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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1624-1627/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 July 2026

Before:
The Honourable Lord Richardson
John Alty
William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Gutmann

Class Representative

v

Vodafone Limited and Others.

Defendants

A P P E A R A N C E S

Rhodri Thompson KC and James White (Instructed by Charles Lyndon) on behalf of Justin Gutmann

Rob Williams KC (Instructed by Linklaters LLP) on behalf of Vodafone Limited and Hutchison 3G UK Limited

Daniel Piccinin KC (Instructed by Freshfields LLP) on behalf of BT Group Plc and EE Limited

Mark Hoskins KC and Jacob Rabinowitz (Instructed by Ashurst Perkins Coie UK LLP) on behalf of Telefonica UK Ltd

Wednesday, 1 July 2026

(10.30 am)

THE CHAIR: Good morning. Before I start I should read the customary notice. Some of you are joining us via live stream on our website; an official recording has been made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Now, that having been said, there are three matters, I think, principal matters, that we need to deal with during the course of this hearing. I've had the benefit of what I understand to be the agreed timetable, which divides up the time helpfully between those issues.

What the Tribunal was minded to do is, having heard the parties on the first issue, which is the split trial issue, it would then be to give the parties our views on that after lunch and thereby focus matters in relation to disclosure and, indeed, yes, that I think would assist the discussions we have to have on that.

So that being so, subject to anything else that any of the parties wish to raise at this stage, I think, Mr Hoskins, are you going to open on the Defendants' application for a split trial?

MR HOSKINS: Yes. I don't know if Mr Thompson had any housekeeping he wanted to do.

MR THOMPSON: The only housekeeping for the Tribunal is that we had four late additions, I think. I think that there should be a bundle F which has been added to the papers --

THE CHAIR: Yes.

MR THOMPSON: -- and recent materials. Then there was a very recent letter from

1 Linklaters last night, which I think was too late for bundle F, so that is floating about,
2 but that's relevant to the disclosure issue. If it hasn't come through the Tribunal, we
3 can sort it out.

4 We have an addition which, again, I think goes to disclosure, and I think that there was
5 a request for referenced skeletons, which I was told just before the start. We have
6 one, I think, in hard copy with the references to the authorities, but I doubt if that's
7 necessary to hand up now.

8 So that's just by way of housekeeping, otherwise I think it is for Mr Hoskins to start.

9 THE CHAIR: Thank you very much. Thank you, Mr Thompson.

10 Submissions by MR HOSKINS

11 MR HOSKINS: Good morning, everyone.

12 Can I begin with the applicable legal principles. I'd like to take you to the *Churchill*
13 *Gowns v Ede & Ravenscroft* judgment for that. So that's bundle -- it depends if you've
14 got hard or electronic -- it's bundle E. It's the second bundle E in hard; it's tab 23. I'll
15 give you the page number in a second. (Pause)

16 So this is the Tribunal judgment (audio distortion) Lord Justice Zacaroli (audio
17 distortion). If you go to page 1059 and if I could ask you, please, to read paragraphs 5
18 to 8. (Pause)

19 THE CHAIR: Yes. It appears that, Mr Hoskins, there is a technical problem. Your
20 microphone, you'll see, the light has gone out, and this apparently means that people
21 all over the world are unable to hear you. It momentarily came on again. (Pause)

22 So apparently, I think -- very well. It seems that we've got a practical workaround, so
23 let's proceed.

24 MR HOSKINS: Let's hope that works.

25 So, well established principles: it's a pragmatic exercise, there's limited utility in
26 referring to other cases, every case is fact sensitive and the EWRG (*Electrical Waste*

1 | *Recycling Group*) factors, if I can use that shorthand, is a non-exhaustive list of factors.
2 | Nothing controversial there.

3 | So the question for the Tribunal today is: can the Tribunal take account of the apparent
4 | merits of claims in deciding whether to order a split trial? In our submission, the
5 | answer is, clearly, yes. Now, it is absolutely correct that in most cases the Tribunal
6 | will not be able to form a preliminary view of the merits, and, indeed, when you see
7 | the authorities or the other examples that have been referred to, none of them take
8 | account of the merits, so we are in a particular situation here.

9 | However, our submission is that where the Tribunal is able to form a preliminary view
10 | of the merits, it is clearly entitled to take that into account in deciding whether to order
11 | a split trial and, indeed, we go further and say that it should do so.

12 | Let me explain that; let me unpack that. There's nothing in the approach to be applied,
13 | as summarised in *Churchill Gowns v Ede & Ravenscroft*, which prevents the merits
14 | being taken into account in an appropriate case. The list of EWRG relevant factors is
15 | non-exhaustive. The overall test to be applied is to ensure that proceedings are dealt
16 | with justly and at proportionate cost.

17 | Now, applying that test, that overall test, the Tribunal can exercise its case
18 | management discretion as it sees fit. There's no limitation on your discretion in
19 | deciding whether to order a split trial or not, as long as you have that ultimate aim in
20 | mind. What that means is that if the Tribunal is able to form a view of the merits, and
21 | if the Tribunal considers that its view of the merits is relevant to its decision whether
22 | to order a split trial, we submit that it may actually be a legal error to refuse to take that
23 | relevant factor into account. And taking account of the merits, we say, is consistent
24 | with the recent recognition by the Supreme Court in the *FX* litigation that opt out
25 | proceedings may be used oppressively against Defendants.

26 | Now, this is not some personal allegation against Mr Gutmann. You'll see that it's an

1 observation on the way the system works. If we can go to *Evans v Barclays Bank Plc*
2 that's bundle E, tab 14, page 951.

3 THE CHAIR: Can you give us the reference again?

4 MR HOSKINS: E, tab 14, page 951.

5 THE CHAIR: Yes.

6 MR HOSKINS: So you'll see that this is the judgment in *Evans v Barclays Bank Plc*
7 as to FX. If I could ask you to read paragraphs 89 to 91, please. (Pause)

8 So whilst these observations were made in relation to a certification decision, in our
9 submission, the same policy concerns apply in relation to case management
10 decisions. If the Tribunal forms the view that a collective claim is weak, it can, and
11 should, take that into account in deciding whether to order a split trial would be the
12 fairest way of determining the claim. That's what I intended to say on the legal
13 principles, unless you had other questions at the moment.

14 So we come to the nub of this application, let's be quite frank about it: the merits of the
15 claim. In order for the Class Representative's claims to succeed, he would need to
16 establish that the Defendants are dominant in a relevant market. Can we go to the
17 claim form in relation to O2. That's bundle A, tab 6, page 178. As you know, all the
18 claim forms are in substantially the same form. Could you look at paragraphs 37 to
19 38, please. (Pause)

20 You'll see that in relation to the alleged individual loyalty markets, the Class
21 Representative's case is not that there is a separate market for each Defendants' own
22 customers, or even that there's a separate market for its own CHA customers; the
23 market is very narrowly defined. It's said that there are separate markets for each
24 Defendants' CHA customers who are on a CHA contract, and that CHA contract is
25 beyond its minimum term.

26 Then if you could, please, read paragraphs 41 and 42, you'll see the position in relation

1 to dominance. (Pause)

2 I'll come back to the collective dominance allegation when I come to that, but that's all
3 I need to show you for the moment.

4 So let's look, first of all, at the allegation that the Defendants are each dominant in
5 individual loyalty markets. Our submission is that that's undermined by the evidence
6 referred to, and relied upon, by the Class Representative's own expert evidence. So
7 I'm not asking you to determine a dispute on evidence; I'm asking you simply to take
8 the Class Representative's evidence as relied upon at face value.

9 Can we go to Mr Davis's first report at bundle B, tab 16, page 280. Can you, please,
10 read paragraph 152(c). It's the bottom of page 280 and over the page. (Pause)

11 MR BISHOP: What are the paragraphs again?

12 MR HOSKINS: Sorry, it's 152(c). So it begins:

13 "there is evidence that a small but still significant share of customers do not react to
14 the large price differential ..."

15 Then over the page you'll see some figures. I'll parse those figures in a minute.

16 THE CHAIR: I mean, it's worth just noting, isn't it, that 152 begins:

17 "My preliminary view, albeit necessarily on the basis of the limited information currently
18 available ..."

19 MR HOSKINS: Absolutely. We're not asking you to decide this question. We're
20 simply asking you to form a view on the merits of the Class Representative's case.
21 This, at the moment, is his case. In our submission, whilst it is relevant that we're at
22 an early stage of the proceedings, by definition, to take a split trial decision, you have
23 to act on the information in front of you. It would be wrong, in our submission, to simply
24 say, "Something might turn up". You see that in all sorts of procedural applications
25 where someone is --

26 THE CHAIR: It's quite interesting that you rely on that, well, you cite that, because

1 where one comes across that, of course, is the phrase is often used by people standing
2 in your position trying to argue – in fact, I think that it was used by the Defendants in
3 this case – for strike out and reverse summary judgment. Now, you didn't seek that in
4 relation to this point.

5 MR HOSKINS: Sorry, we didn't seek summary judgment in relation to this point?

6 THE CHAIR: No.

7 MR HOSKINS: No, because we didn't think this was an appropriate point for summary
8 judgment. We think there should be a trial for the matter.

