as to how this would work.  
26 MR JUSTICE WAKSMAN: Yes.

1 MR ARMITAGE: What we would propose is a further short opt-out period which  
2 expires on the eve of the trial essentially. Now we recognise that that is shorter than  
3 the 6 months that was --

4 MR JUSTICE WAKSMAN: As a matter of interest, does it have to be on the eve of  
5 trial, because --

6 MR ARMITAGE: Well --

7 MR JUSTICE WAKSMAN: -- so what if the trial starts and they opt-out -- they have  
8 an opt-out a month later.

9 MR ARMITAGE: Well, we are inclined to agree, but I think BT takes a different view  
10 of that and considers that the eve of the trial -- but, as I say, we entirely agree.

11 MR JUSTICE WAKSMAN: Right okay, subject to timing, you are dealing with an  
12 opt-out and you can draft an opt-out for that, although there will have to be a new  
13 notification.

14 MR ARMITAGE: So, what we will propose to do, subject to the Tribunal's views --

15 MR JUSTICE WAKSMAN: Yes.

16 MR ARMITAGE: -- in short order, after today --

17 MR JUSTICE WAKSMAN: Yes.

18 MR ARMITAGE: -- as early as possible next week.

19 MR JUSTICE WAKSMAN: Yes.

20 MR ARMITAGE: -- because we are obviously where we are on timing --

21 MR JUSTICE WAKSMAN: Yes.

22 MR ARMITAGE: -- put together a short draft plan, notice, and we would be  
23 envisaging a very different form of notification than the full blown exercise --

24 MR JUSTICE WAKSMAN: Yes.

25 MR ARMITAGE: -- the first time around, marginally online -- entirely online I think.

26 MR JUSTICE WAKSMAN: Yes.

1 MR ARMITAGE – and a draft; It may be an amended notice, it may be a further  
2 notice to deal with this situation, clearly explaining how this has arisen.

3 MR JUSTICE WAKSMAN: Yes.

4 MR ARMITAGE: We would submit that, as I say, as early as we can next week, for  
5 consideration by the Tribunal, copied to BT of course.

6 MR JUSTICE WAKSMAN: Yes.

7 MR ARMITAGE: Subject to any views of the Tribunal, we would then hope to be in a  
8 position to, as I say, snap into gear --

9 MR JUSTICE WAKSMAN: Yes.

10 MR ARMITAGE: -- shortly before Christmas, by I think 20 December was the date  
11 we had hoped we would have finality on that and then we think, with the assistance  
12 of our claims people, we could have an effective short opt-out period and then there  
13 is a question of timing. For our part, the end of the trial would be possible, preferable  
14 because that is a bit longer.

15 MR JUSTICE WAKSMAN: Yes. Yes. Right.

16 MR ARMITAGE: So, that is what we would – so I think we, subject again, to the  
17 Tribunal's views of course --

18 MR JUSTICE WAKSMAN: Yes.

19 MR ARMITAGE: -- if we could have until --

20 MR JUSTICE WAKSMAN: Wednesday?

21 MR ARMITAGE: I think, Wednesday – yes, I think we could do Tuesday but --

22 MR JUSTICE WAKSMAN: Wednesday. 4pm by latest.

23 MR ARMITAGE: 4pm.

24 MR JUSTICE WAKSMAN: By latest 4 pm Wednesday. Right.

25 MR ARMITAGE: So that would be a draft notice --

26 MR JUSTICE WAKSMAN: Draft new notice. Yes.

1 MR ARMITAGE: -- and a draft of an outline plan.

2 MR JUSTICE WAKSMAN: Yes.

3 MR ARMITAGE: Yes.

4 MR JUSTICE WAKSMAN: Right. Thank you, Mr Beard.

5 MR BEARD: Well, it seems it is open for him to come forward with a new notification  
6 proposal and so we will listen to it. We have indicated on a WP basis, where our  
7 concerns arise legally in relation to these issues. Mr Armitage perfectly fairly said,  
8 we do not think you can run concurrent opt-out periods during a trial but --

9 MR JUSTICE WAKSMAN: I see.

10 MR BEARD: So, I think that that is --

11 MR JUSTICE WAKSMAN: That is why – because otherwise there is no magic in the  
12 beginning of the trial. There is certainly magic before the judgment, but I mean.

13 MR BEARD: Well, I am not sure that – I do not want to speculate on the magic of  
14 the Tribunal.

15 MR JUSTICE WAKSMAN: No, but are you – can we try and see if we can reach  
16 agreement on this. Is your position that the opt-out period should expire before the  
17 trial starts?

18 MR BEARD: If you are putting in a new opt-out period, yes.

19 MR JUSTICE WAKSMAN: Right. All right.

20 MR BEARD: But, look, we will look at what the proposal is. We are not --

21 MR JUSTICE WAKSMAN: Can I just say --

22 MR BEARD: We are not trying to be obstructive here.

23 MR JUSTICE WAKSMAN: No, but I am taking it directly from your skeleton  
24 argument which I have re-read, and I have, of course, now read Sony.

25 MR BEARD: Yes.

26 MR JUSTICE WAKSMAN: And you are right as a matter of what Sony decides, I

1 think, but you say you are content to go down the procedural shortcut of an  
2 amendment, but it needs a new opt-out. Now therefore --

3 MR BEARD: Yes. Because effectively you are certifying a new class.

4 MR JUSTICE WAKSMAN: Well, I follow that, but then whilst you say, well you will  
5 look at it, but what are the objections you are likely to raise in relation to this because  
6 you seem to be agreed in principle about what can be done. Let us say we go with  
7 your proposed expiry of the opt-out the day before the trial --

8 MR BEARD: Yes.

9 MR JUSTICE WAKSMAN: Well, is there going to be anything – I mean, unless there  
10 is something about the form of works.

11 MR BEARD: Well, that is the – we just need to see what the proposal is in relation to  
12 the notification.

13 MR JUSTICE WAKSMAN: Right.

14 MR BEARD: I mean, we are conscious that – not me personally, but those around  
15 me are conscious that there was an awful lot of discussion about how notifications  
16 should work and the time periods and --

17 MR JUSTICE WAKSMAN: All right, but can I just make it clear that what we would  
18 not be expecting is you to come back and say, actually we do not – no you cannot do  
19 an opt-out, you cannot do a new notice, because I am proceeding on the basis that  
20 you have agreed you can because that is what is in your skeleton argument.

21 MR BEARD: We are not saying to the contrary because we recognise --

22 MR JUSTICE WAKSMAN: Yes.

23 MR BEARD: -- that --

24 MR JUSTICE WAKSMAN: I am just trying to make life – I am just trying to make life  
25 easier for everybody – (Inaudible due to over speaking)

26 MR BEARD: There is no concession here in the sense that in Sony, it was clear that

1 | if you start a new claim then there would be a no notice procedure, and that would  
2 | apply.

3 | MR JUSTICE WAKSMAN: Yes, yes. Right.

4 | MR BEARD: All we said in the skeleton was, rather than forcing you to do a full new  
5 | application --

6 | MR JUSTICE WAKSMAN: No, no I understand that. All right, so I --

7 | MR BEARD: So, that has always been our position.

8 | MR JUSTICE WAKSMAN: Right, well I think what I am going to do is, and this bit  
9 | need not – I am going to record that it is common ground that the way to deal with  
10 | the new claimants will be by way of amendment, plus a new opt-out period for those  
11 | added claimants, which will expire at 4 p.m. the day before the trial but then you are,  
12 | by 4 p.m. next Wednesday, to file with the court and copy to BT, the draft notice.

13 | MR BEARD: Yes, and then we can comment --

14 | MR JUSTICE WAKSMAN: If you want to comment on it, you can comment on it.  
15 | Yes, right.

16 | MR BEARD: Yes.

17 | MR JUSTICE WAKSMAN: Right, all right?

18 | MR BEARD: We recognise that this is an unusual situation --

19 | MR JUSTICE WAKSMAN: No, I take your point and you have facilitated it by saying  
20 | you are not making them issue a new claim form and all the rest of it, but I do  
21 | understand that.

22 | MR ARMITAGE: We are totally content with that, subject only to the observation that  
23 | we see there being real limit to what BT would have to say --

24 | MR JUSTICE WAKSMAN: I understand that, but let us not –

25 | MR ARMITAGE: -- on the plan and notice.

26 | MR JUSTICE WAKSMAN: BT have also had my observations, so let us --

1 MR ARMITAGE: No, I understand. Yes.

2 MR JUSTICE WAKSMAN: Let us just try and deal with it on that basis. Right.

3 MR ARMITAGE: I am very grateful.

4 MR JUSTICE WAKSMAN: Thank you both. That is very helpful. Right. Now, is  
5 there any – Now, update on bundles. Well, we talked about that, but is there  
6 anything more to say on the update of bundles?