9 THE CHAIR: Yes, but the issue, and I quite see why you would come to that
10 conclusion because it depends on the evidence, but what I'm trying to do is work out
11 what weight I can attach to -- I mean, your opening so far has been to say, "We need
12 to consider this. We need to weigh this in the balance in terms of working out what
13 the appropriate procedure going forward should be". You're saying that we should
14 attach great significance to the fact that you say, at present, the case being put forward
15 by the Claimant is a weak one. What I'm trying to understand is how in weighing that
16 in the balance, I take into account the fact that what you're citing to me is in itself
17 preliminary and provisional.

18 MR HOSKINS: Well, these are Ofcom figures. So they're produced by a third party.
19 They are figures that are relied upon by the CR. For what it's worth, our position is
20 that we agree that there's a large amount of switching, but what you don't have to do
21 for the purpose of this application as I'll show you as I develop it, is say that the
22 switching was definitely 6 per cent, or 7 per cent, or 8 per cent.

23 What you can do, on the basis of the Ofcom figures relied upon by the CR for his own
24 case, is come to the conclusion that there clearly is a large amount of switching at the
25 end of the minimum term, and within a year of the expiry of the minimum term. I have
26 to put this point simply because otherwise it doesn't fly. I absolutely understand that,

1 but it can be put simply, and that's what I'm going to move on to next if you're happy
2 for me to do so, please.

3 So what do these figures tell us? What do these switching figures tell us? Well, we
4 set this out, we parsed those figures, if you like, in our skeleton argument, which is
5 bundle D, tab 4, page 57. This is paragraphs 13 to 15. You'll have read that when
6 you did your pre reading.

7 Just to split out what we get from those figures, according to Ofcom, between
8 89 per cent and 94 per cent of customers with CHA contracts do not stay on those
9 contracts beyond their minimum term. Now excuse me in my simplicity but, by
10 definition, that means that only 6 per cent to 11 per cent do remain on their CHA
11 contract beyond their minimum term. We also know from the Ofcom figures that of
12 that 6 per cent to 11 per cent, only 38 per cent of those stay on their contracts after
13 a year or more. Just doing the arithmetic, that means that only between 2 per cent
14 and 4 per cent of all customers with contracts remain on them for more than a year
15 after the expiry of their minimum term. I get the figure 2 per cent because that's 38
16 per cent of 6. I get the figure 4 per cent because that's 38 per cent of 11.

17 So just going back to your point, if we were in a realm where the Ofcom figures were
18 coming out at sort of 30, 40, 50 per cent, I'd absolutely take the point you made to me.
19 But we're nowhere near that realm. We're in a realm of 89 per cent and above. So
20 even if one allows for "well, something might come out of this", that is the very strong
21 likelihood of what the position will be at trial. So just to summarise on the Ofcom
22 figures relied upon by the CR for his own case, between 89 per cent and 94 per cent
23 of customers with CHA contracts do not stay in those contracts beyond the minimum
24 term. Between 96 per cent and 98 per cent of all CHA customers switched to new
25 contracts within a year. What does that tell us? Well, in our submission it tells us two
26 things.

1 First of all, given the very high degree of switching upon expiry of the minimum term,
2 it is unlikely that the customers who remain on their CHA contract after the minimum
3 term constitute discrete product markets for each of the Defendants.

4 Secondly, even if the relevant product markets were as suggested by the CR -- so
5 even if the relevant product markets were customers who remain on their CHA
6 contract after the minimum term -- these figures suggest that between 96 per cent and
7 98 per cent of CHA customers switched to new contracts within a year of the minimum
8 term expiring. So even on the CR's own ILM market definition, there's a massive
9 amount of switching within a year with just taking their own market, and that is simply
10 not consistent with the Defendants being dominant in each of their individual loyalty
11 markets. How can you be dominant in a market where 96 to 98 per cent of the
12 customers have gone within the year? That's the point we want to make.

13 MR ALTY: Can I just (inaudible) on that.

14 MR HOSKINS: Of course.

15 MR ALTY: Just for my benefit to clarify, so your point is that 89 to 94 per cent don't
16 stay beyond the minimum term. So the people who do stay beyond the minimum term
17 are the people of whom only 38 per cent stay more than a year. So isn't the figure the
18 38 per cent that's more relevant to their case?

19 MR HOSKINS: Well, it's not if you then look at what -- the reason why I do the further
20 arithmetical position is to see how many people have switched to a new contract within
21 a year.

22 MR ALTY: Sure. Within a year, yes.

23 MR HOSKINS: Because it's been said that, if there is this individual loyalty market,
24 we're dominant on it. How can you be dominant -- sorry, I don't want to repeat myself
25 but how can we dominate a market where 98 per cent of people have gone elsewhere
26 to new contracts within a year?

1 MR ALTY: Yes, sure. I suppose my only point was that most of your 98 per cent are
2 the people who never did continue, just stopped at the end of the contract. They're
3 not people who then carried on.

4 MR HOSKINS: That's right, but that's still relevant to the dominance, in our position.
5 The individual loyalty market is said to be those who have a CHA contract upon expiry
6 of the minimum term. The first figure is all the people who leave at the end of the
7 minimum term, the 89 to 94 per cent.

8 MR ALTY: Okay, thank you.

9 MR HOSKINS: You have the percentage that leave within a year thereafter.

10 MR ALTY: Yes, yes.

11 MR HOSKINS: As I said, they're not knife-edge figures. They're overwhelming
12 figures.

13 So we've thrown down the gauntlet. We said, "Your case is weak for this reason", and
14 what's the Class Representative's response to these points? Well, if we can go to
15 their skeleton, it's bundle D, tab 1, page 13.

16 Actually, if you look at it first at page 12, you'll see the heading, "D's assertion as to
17 the merits of the CR's case on MDD issues is not a relevant or proper factor to take
18 into account".

19 You've read this.

20 THE CHAIR: Yes.

21 MR HOSKINS: The only paragraph that's actually relevant to this particular point is
22 paragraph 27(c) on page 13, where the CR says:

23 "Burnett 3, paragraphs 10 and 11 address two other matters, raised respectively at
24 paragraph 9 (mischaracterisation of the CR's position on the substantial proportion of
25 customers who switch ..."

26 And paragraph 25 which is about the alternative nature of the market definitions.

1 So all you have in the skeleton is a cross reference to Burnett 3, so let's go there.
2 That's bundle A, tab 20, page 572. The skeleton cross-refers to paragraphs 10 and
3 11 of third Burnett. It's paragraph 10 that is relevant to this issue. I'd invite you to,
4 please, to read paragraph 10. (Pause)

5 Just to give you the spoiler, Mr Burnett does not provide any substantive response to
6 the points that we have raised in our application. (Pause)

7 He doesn't make any response, having consulted with Dr Davis. So one has to
8 assume that Dr Davis did not have a response that he wished to put forward. This
9 was absolutely the basis of our application.

10 Now, we're not asking the Tribunal to decide the point now, obviously. We don't have
11 to. The position is simply this: we pointed out an apparent weakness in the allegation
12 that the relevant product markets are the individual loyalty markets suggested by the
13 Class Representative. The point we have made is based on Ofcom's analysis.
14 Dr Davis relies upon those figures in his own report for his own position. Neither the
15 Class Representative nor Dr Davis has provided any substantive response to the issue
16 we have raised and, in these circumstances, our submission is that the Tribunal is
17 entitled to and should conclude that the Claimant's primary case on market definition
18 and dominance is weak. Simply that.

19 MR BISHOP: Mr Hoskins, would it be a fair summary of your case, or at least an
20 aspect of your case to say this: that the facts here represent a consumer protection
21 matter which the Claimants are trying to shoehorn into the structure of competition
22 law.

23 MR HOSKINS: I certainly wouldn't resile from that as a characterisation of what's
24 happening. It's not something that the Tribunal is unused to seeing. I mean, there's
25 been a glut of these sorts of cases. How do you shoehorn it in? Well, you have to
26 shoehorn it in through dominance and here we are, and you have our point.

1 THE CHAIR: I suppose what we come back to -- and no doubt you're going to come
2 on to this -- is that this is one of the facts we need to consider. But clearly I think it's
3 a fair reading of the factors of the foundational case -- that both you and the Claimants
4 rely on the *Electrical Waste* case -- that what we're dealing with here is ultimately
5 about pragmatic case management. You're suggesting that we ought to divide up the
6 issues. And you have a neat answer to that where you say, "Well, it's obvious the
7 issues we want to deal with, we want to deal with market definition and dominance".
8 That's straightforward. I think it'd be fair to say that I wasn't persuaded by that analysis
9 because it seemed to me, on the face of it, it was quite superficial.

10 MR HOSKINS: Can I come --

11 THE CHAIR: Sorry, just to finish the point.

12 MR HOSKINS: Sorry, sir.

13 THE CHAIR: I paused, so don't apologise. But the difficulty I think I find with it is that
14 if the pragmatic and practical difficulties are very, very onerous, that significantly
15 undermines the potential benefit that would arise or the benefit we can attribute to the
16 supposed weakness of the case; does it not?

17 MR HOSKINS: I'll come on to that. Absolutely, I'm going to go through the factors
18 with you. Just, again, as a sort of precursor to that, the weakness of the case isn't
19 a freestanding factor. The weakness of the case is a consideration that plays into the
20 consideration of the factors. I'll deal with the particular point you've put to me when
21 I come to it. But I think it's important to understand that the weakness is not
22 a freestanding factor that just gets weighed up.