7 MR ARMITAGE: There is one point.

8 MR JUSTICE WAKSMAN: Yes.

9 MR ARMITAGE: Sorry --

10 MR JUSTICE WAKSMAN: Do sit down, Mr Beard.

11 MR ARMITAGE: It is only a question of a core bundle for the trial.

12 MR JUSTICE WAKSMAN: Yes.

13 MR ARMITAGE: We are completely in the Tribunal's hands. It is simply to make the  
14 point – the documents are all already there and I believe, accessible, or at least  
15 ought to be accessible to you on well-ordered electronic files on Opus, but obviously  
16 should the Tribunal require a core bundle to be produced, including in hard copy, we  
17 can obviously do that. I mean, I am not saying anything desperately surprising but --

18 MR JUSTICE WAKSMAN: No.

19 MR ARMITAGE: -- if you have any requests in that regard, we are receptive to  
20 those.

21 MR JUSTICE WAKSMAN: (After a pause) But then you would have to agree what  
22 the core bundle is.

23 MR ARMITAGE: Well, yes, there is that.

24 MR JUSTICE WAKSMAN: I mean, obviously there is the usual facility on Opus  
25 where you can --

26 MR ARMITAGE: Create custom bundles.



1 MR JUSTICE WAKSMAN: -- you can create your own as you go along. I mean I  
2 find it -- I do not know how much -- Since there is a lot of expert evidence here, I do  
3 not know how much the core bundle is likely to take up. I have seen cases where  
4 you have a core bundle which takes into account all the documents that are put to  
5 the factual witnesses or to the expert witnesses and it sort of increases along the  
6 way. I do not want the parties to spend long on this because you have got other  
7 things to do. I think it might be helpful if your side could propose an index as to what  
8 the core bundle would be and copy BT in on it and let us have a look at it. I think  
9 that is the way to deal with it, and then we will come back to you in good time. Yes.  
10 Right. Is there anything on confidentiality we need to deal with today?  
11 MR ARMITAGE: No, happily there are no current confidentiality issues --The  
12 process has worked very well.  
13 MR JUSTICE WAKSMAN: Good. Good. Thank you. So, as far as your side is  
14 concerned, there is nothing else for today?  
15 MS KREISBERGER: That concludes for today.  
16 MR JUSTICE WAKSMAN: Mr Beard?  
17 MR BEARD: No, I do not think so. If the Tribunal wants an indication, that is the  
18 expert reports with no annexes --  
19 MR JUSTICE WAKSMAN: Yes.  
20 MR BEARD: -- in terms of things you might usefully want, but that is not to cut  
21 across the exercise of creating a core bundle, but I am just saying.  
22 MR JUSTICE WAKSMAN: Well, I mean, speaking for myself, I probably would want  
23 --  
24 MR RIDYARD: You want hard copies?  
25 MR JUSTICE WAKSMAN: Do you want hard copies at all. Well on this anti-diluvian  
26 side of the Tribunal, we probably do, but you would quite like to have hard-copies of

1 the experts, and so would I, thank you.

2 MR BEARD: Yes, Ms Love correctly points out that bundle I held up does not  
3 include the third Punter report. I would like to take that point, but other than that --

4 MR JUSTICE WAKSMAN: You should have disclosed that!

5 MR BEARD: Other than that, I am --

6 MR JUSTICE WAKSMAN: Other than that --

7 MR BEARD: I will leave it to the (inaudible due to coughing). I just had a feeling that  
8 that might actually be -- it is not a proper core bundle, but it might actually be a useful  
9 one.

10 MR RIDYARD: They are also a good size set of documents to have.

11 MR BEARD: Yes. It is sort of manageable in A5.

12 MR JUSTICE WAKSMAN: Good. I hope everything that we have said when we have  
13 gone through the drafting was-- I have got my own notes on the drafting of the  
14 issues and things like that. It should all have been taken down and you can get it on  
15 Opus if you need to. Can we please have the draft order in the course of next week;  
16 not leave it any later. We are extremely indebted as always to counsel who have  
17 been very helpful today, and you have managed to agree quite a lot. So, that will  
18 conclude the hearing for today.

19 (14.15)

20 (The Hearing Adjourned)

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