23 I need to finish off the merits point before we get there and, therefore, we have to look
24 at the CR's alternative allegation of collective dominance. Can we go back to Davis
25 1. That's bundle B, tab 16, page 195 and it's paragraph 13(a). These are the
26 instructions that Dr Davis has been given, including the instructions as to the legal

1 position that he is to assume. You'll see in 13(a):

2 "In relation to collective dominance, I am further instructed that:

3 "a. a dominant position may be held by two or more economic entities legally
4 independent of each other, provided that from an economic point of view they present
5 themselves or act together on a particular market as a collective entity;"

6 We agree that is common ground. In order to establish a collective dominance case,
7 the relevant undertakings must present themselves or act together on a particular
8 market as a collective entity. So what is the alleged parallel conduct that the CR relies
9 upon?

10 If we go to the O2 claim form, bundle A, tab 6, page 180. Paragraph 44:

11 "Mr Gutmann relies on the following features as relevant to the analysis of market
12 power of the MNOs on the Mobile Retail Market:"

13 The allegation of parallel conduct is at (5):

14 "Each of the MNOs ... has engaged in the parallel practice of charging Loyalty
15 Penalties to customers on CHA Contracts over an extended period of time."

16 So the only allegation of parallel conduct is each of the Defendants charge loyalty
17 penalties to customers on CHA contracts. (Pause)

18 But again, just for the purpose of this exercise, I'm not going to enter into some sort of
19 dispute about facts. I'm just going to show you what the CR's own pleadings and
20 expert evidence suggest about the nature of the conduct in relation to CHA contracts.

21 It's quite clear that there was no parallel conduct. Remember, the claim period begins
22 on 1 October 2015, when we're going through this. First of all, first Davis, bundle B,
23 tab 16, page 224. It's paragraph 44, if you could read that please. (Pause)

24 That reflects the fact that over time there was a move away from CHA contracts to
25 split contracts. But that move took place at different times for each of the players in
26 the market. It wasn't done on a parallel basis.

1 THE CHAIR: Yes, although another reading of that would be to say that in relation
2 to -- you refer to this in your skeleton, don't you?

3 MR HOSKINS: We did. Yes, absolutely.

4 THE CHAIR: Can you give me the reference to that?

5 MR HOSKINS: It's actually in the split trial application. Sorry, I think - it may be in the
6 skeleton as well. But the split trial application is bundle A, tab 19, page 556. (Pause)

7 THE CHAIR: Yes, yes, there is that.

8 MR HOSKINS: It's in paragraph 14.

9 THE CHAIR: Yes, I had a different paragraph in mind in the skeleton but --

10 MR HOSKINS: Oh, sorry.

11 THE CHAIR: -- don't worry. In any event, carry on with your submissions.

12 MR HOSKINS: Then, if we're going to look at the claim form next please, that's
13 bundle A, tab 6 at page 169. So we looked at the offering of split contracts as opposed
14 to CHA contracts. Now we're going to look at the conduct in relation to CHA contracts
15 and how that changed over time. Again, there was no parallel behaviour. So
16 paragraph 17 of the claim form, and also paragraph 34(1) to (5) at page 176 of the
17 claim form. (Pause)

18 What is striking is the lack of parallel behaviour rather than the existence of parallel
19 behaviour. You've seen that, again, we made this point at paragraphs 11 to 17 of our
20 split trial application. It's not even acknowledged that we made this point in third
21 Burnett or the Class Representative's skeleton, let alone as an answer proffered to it.
22 A deafening and telling silence. Again, we're not asking the Tribunal to decide this
23 point now. We're simply asking the Tribunal to form the view: the CR's allegation of
24 collective dominance is palpably weak.

25 That's all I wanted to say on the merits, and I was going to then move to the application
26 of the factors. Obviously, we say that the weakness of the allegations must be taken

1 into account when deciding whether to order a split trial. We say it's not a freestanding
2 consideration, that it actually feeds into all of the considerations when we're looking at
3 them.

4 Now, one of the most important factors is whether there is a prospective advantage of
5 saving costs if no further trial is necessary -- so if you have a split trial and we
6 win -- outweighs the likelihood of increased aggregate costs if a further trial is
7 necessary. So it's a balancing exercise. Our position on this is simple: if a split trial
8 of market definition and dominance is ordered, then given the weakness of the CR's
9 allegations, we say, at this stage, we can say it is likely that we will win it, and therefore
10 you can address this factor on the basis that there's not likely to be any need for
11 a second trial on abuse or quantum.

12 THE CHAIR: Surely, presumably you would agree that one factor that we would need
13 to consider in looking at the savings, as it were, is we would need to think about the
14 costs that would be incurred in getting to the first proposed first trial, as it were?

15 MR HOSKINS: Yes. But my submission, my simple submission -- and you're tired of
16 me saying "my simple submission", I apologise; you'll test me and push me on it -- is
17 that the costs of having a first trial on its own will inevitably be less than a full trial.

18 THE CHAIR: Yes.

19 MR HOSKINS: We're going to come on to that as well, but inevitably less. So
20 standing --

21 THE CHAIR: How much less is the point, and this is the question I want to ask you
22 about. Because let us suppose that trying to disentangle the evidence and the
23 treatment of issues on matters which are to be dealt with in the first proposed trial by
24 trying to split them, if we are, let's say, envisaging a number of other CMCs, further
25 satellite proceedings, whatever, to try and get to the bottom of that split, that surely is
26 a matter that we would need to weigh in the balance in thinking, "How much savings

1 are we going to make"?

2 In other words, if to get to your first proposed trial, we end up spending a lot of time
3 and money just to get there, and that trial itself isn't very much shorter than any trial of
4 everything, then it's not much of a saving, even if you're right.

5 MR HOSKINS: In our submission, the prospect of having to have trench warfare, what
6 would be in the first trial, is simply not going to arise. If you make an order saying the
7 first trial would be market definition and dominance, we have the pleadings on market
8 definition and dominance. The CR, for example, will make his request for disclosure,
9 that he considers is necessary to deal with market definition and dominance, and we'll
10 respond, and we'll go on like that.

11 Quite simply, anything that's relevant to market definition and dominance, unless the
12 Tribunal steps in and says "You've gone too far", but anything that's relevant to market
13 definition dominance will be in the first trial, and will be determined in the first trial.

14 THE CHAIR: If we take, for example, the issue of competitive pricing, which clearly
15 would arise - it would run as a thread through many issues -- one struggles
16 terminologically here, because we have issues and matters and evidence and we run
17 out of words to describe things. But if we take that matter to separate it from an issue
18 and we say that runs through and might be analysed in different ways, if we're looking
19 at, for example, quantum, we're looking at abuse, we're looking at effects and market
20 definition and dominance.

21 Now, if we're saying, "Oh, well, that's fine. All we're doing here is market definition
22 and dominance", does that mean that the parties wouldn't be allowed to consider that
23 matter in the context in which it arises, in relation to effects, in relation to abuse, in
24 relation to quantum, and if so, if we make a finding on that in the context of market
25 definition dominance, does that bind the parties?

26 Or what if you lose and then you say, "Oh, well, actually, although we said this about

1 competitive pricing, we found some more evidence we would like to lead about that",
2 and how are we to enforce that?

3 So -- because, I mean, just to -- I appreciate that, but I did find the Defendants'
4 application very light on detail on this.

5 MR HOSKINS: That's because the first answer I'm going to give you to the point you
6 just made is: this problem doesn't arise if we win the first trial.

7 THE CHAIR: It does arise --

8 MR HOSKINS: Everything is at an end.

9 THE CHAIR: It does arise, because we still, in order to have the first trial, we need to
10 be able to have a clear understanding about what we're hearing evidence on and what
11 the status of those findings of fact is.

12 MR HOSKINS: Well, with respect, sir, in terms of what evidence do we have to hear,
13 you have to hear the evidence necessary to determine market definition and
14 dominance. No more, no less.

15 Then the second point you make to me is, "Well, what if we make a finding in relation
16 to that and there is a second trial? What's the relationship?" My point I'm putting to
17 you is, because of the weakness of the CR's case, it's unlikely there will be a second
18 trial.

19 Now, of course, I can't say there will definitely not be a second trial, but the whole point
20 of this application, the whole point of showing you the merits, is that when you take
21 that balancing into account, you do take into account the likelihood of there actually
22 being a second trial.

23 THE CHAIR: But you're not suggesting for a moment that, in some ways, it's so
24 unlikely that there's going to be a second trial, that this is a matter that can be dealt
25 with, for example, by way of reverse summary judgment. You're saying, "No, no, we
26 need to hear the evidence, but we think, on balance, we're going to win".

1 MR HOSKINS: Will there be a degree of overlap -- and it's dangerous to use the word
2 "overlap" because that connotes a lot of other things. The competitive pricing is
3 probably a good practical example. Will we have to look at competitive pricing for
4 market definition? Yes. Will we have to look at competitive pricing for, for example,
5 excessive pricing? Yes. Will there be an overlap between the evidence that's required
6 for them? Yes.

7 THE CHAIR: But how can there be an overlap? Because what you just put to me
8 was: we would hear all the evidence we needed to deal with market definition and
9 dominance, and if that's right -- so if insofar as competitive pricing is an issue that
10 arises in the first trial, we'd hear all the evidence about competitive pricing in the first
11 trial, wouldn't we?

12 MR HOSKINS: You'd hear all the evidence that was there. You would take a decision
13 on it. If we come to a second trial, and you have my point on that --

14 THE CHAIR: Yes.

15 MR HOSKINS: -- the parties will have your finding on competitive pricing.

16 Now, let's just look at this practically, because it's easy to get lost in sort of possibilities.
17 You've made a decision. Everyone has put their best foot forward in competitive
18 pricing. Are people likely to try and go behind that? Well, people are going to be
19 reticent to do that because they'll be facing the three of you staring at me like you are
20 now, and they're saying, "Well, we want to revisit this". Unless they have come up
21 with some blockbuster piece of evidence, and unless they're saying we couldn't have
22 got this in the first trial, they're not going to do it. They're not even going to ask you to
23 do it.

24 THE CHAIR: So we should rely on the fact that the parties will choose that discretion
25 is the better part of valour and not advance arguments. I have to say, my experience
26 in this Tribunal is such that I've rarely come across parties who don't feel that it's worth

1 | arguing the point, arguing the toss anyway, so --

2 | MR HOSKINS: Well --

3 | THE CHAIR: But I have your submission on that.

4 | MR HOSKINS: So you also have the protection of issue (inaudible) will apply within

5 | trials. It applies to the parties between trials. You have the protection of --

6 | THE CHAIR: We're going to have arguments about arguments then, because we'd

7 | end up having arguments about, "Oh, what was the scope -- what was the breadth of

8 | this finding? Did it cover it or does it cover this other aspect or not? We better have

9 | an argument about that".

10 | MR HOSKINS: Sir, I'm not --

11 | THE CHAIR: It just looks like a -- I mean, I quite see the simplicity of it and it's very

12 | attractive, I understand that. But as soon as one gets into the weeds, it seems to me

13 | that essentially what you're asking us to do is the siren song of, "Oh, it's very, very

14 | simple and we're going to win and then you won't need to worry about all this stuff",

15 | and actually what's going to happen is getting there is going to be incredibly difficult

16 | because of the unravelling --

17 | MR HOSKINS: I disagree with that, sir. I'm sorry. I disagree with that because --

18 | THE CHAIR: Well, you have --

19 | MR HOSKINS: What you make will be: market definition and dominance is to be tried

20 | in the first case. The only problems that could come up would come up if there is

21 | a second trial, and you have my submission on merit.

22 | THE CHAIR: Yes. No, I -- it may be that I didn't -- as I say, I didn't find your

23 | applications of assistance in dealing with the practical steps to get to the split trial,

24 | beyond what seemed to me a very superficial submission that we just King Canute-like

25 | say, "These are the issues we're going to deal with and leave it after that". It just

26 | seems to me that is very, very over-simplistic.

1 MR HOSKINS: Sir, this application depends on the merits point and the weight you
2 are prepared to give it. The approach that you have suggested to me, the view you
3 have taken, would lead to, I think I'd be as bold as saying, "You'd never have a split
4 trial of market definition dominance and abuse, where there was any overlap".
5 We know, for example, from *Purple Parking*, a High Court case which dealt with abuse
6 first and separately from market definition and dominance. So the order is reversed,
7 but the overlap issue is exactly the same. *Purple Parking* did it that way. We know
8 that *Streetmap v Google*, a case I was involved in, exactly the same: abuse was taken
9 first; market definition and dominance were parked. So there was the possibility of an
10 overlap, and yet, that was deemed to be (inaudible) to do it, and I can tell you what
11 happened in *Streetmap v Google*: there was no second trial because we lost.
12 We've had it more recently in the Gutmann rail fares case. Again, abuse was taken
13 first, before market definition and dominance. You have the overlap problem. Yet,
14 that was deemed to be the correct way to deal with it and it was the end of the matter.
15 So I understand your caution. It's impossible, whatever case we're looking at, where
16 there is a degree of overlap, for someone to come up with a neat table and say to you,
17 "Here are the bits of overlap. This is what they look like. Here are the micro issues".
18 Nobody's ever going to come before you and say that.
19 But we have the practical examples where overlap has not stopped a split trial
20 happening. We have the practical examples where the split has led to the early
21 resolution of the claims. We're in that position, but we're in a stronger position because
22 we have the merits point, and there was no merits point in *Purple Parking*. There was
23 no merits point in *Gutmann* rail fares. There was no merit points in *Streetmap*.
24 I completely understand the point you're putting to me, you will decide whether I've
25 persuaded you or not, whether there is utility in this approach, but it has proved
26 successful in other cases, even where they didn't have this merits point.

1 If we do go down this route, and if we do win the first trial, let's have a think about the
2 potential magnitude of the savings if we win, because that's all part of the balance. In
3 our submission, the savings would clearly be substantial because, for example, it
4 would avoid the need to carry out a full excessive pricing analysis, and those of us
5 who've sat in trials where there's been a full excessive pricing analysis know how
6 complicated that is as an exercise.

7 It would also avoid the need for Dr Davis's proposed, as he spells it, "bottom-up
8 quantum analysis" of each individual class member's loss, because that's what he's
9 proposing. On the Class Representative's case, there are between roughly 5 million
10 and 12.3 million class members, and Dr Davis wants to do a bottom-up analysis.

11 So as part of all this balancing up, if there's a first trial, if we win, you save all that. On
12 our estimate, a split trial on market definition dominance alone would take between
13 four and five weeks. Again, I rely on your experience -- all of us who have sat in trials
14 will have a sense of how long that is likely to take -- and in our submission, a full unitary
15 trial is likely to take between eight to ten weeks. Again, anyone with any experience
16 of trials in this Tribunal, I don't think we'll quibble with that as an assessment.

17 THE CHAIR: But the Claimant could (inaudible).

18 MR HOSKINS: I'm going to come to what they say on that, but you have your own
19 experience. It's all very well of me saying, "I think it will take X, Mr Burnett's ..." You've
20 all done these cases; you will have a strong sense of whether I'm in the right ballpark,
21 or Mr Burnett's in the right ballpark.

22 THE CHAIR: But again, I mean, I think that it's when you start getting down to the
23 questions of, for example, estimates of how long it's going to take, which clearly is
24 important because it goes to the savings, potential savings, but it's when one gets into
25 that detail that if, for example, the Claimant says, "It's going to be eight weeks as
26 opposed to ten weeks", it's not much of a saving really.

1 MR HOSKINS: That's right if they're right. But in our submission, the idea that it's
2 going to take eight weeks, for example -- I can't remember the exact phrase, I think it's
3 seven to eight weeks for the market definition dominance trial -- I'm sorry to be
4 colloquial, but no way. I mean, the whole of the -- I have to get this right and correct
5 me -- the *Kent v Apple Inc* case, which was a very heavy case, eight weeks for the
6 whole trial, the idea was that we're going to spend eight weeks on this market
7 definition. I'm sorry, it's not (inaudible).

8 THE CHAIR: But the reason it becomes less -- I mean, I just sat through Sony and
9 that was eight weeks. Depending on how you split things up and which bit falls into
10 which category -- if, for example, we're talking about, come back, to the issue of
11 competitive pricing, I can quite easily see that the parties wishing to deal with that
12 issue exhaustively, knowing its significance, which could run through multiple issues,
13 and having set out the evidence that you would require to hear and, you know, to take
14 another topic that the Claimant picks on: the issue of the "sticky customer", to use
15 a label for it. Hearing evidence about that and then hearing the expert analysis of it,
16 one can see that it quite rapidly fills up a significant number of weeks more than what
17 the first principles you would say are, "Well, it can't take that long if we're just dealing
18 with these discrete issues", because of the question of the overlap. But I mean --

19 MR HOSKINS: It's difficult for me to respond to that because we each have our own
20 experiences. I can say to you that it's not my experience having done, I hate to think,
21 you know, how many cases, et cetera. You've had a recent --

22 THE CHAIR: You've had more than I've had, I'm sure.

23 MR HOSKINS: You've had a recent bruising experience in, you know, *Neill v Sony*.
24 I'll come on to the respective timetables and estimates, but in our submission, if we'd
25 come up with and said to you that we need eight weeks for market definition and
26 dominance, I think we'd have been laughed out of court. But maybe not, if you were

1 the judge.

2 THE CHAIR: There wouldn't be laughter on my side either way, but in the sense
3 that -- my point is simply that: viewing it from our perspective, looking down on what
4 the parties say, "This is how long it's going to take", and you say, "Oh no", the
5 confidence clearly is part of your argument. You don't want it to take very long,
6 because you want there to be a big saving. Mr Thompson says, "It's going to take
7 a long time". Of course he wants to say that, but --

8 MR HOSKINS: I understand that you have to price that in. Of course you do. But
9 let's also be clear, I mean, what we're looking at is the difference between, "How long
10 would a first trial take" and, "How long would a whole trial take?" Now, the first trial,
11 even with the bells and whistles you describe, doesn't do a full excessive pricing
12 analysis; it doesn't do a full bottom-up quantum analysis. So I can't say to you that it's
13 40 per cent, 60 per cent. Nobody can; of course we can't.
14 But I can say to you, "It's not a full excessive pricing analysis. It's not a full bottom-up
15 quantum analysis". And those things are going to take a lot of time to prepare, a lot of
16 money to prepare, a lot of court time to hear, so I'm not sure it's actually that helpful to
17 say, I come and say four to five weeks, the other side says seven to eight. I can tell
18 you for sure that those two things don't need to be done in full. Ultimately, and I'm
19 sorry to use this, it's touchy feely for you, because there's no hard edge to this.

20 THE CHAIR: No.

21 MR HOSKINS: I've dealt with the overlap point, because I deal with it in the way I do
22 and you've had my submissions on that.

23 Another relevant factor is the question of delay in obtaining a final resolution of these
24 claims if a split trial is ordered and the CR is successful at the first trial, and I mean,
25 you're going to get bored of me making this point, but the weakness is relevant here
26 as well. If a split trial is ordered, it's likely we say that we will win; there will be no need

1 for a second trial. So in terms of looking at what is the quickest way to bring these
2 claims to an end, we say, it's likely to be the split trial, because they'll fail and we won't
3 go any further.

4 But for the sake of completeness, I do want to address the question of when a split
5 trial could take place, and when a unitary trial could take place, and also come
6 back -- I've dealt with it to a certain extent -- to the time estimates for those trials. Now,
7 our estimate is that a first split trial could take place in November 2027, and it would
8 last four to five weeks. We estimate that a unitary trial could take place in autumn
9 2028, beginning of 2029, and would last eight to ten weeks.

10 The CR's position is that a first split trial could take place in late June, or autumn 2028,
11 and would last seven weeks, and that a unitary trial could take place in late
12 October 2028 and would last nine weeks. They're basically saying that the unitary
13 trial's coming on pretty much at the same time as the first trial, and it would last
14 nine weeks, as opposed to the split trial of seven weeks.

15 We do say that that suggestion is surprising in two respects. The suggestion that
16 a trial dealing with only market definition and dominance, even a bells and whistles
17 market definition dominance trial, would need seven weeks, we say, is incredible. The
18 idea that the difference between a split trial and market definition and dominance, and
19 a full unitary trial is only two weeks is not really credible.

20 Also, the suggestion that a first split trial could only take place at around the same time
21 as the full unitary trial is also not really credible. The problem with the CR's proposal
22 is that it fails to recognise that there would be more issues, and therefore work, in
23 a unitary trial than a first split trial. For example, excessive pricing; for example,
24 bottom-up quantum analysis.

25 If we can just look at the CR's proposal, you'll see the failure to recognise that there is
26 more work in unitary trial. It's at bundle D, tab 1, page 27. (Pause)

1 It's quite hard to get your mind around this, but let me tell you that the time allowed for
2 disclosure, so the difference between the date of the disclosure CMC and the
3 completion of disclosure, is the same for a split and unitary trial. It's only three months.
4 And three months, for example, is not enough time for disclosure for the unitary trial,
5 for all the issues. So they fail to recognise the difference in the workload between split
6 and unitary. The time allowed for fact evidence, if you judge it from the last date of
7 the repleading witness statements, is around two months for both.

8 But again, if we're doing a unitary trial, the fact evidence is going to have to cover a lot
9 of other ground. The time allowed for the expert process -- so expert report,
10 responsive reports, reply report, joint expert statement -- the gaps are three months,
11 two months and two months. It's exactly the same for the split trial and the unitary
12 trial. Again, that just can't be right if the experts are doing a full excessive pricing
13 analysis and a bottom-up quantum analysis. The idea that it's the same amount of
14 time, again, I'm sorry, but it's really not credible.

15 So the bottom line is that whatever specific directions you were to make, whatever you
16 ultimately decide about early disclosure and DRs and whatever you decide, it's likely
17 that a first split trial could take place about a year, maybe slightly more in advance of
18 a unitary trial. You have our submission on that. If we do have a first split trial, we're
19 likely to win. Everything is finished. No more time, no more money.

20 The issue of prejudice is one of the factors to be considered. The risk of delaying any
21 ultimate award of damages is a relevant factor. But the claim form, paragraph 102,
22 for example, of the O2 claim form accepts that:

23 "... any returns to individual class members will be, [and I'm quoting here] of
24 a relatively modest value."

25 It's not a business dispute where the money claimed is the lifeblood for the Claimant;
26 these are small individual consumer claims. I'm not, for a moment, seeking to

1 | undermine the fact that the system seeks to get money to consumers. I'm simply
2 | pointing out these are small amounts of money that are not going to change any lives,
3 | and therefore the factor of delaying any ultimate damages award is really of very little
4 | relevance in a case such as this.

5 | In my submission, it's the same in relation to appeals. If there's no great urgency to
6 | get money into the hands of the consumers because it's such a small amount, if this
7 | case requires appeals, then so be it. That's again the same in any split trial decision,
8 | the risk of appeals; it was there in *Purple Parking Ltd v Heahtrow Airport Ltd*, it was
9 | there in *Streetmap.eu Ltd v Google Inc*, it was there in
10 | *Gutmann v First MTR South Western Trains*.

11 | The witnesses issue: inconvenience to witnesses. Well, because this is an opt-out
12 | consumer action, it's very unlikely that the CR will have any factual witnesses. That's
13 | what one sees in these cases; it's not normal. The factual evidence comes from the
14 | Defendants. If there is a risk, if we don't win the first trial and some of our witnesses
15 | have to come back twice, that's a price we are happy to pay if it's in return for a split
16 | trial being ordered.

17 | The settlement point is just the obvious one. If there is a first trial, at the moment, we
18 | think that -- you'll have seen from my submissions and, hopefully, the enthusiasm with
19 | which I've presented them -- we think these cases are groundless. If there is a trial
20 | and we're wrong and we lose at trial, I put it no higher than that might alter the
21 | incentives for settlement. You've seen where the parties are at the moment.

22 | The alternative allegations point is the last one I want to look at because it's important,
23 | because, as you've seen, the Class Representative is currently pursuing two
24 | alternative cases on market definition and dominance. They're very different cases
25 | and they pull against each other. There's been an attempt to try and, sort of, smooth
26 | out the tension in *Burnett 3*, but they're pleaded as alternatives, and they're clearly

1 very different cases.

2 This is a submission which is of a different nature for me. It's not simply, "If we have
3 a first trial, we'll win". My point here is: if there's a first trial and we lose, then that
4 would allow the second trial to take place with the advantage of knowing which
5 dominance case has to be addressed. In the context of these sorts of claims, which
6 are very context specific -- the unfairness aspects of the claims -- that's going to be
7 really important. It will make the Tribunal's job, the expert's job, far easier if they know
8 what the bedrock of the allegations to be assessed is, because at the moment, if you
9 have a unitary trial, we're going to have to go into it with this terrible split alternative as
10 a possibility.

11 Sorry, I'm slightly within my allotted time. But I don't have anything else to say unless
12 you have any questions for me.

13 THE CHAIR: Well, I'm extremely grateful to you, Mr Hoskins, particularly given the
14 amount of interruption you had to put up with.

15 MR HOSKINS: No, it's an occupational hazard.

16 THE CHAIR: I'm very grateful to you.

17 What we will do is we will take the break now as the parties had suggested, and we
18 will sit again in 15 minutes. Thank you.

19 (11.30 am)

20 (A short break)

21 (11.48 am)

22 Submissions by MR THOMPSON

23 THE CHAIR: Good morning, Mr Thompson.

24 MR THOMPSON: Good morning.

25 I don't think the Tribunal will be surprised that our overarching submission is that
26 there's no proper basis for a market definition and dominance trial in this case. The

1 | burden, as I'm sure the Tribunal is aware, is on the Defendants to show that there are
2 | good reasons to depart from the norm of a unitary trial.

3 | We've given the reference to the *Jinxin* case at paragraph 23, which is in bundle E,
4 | tab 11, pages 490 to 491, and the judgment of Mr Lenon in the *Ennis* case, which is
5 | at E 39, 1204 to 1206. In particular, at paragraphs 14 and 21, he refers to the siren
6 | song that the chairman put to Mr Hoskins.

7 | I think it's often said, as we say in our skeleton, that the risk is that what appears to be
8 | a shortcut will in fact be a long way round to resolve the issues between the parties.

9 | We say that there are particular difficulties here which are, to some extent, of the
10 | Defendants' own making. There's no expert or witness evidence in support of their
11 | defences or the current application.

12 | Indeed, there's no such evidence in relation to disclosure either. The only evidence
13 | they put in, in the form of a letter from Mr Parker, is at bundle A, tab 27. It's a short,
14 | responsive letter which we would say is not appropriate evidence. By contrast,
15 | although Mr Hoskins has made one specific criticism of Dr Davis, in fact the Tribunal
16 | will be aware that there is a very detailed and conventional analysis by Dr Davis,
17 | including the precise statistics relied on by Mr Hoskins which he derives from his own
18 | report which were in turn derived from the Ofcom materials.

19 | I note, and again I don't think it's necessary to turn it up, but at paragraph 100 of
20 | Dr Davis's report, the number of people on contracts after their minimum term was
21 | said by Ofcom to be 2 million. So if 38 per cent of those were still on contracts after
22 | the minimum term, that would be some 400,000 people even at the single snapshot
23 | that's given. So in my submission this is not a trivial matter and clearly it was not
24 | treated as such by Dr Davis. Even though it's a relatively small proportion of the total,
25 | it's actually quite a lot of people.

26 | MR BISHOP: Mr Thompson, I'm having trouble with the mental arithmetic at the

1 moment. 38 per cent of 2 million looks more like 800,000 than 400,000.

2 MR THOMPSON: Your mental arithmetic is much better than mine.

3 MR BISHOP: Okay.

4 MR THOMPSON: You're quite right, sir. So it strengthens rather than weakens my
5 point, and I apologise for my maths.

6 In terms of the overlaps -- which we would say is the key issue that was put to
7 Mr Hoskins by the chairman earlier on -- we would say that the issue of competitive
8 pricing is clearly relevant to the operation of any effective SSNIP test and is also
9 central to the issues of abuse, and indeed dominance. The transparency issue -- the
10 sticky customer issue -- equally cuts across market definition, dominance and abuse.
11 Issues of prices and costs and margins are relevant in particular to market power and
12 abuse. There is also a slightly paradoxical situation in relation to O2 itself, whereby it
13 appears to rely on its slightly different position in relation to the joint dominance issue.
14 But I'm not clear whether Mr Hoskins would take a different view in relation to abuse
15 or whether he would regard all of those issues being taken within the scope of the
16 market definition and dominance trial. But it seems to me that all of those factors, in
17 reality, would straddle the two proposed trials. There would indeed be difficulties in
18 trying to distinguish between them.

19 So far as our estimates go -- which we've set out in the annex -- we do stand by them
20 and we say that they're supported by the evidence of Mr Burnett and the detailed
21 notes. We think it's realistic to submit that there would not be much gain given the
22 extent of the overlaps, the point that the chairman put to Mr Hoskins about the
23 likelihood of disputes over where to cut the joints, as it were, and then the risk of further
24 CMCs or even possibly appeals in relation to issues of that kind. I don't think that
25 could be completely ruled out given the history of various cases in this jurisdiction.

26 Of course, there's also the possibility that both at the hearing and at any interim

1 stages -- and to some extent we've seen that already -- the four parties would not
2 necessarily be aligned in all respects. So there's a risk that any attempt to separate
3 the issues would lead to disputes between the Defendants as well as between the
4 Defendants and the Class Representative. So all in all, whatever the position the
5 Tribunal thinks about the merits, we would say that this is a highly inappropriate
6 attempt by the Defendants to try and short circuit proceedings.

7 I think Mr Hoskins also said that there might be specific issues in relation to excessive
8 pricing and loss analysis but, in my submission, it's premature to take that into account
9 at this stage. That's a matter that could be addressed in relation to the issues for
10 a unitary trial or possibly directions as to how the trial should be conducted. But it's
11 not a matter that addresses the issues that are being raised at this stage.

12 THE CHAIR: I think, as I understood it, Mr Hoskins's point was simply, he was
13 saying -- and I have considerable sympathy for this submission -- that trying to
14 estimate how long trials are going to take is very difficult. One ends up, to some extent,
15 putting one's finger in the air. But what Mr Hoskins was saying was: one thing he
16 could be clear about was that the proposed first trial, as it were, wouldn't include an
17 analysis of excess pricing. So therefore, if we're starting with a longer period, some
18 period of that period which would be required to deal with excess pricing could be
19 taken out of consideration when dealing with the shorter period. I think that was the
20 argument.

21 MR THOMPSON: Yes, I understand that. That wouldn't be one of the bells or whistles
22 for MDD. I'm simply pointing out that we're looking a long way into the crystal ball.
23 For example, there will be exchange of expert reports and there may be a degree of
24 agreement as to what the correct approach is to these matters if the matter goes to
25 a unitary trial. So to try and anticipate all that now is really very difficult indeed.

26 All I'm saying here is that the procedure is likely, in fact, to be more straightforward

1 both for the purposes of disclosure and case management, to know that everything is
2 in so that the Tribunal can exercise jurisdiction over the whole exercise at one time.

3 So far as the legal tests go, I've referred to *Jinxin* and *Ennis* briefly but, in my
4 submission, the core authority is in fact the case that we referred to briefly, which
5 I think Mr Bishop in particular is very familiar with, the *Kent* case, where a somewhat
6 similar application to this one was made at an early stage and was rejected. That's at
7 bundle E, tab 26. It starts at, I think, 1080 or if it doesn't start there it starts shortly
8 before that.

9 THE CHAIR: 1076.

10 MR THOMPSON: Sorry, it starts at 1076. Then the analysis that I rely on starts at
11 1080 where it sets out, in slightly more schematic form, the factors that Mr Hoskins
12 has already referred to. I think the key factor from my perspective is factor 6, which is
13 really the question of whether it's easy to divide the issues, which then feeds into
14 a number of other factors.

15 If one turns over the page to paragraph 10, the Tribunal says:

16 "In a Chapter II/Article 102 TFEU case, one would ordinarily expect there to be
17 significant overlap between the factual material relevant to market definition and
18 dominance and the factual material supporting the allegations of abuse. To take an
19 example, the identification of the price for the calculation of the 'Hypothetical
20 Monopolist' or 'SSNIP' test (being a conventional tool for assessing the closeness of
21 product substitutability for market definition purposes) may overlap with an enquiry
22 into whether prices were excessive, which is one of the species of abuse treated by
23 the Class Representative."

24 In my submission, that finding or that statement is particularly in point here because
25 of the way in which Dr Davis has analysed the issues in his report and as a matter of
26 principle. For what it's worth, that point was not merely theoretical because, one finds

1 in the Kent judgment, which is at E, tab 13, page 640, paragraph 300. I'm sorry --

2 MR BISHOP: Bundle ... We're still in the same ...?

3 MR THOMPSON: It's the same case but it's a different judgment.

4 MR BISHOP: Okay.

5 THE CHAIR: Is this the final judgment you're taking?

6 MR THOMPSON: Yes. It's the final judgment.

7 THE CHAIR: What is the page reference again?

8 MR THOMPSON: Page 640. The Tribunal says, in relation to market definition, this
9 is their conclusion on market definition:

10 "We have revisited this section of the judgment in the light of the conclusions we have
11 reached on the alleged exclusionary abuse (at section F) and the alleged excessive
12 and unfair pricing abuse (at section G). There is nothing apparent from that review
13 which causes us to reconsider any of the conclusions we have reached on this market
14 definition exercise. In other words, we consider that the evidence before us is
15 generally consistent with the conclusions we have reached on market definition for
16 iOS app distribution services."

17 So although that's, in a way, a throwaway line, it shows that the analysis was
18 integrated and thought to be relevant by the Tribunal at trial.

19 If we return to the ruling in Kent at tab 26, and then move on to paragraphs 20 and 21.

20 That's at page 1084. If the Tribunal could read that passage at paragraph 20. (Pause)

21 In my submission, each of the three subparagraphs would equally apply here.

22 THE CHAIR: I mean, the obvious point that is made is that there isn't an analysis here
23 of the sort that Mr Hoskins put forward, going to what he says is the palpable weakness
24 of the Claimants' case here. It would help us to understand what your position is, both
25 as to where that fits into the analysis -- if it does on your view -- and secondly,
26 substantively, how you respond to that. Because, I mean, on the difficulties of the

1 split, I recognise the strength of your position but I'm keen to understand what you say
2 about what I think is the heart of the --

3 MR THOMPSON: Yes. I was going to come to that, and I think the obvious way to do
4 that is by reference to Dr Davis's report, because --

5 THE CHAIR: Well, don't take it out of order by any means.

6 MR THOMPSON: No, no, I was going to -- I think your Lordship has the point, and
7 dare I say it, agrees with the point that's made at paragraph 21, that if there is
8 a problem with the split, then it feeds into all the other factors as well. I think that was
9 very much the reason that Mr Lenon took the view he did in *Ennis*, that, in fact, it was
10 going to be a very messy exercise to try and split the two issues.

11 There is one issue on precedent, which is a point that's made at paragraph 15 of the
12 ruling, that a submission was made that there was no precedent for market definition
13 and dominance going ahead of abuse. Mr Hoskins did point you to a few cases where
14 the reverse is true, where abuse has been taken on an assumption of dominance. We
15 can look at individual cases, but my general submission is that the tendency has been
16 that where you have a monopolist on a reasonably well-defined market, or
17 a monopolist on any reasonably defined market, the court has from time to time
18 thought, "Well, rather than spend a lot of time on market definition and dominance,
19 let's get to the meat of the case and look at the abuse".

20 I think possibly the clearest case is a case called *Arriva the Shires*, which has the
21 double benefit of being a case management direction by the former chairman,
22 Mr Justice Roth, applied by a current member of the Supreme Court, Lady Rose, and
23 that's at page 240. I think it starts on the previous page of bundle E, and the relevant
24 passage is a short one at page 242, paragraph 6, where Mrs Justice Rose, as she
25 then was, describes an interlocutory hearing in June 2013, and then an agreement at
26 6(i):

1 "the trial would proceed on the assumption that Luton Operations hold a dominant
2 position because they hold a 100 per cent share in the relevant market, namely the
3 market for the supply of facilities at the Bus Station."

4 So, in that sort of case, it obviously can make good sense to go straight for the issue
5 of abuse, because there is really no particular dispute over market definition and
6 dominance. In my submission, there's a good reason why there's no precedent for
7 this type of case, because it's frequently the case, as here, where particular issues of
8 pricing relevant to the hypothetical monopoly test will also be relevant to issues of
9 abuse, precisely the point that the Tribunal made in Kent at paragraph 10.

10 We've got a number of case law references at paragraph 6 of our skeleton, but I won't
11 take up more time now. Turning to Dr Davis's analysis, including of the issues that are
12 made by Mr Hoskins, if one looks at tab 16 of bundle B, page 181, you'll find the
13 detailed evidence of Dr Davis that was served on the Defendants, I think at the end of
14 November 2023. They've had plenty of time to think about it. The first point I'd make
15 is, to some degree a jury point, but I think it's worth making, that Dr Davis is a very
16 distinguished and well-qualified expert, which one sees summarised at paragraph 1 of
17 his report, page 186. His CV extends over ten pages at the back of his report, at
18 pages 373 to 387.

19 The second point is that, notwithstanding the small piece of evidence that Mr Hoskins
20 has taken you to, Dr Davis reaches a clear conclusion on his preferred market
21 definition, i.e. the narrow market definition, which one finds at, for example,
22 paragraph 149(a) and 155, having considered the matter in considerable detail. That's
23 at pages 278 to 279, I think. Yes, 278 to 279, in particular 149(a). Then he assesses
24 the very question that Mr Hoskins has put in relation to substitutions onto that market
25 in the following passage, and then concludes at paragraph 155 that that doesn't
26 change his assessment.

1 Then his findings in relation to the wider market, which is his secondary view, is at
2 paragraphs 159 to 161, pages 285 to 288. I think it's fair to say that he would say that
3 there are a number of indicators in relation to that, that would support a finding of joint
4 dominance, but the matter is one for evidence at trial, which in my submission is a very
5 proper approach for him to take.

6 So far as the narrow market definition goes, his preferred market definition, that's set
7 out in detail in section V of his report, which starts at page 251 and runs through to
8 where we took leave of it at the end of 290. In my submission, one can do this in
9 various ways -- I don't know whether the Tribunal has had a chance to read this
10 material recently -- but my general submission is that this is a conventional SSNIP
11 analysis based on a focal product, and then applying the CMA guidelines throughout,
12 the key issue being, as I think the Tribunal has already put to Mr Hoskins, the question
13 of competitive prices.

14 The second point that Mr Hoskins makes, and I think Mr Parker has also made, is that
15 there's a lack of clarity about the distinction between the primary and secondary
16 markets, or the wider and narrower markets. In my submission, that's not a fair
17 criticism. On the contrary, Dr Davis looks at that matter in some detail by reference to
18 the relevant guidelines at section V.A.3 and then comes back to it at V.A.8.

19 As I've said, he makes it clear that his primary analysis is the narrow market, on the
20 basis that there are no effective constraints on pricing by individual MNOs on that
21 narrow market, which is consistent with his preliminary view SSNIP test. He discusses
22 competitive price levels for the SSNIP at paragraphs 125 to 128, cellophane fallacy
23 issues, if that's clear to the Tribunal, the question of whether or not prices are inflated
24 by the market power of the Defendants, at paragraphs 131 to 133. Transparency
25 issues at paragraphs 156 to 158, and then he, as I've said, he specifically looks at the
26 possible constraints from wider markets, where the passage that Mr Hoskins relies on,

1 paragraphs 149(b) and 155 to 156.

2 For good measure, insofar as Mr Hoskins relies on other cases which he says shows
3 how competitive this market is, he also notes the mobile call termination saga, where
4 extremely narrow markets were found by Ofcom and endorsed by this Tribunal and
5 the Court of Appeal in relation to mobile call termination. Also, the PPI case, where in
6 fact Dr Davis was the chairman of the relevant competition panel, and where very
7 narrow markets were again found. The references there are at bundle B, tab 16,
8 pages 260, 262, 265, 279.

9 Now, the purpose of going through this is not to reach any findings as to whether
10 Dr Davis is correct, but as context for Mr Hoskins's suggestion that the Tribunal can
11 be so clear on the merits at this stage that it can take it effectively into account as
12 a knockout blow. In my submission, the position, if anything, is the opposite: the
13 Defendants, no doubt for good strategic reasons, have not put forward any -- they've
14 had this material for two and a half years; they didn't try and strike it out at the CPO
15 stage; they haven't put in any evidence in response at that stage or since then; they
16 didn't put any evidence in support of this application; and they've served a short letter
17 by an expert in response, but without addressing these issues at all. There's nothing
18 in Mr Parker's letter that says that Dr Davis's analysis is disreputable or weak or
19 unconventional. Indeed, he just doesn't address it at all.

20 In those situations, my submission is that there's no basis to say that Dr Davis's
21 approach is palpably weak. On the contrary, it hasn't yet been seriously opposed,
22 except by a few extracts and references to different cases. Just in relation to those
23 other cases, the Tribunal will be alive to the slight irony that the defences are full of
24 assertions that the Ofcom materials are irrelevant and inadmissible at trial, on the
25 basis of the *Evans* case. But in relation to this issue, they rely on a number of other
26 regulatory decisions in different markets and under different legislative regimes as the

1 basis, or one basis, for their palpably weak argument. In my submission, they can't
2 have their cake and eat it in that respect either.

3 THE CHAIR: So that's your answer, as I would understand, on as well the substance
4 of Mr Hoskins's argument. Where do you say it fits into the analysis, or does it fit into
5 the analysis as far as you're concerned?

6 MR THOMPSON: Yes, we do. We say that on the key factor of clear split, we say
7 there are three key areas of overlap in Dr Davis's preliminary analysis, and one can
8 see that from the contents page if one looks at pages 182 to 183. The implementation
9 of the HMT, the hypothetical monopoly test, at V.A.7 is concerned with the competitive
10 price level. Likewise, the cellophane fallacy issue at V.A.5, where he says "competitive
11 price levels, cellophane fallacy".

12 Then in relation to the abuse section which he calls "economic assessment of effects",
13 there's an entire section on economic evidence on whether prices are in excess of
14 competitive benchmarks and then two subparagraphs in relation to that. In my
15 submission, there's a clear overlap which is reflected in the body of the text, for
16 example, at paragraphs 105, 152(a), which is at 257 and 280, where Dr Davis
17 cross-refers to his analysis at section 7(b)(i) for more detailed price comparison
18 materials at 237 to 250, which is at pages 328 to 333.

19 Then in relation to costs and profitability, again, implementation of the hypothetical
20 monopoly test and the section on competitive benchmarks. But that's also linked to
21 the counterfactual prices that Dr Davis would use, which you see at section VIII.A, in
22 relation to counterfactual prices, starting at page 166 of his report. Then the third area,
23 transparency and consumer awareness, he addresses that in considerable detail in
24 sections A.3 and A.8 of section V, and then there's a whole section on that in VII.C in
25 relation to abuse. In relation to the position at the expiry of the minimum term, as
26 against entry into the CHA contracts, again, I'd refer to V.A.8 and then VII.C.3 on lack

1 of transparency. In my submission, all of those analyses are essentially overlapping
2 with one another.

3 To address a point that Mr Parker takes, this is not merely a matter of overlapping
4 evidence, but it's clearly overlapping analysis of core economic issues under two or
5 more heads, market definition, dominance, abuse, and quantum. So we say that the
6 other issues, taking that into account, also favour the unitary trial. We say that, as in
7 Kent, there are obvious risks of duplication, prejudicial delay in making findings on
8 liability and quantum. We would say prejudice must be assessed at the level of the
9 class rather than of individual claimants. So we say that that point of Mr Hoskins also
10 goes nowhere.

11 We say that in an area of this kind, particularly in relation to collective dominance, but
12 also in relation to the narrow market definition, there must be a risk of bifurcated
13 appeals and consequential delay, and there's plenty of examples of that in the papers
14 looking back over the history of this Tribunal. There's a risk of an incomplete factual
15 or economic analysis of prices, or the transparency issue. There's a risk of
16 inconsistent factual or economic evidence between the two trials.

17 There's also a point that's made at paragraph 19 of Kent about prematurity, and given
18 that there's been no disclosure whatsoever by the Defendants at this stage, including
19 of documents that they relied on for purposes of their strike-out over a year ago, and
20 in their pleadings this year, there must be a probability that the cases are likely to
21 change on disclosure and a clear risk that overlaps will increase rather than be
22 eliminated. There's obviously a possibility of the converse, but that's not something
23 we can know at this stage.

24 Then finally, and we've addressed this, and I think I addressed it briefly at the
25 beginning, that the annex to our skeleton is our best attempt to try and look in the
26 crystal ball, subject to all the challenges and uncertainties, and strangely enough,

1 we're not very far apart in relation to the unitary trial. I think, even if our incentives are
2 different, we've come to a, I think, a nine-week estimate, which we think could get on
3 at the end of 2028, whereas, Mr Piccinin I think has suggested eight to ten weeks,
4 which we might be able to get on at the end of 2028, but probably more safely put into
5 2029. I don't think we're going to fall out over that sort of calculation.

6 The more difficult question is obviously the estimates for the MDD trial, if that were to
7 be ordered. We think, and this is something we'll come to this afternoon, that the
8 estimates for the disclosure process, and indeed the whole approach to disclosure
9 that the Defendants put forward in support of their application, is completely unrealistic
10 and unachievable. Even if it could be achieved, it would be extremely unfair and
11 contrary to principle. I think at one point it was suggested that we might be able to
12 produce Redfern schedules within two weeks of this hearing, without any prior
13 disclosure from the Defendants at all. In my submission, that's symptomatic of
14 a completely misguided approach, but I won't go into that any further.

15 But we think that, realistically, our parallel analysis is realistic and that the timetables
16 we've put forward, including the time likely for a 'bells and whistles' MDD trial are also
17 realistic, so that in practice, the nominal gain might be six months and possibly a week
18 or two of the Tribunal's time.

19 But as I think that the Chair put to Mr Hoskins in argument, the countervailing
20 disbenefit is that even if that timetable was achieved, it might come with quite a lot of
21 blood, sweat and tears from here to now to try and work out what was actually going
22 to be covered in that trial and what wasn't, quite apart from the possibility that we could
23 be in the Court of Appeal in 2030 and back here again in 2032, which is not a prospect
24 that anyone feels comfortable about. But looking at some of the cases in this Tribunal,
25 it is not a completely unrealistic one.

26 I have got some other points, but I think that probably covers the ground, unless

1 | there's anything else the Tribunal wants to put to me. (Pause)

2 | THE CHAIR: No, that's helpful, actually. Thank you. We have no further questions
3 | for you at this stage.

4 | MR THOMPSON: I'm grateful. In which case we're slightly ahead of schedule. I don't
5 | know how --

6 | THE CHAIR: But I think what we would be keen to do is hear from Mr Hoskins. I don't
7 | know how long you are planning to take, Mr Hoskins, but, in a sense, subject to that,
8 | I think what we were minded to do is once we've heard what you have to say in reply,
9 | would be to rise perhaps slightly earlier and then, at the very latest, come back at
10 | 2.00 pm, but maybe slightly earlier, depending on how long you take.

11 |
12 | Reply submissions by MR HOSKINS

13 | MR HOSKINS: On the merits, you've seen the points that we make. You were, sort
14 | of, wafted through Davis 1; we're not shown any paragraphs in Davis 1 that actually
15 | address the points that we've made. That's, in a sense, our point. You've got this
16 | great Dr Davis document and it just doesn't address the points that we've put, which
17 | are very simple points. If there were an answer in the report, then Mr Thompson's had
18 | the chance to point you to it. That hasn't happened. If there were a simple answer,
19 | you'd expect to find it in Burnett 3 as a result of the conversation with Dr Davis. It
20 | hasn't happened.

21 | So you are left with a position where we have laid down the gauntlet on the merits and
22 | you have had no substantive response whatsoever. In that circumstance, we say, you
23 | are fully entitled to, and should, approach this case management decision on the basis
24 | that these claims are palpably weak. They simply haven't been able to deal with those
25 | points.

26 | THE CHAIR: I mean, just thinking about that argument, essentially what we have

1 before us, formerly, if we think about it in those terms, we have an expert report from
2 an expert. I'm sure whatever other points you take about Dr Davis, you don't dispute
3 his expertise.

4 MR HOSKINS: Absolutely not. He's a very experienced economist.

5 THE CHAIR: So we have the expert opinion of Dr Davis and you say, you point to, in
6 a sense, the starting point of his analysis for the narrow market definition and you say,
7 "Essentially, well, that can't be right". You say that without the benefit of any expert
8 evidence on your side and nothing more than essentially your assertion.

9 MR HOSKINS: It's not an assertion. I'm sorry, this is a specialist Tribunal. I have
10 taken the figures that Dr Davis relies upon, and I've shown you that within a year of
11 the end of the minimum term 96 to 98 per cent of people have switched. I've made
12 the very simple point to you: that is the opposite of dominance. I'm sorry, the idea that
13 you need an expert report to come to this Tribunal to make that point, it's just not right.
14 I'm either right or I'm wrong as a matter of economic principle. You have a very
15 experienced economist on the panel, and he will no doubt be sitting there thinking,
16 either, "Hoskins has got it terribly wrong", or, "Yes, you know, I can see the point", but
17 the idea that you have to have an expert report to make the sort of point we're making,
18 I do push back on this. It's simply not right.

19 THE CHAIR: I'm not suggesting for a moment that you need an expert report to make
20 the point you're making. This is all about weighing the various factors, and in terms of
21 weighing, "How much significance can we attach to your arguments of palpable
22 weakness", it's in that context that the issue arises. But your argument essentially is
23 to say, "Well, Dr Davis, his analysis of market definition must be wrong", cannot be
24 given.

25 MR HOSKINS: It's "palpably weak", not, "must be wrong".

26 THE CHAIR: Thank you. Thank you for that. But at the same time, you're saying in

1 | order to demonstrate that palpable weakness, you'll need four weeks in court to do so.

2 | MR HOSKINS: I would love to have run this point at certification, but we were

3 | hamstrung by *Merricks*, which said that the only way you can run these points is

4 | a strikeout. And a strikeout generally requires no factual evidence. Now, it doesn't

5 | mean just because we've taken the view that we couldn't strike this out – just because

6 | we accept that this should be tried with evidence – doesn't stop you concluding that

7 | this is weak.

8 | If, for example, we produced an expert report from Mr Parker, and he just cut and

9 | pasted -- it's a very short one -- he cut and pasted the bits that you find in our

10 | application in our skeleton, he'd made those points and he had said, "I think Dr Davis

11 | has not considered these points", and he'd laid down the gauntlet in our report, we

12 | wouldn't be in any better position for you, an expert Tribunal, to form a view on the

13 | merits. You're perfectly capable of doing that and you shouldn't shy from doing that.

14 | The fact that there is a report from Dr Davis, well, with respect to Dr Davis, he would

15 | not be the first expert who had been found to have missed a point in this Tribunal.

16 | That's your job; that's what you do. Just because you turn up and say that there is an

17 | eminent expert and the Tribunal can't go behind them, I'm sorry, but that's not good

18 | enough. We have made some very specific points which are easy to follow and

19 | haven't been contradicted at all.

20 | THE CHAIR: But on one hand, you're saying that these are very simple points and it's

21 | very clear, and they've not addressed them. But at the same point you're saying, "Oh,

22 | but you don't actually have to reach a conclusion on it in any final way now. All you

23 | need to do is to weigh those significantly in the balance to embark on the procedural

24 | adventure you'd like us to take".

25 | MR HOSKINS: Absolutely. I'm asking you to form a view, at an early stage, on the

26 | merits. I'm asking you to form that view, whatever it is, for me or against me, and I'm

1 asking you to take it into account. That's absolutely -- that's --

2 THE CHAIR: I don't understand from Mr Thompson, albeit he says that he focuses
3 on, I think, factor 6, which is the ease of the split and says that that influences the other
4 factors. But I didn't understand him to be saying that we couldn't take --

5 MR HOSKINS: You asked him that question directly and there was no push back.

6 THE CHAIR: No. I understand your argument. I understand the point you're making.

7 MR HOSKINS: I'm just going to end with a, sort of, *cri de coeur*, if you like, which is
8 this: this Tribunal prides itself on active case management. I've suffered at the hands
9 of this Tribunal many times in the name of active case management, and that's what
10 we're asking you to do here. We have a choice, which is just to say, "Fine, we'll let
11 this run through to a full trial", and you can see immediately what the extent of that trial
12 is going to be. Or you can say -- if you agree with me that there are real questions
13 about the merits of this case on market dominance -- you can say, "What does active
14 case management require?"

15 In our submission, if you have real doubts about the merits of this case, then active
16 case management requires a split trial, because if we have that trial and if we're right,
17 you will save an awful lot of time and money; not just our time, but your time as well.
18 Other courts, other judges, have been prepared to take that step despite the existence
19 of an overlap. And you have my point: *Purple Parking Ltd v Heathrow Airport Ltd*,
20 *Streetmap.eu Ltd v Google Inc*, *Gutmann v First MTR South Western Trains*. This is
21 not some sort of wild flier that we've come up with.

22 THE CHAIR: Well, no -- just -- can you help me with this: in relation to those
23 precedents, are any of them examples of where market definition and dominance was
24 dealt with before abuse, as opposed to the other way around?

25 MR HOSKINS: No, it's the other way around.

26 THE CHAIR: Yeah. One can see that -- and it goes to the point that you make in your

1 skeleton about the fact that each case needs to be considered on its own merits and
2 its own factual circumstances -- it's a bit different to do it the other way around, in other
3 words, to assume market definition and dominance and then test the question of
4 abuse, as opposed to trying to keep everything open and consider market definition
5 and dominance first on your argument that you win there and it falls down. But it is
6 different.

7 MR HOSKINS: The overlap problem is the same. I mean, in *Purple Parking Ltd v*
8 *Heathrow Airport Ltd*, one of the heads of abuse was upheld, so there was going to
9 have to be a trial on market definition and dominance. It's the same issue on overlap
10 whichever order you take them in. All I'm referring to is that it said there's no example
11 of anyone doing this, and I'm saying that there are examples of people, despite the
12 overlap, splitting the trials, market dominance and abuse. In those trials there was no
13 merits issue. That's the point I made to you. For once, I'm standing here before the
14 Tribunal saying, "Actively case manage me, please". That's our submission.

15 THE CHAIR: I'm very grateful. Thank you, Mr Hoskins. Is there any ...?

16 Well, I think that what we will endeavour to do is to see whether we can reach a view
17 on the submissions we've made on this point, because I think it would be of assistance
18 if we could, as long as it doesn't inconvenience parties, if we were to aim to sit again
19 at 1.45. Would that cause any difficulty?

20 No, very well. We will do that. Thank you.

21 (12.33 pm)

22 (The short adjournment)

23 (1.45 pm)

24 **Judgment re split trial**

25 THE CHAIR: Good afternoon.

26 The decision as to whether or not to split the trial is essentially a pragmatic one and

1 incorporates, among others, the factors identified by Mr Justice Hildyard in
2 *Electrical Waste Recycling v Philips Electronics UK Limited [2012] EWHC 38 (Ch)*. At
3 the heart of the exercise of weighing up the competing factors must be a consideration
4 of the proposed split between the issues. The ease, or otherwise, with which both the
5 issues and the evidence required to resolve them can be separated will directly inform
6 an assessment of the likely advantages and disadvantages which are likely to flow
7 from any attempt to split the trial.

8 On the question of the proposed split, the Defendants content themselves by simply
9 identifying issues of market definition and dominance. The Defendants then contend
10 that the evidence to be heard at the proposed first trial would essentially be everything
11 that is necessary to resolve those two issues. We are not persuaded by this approach.
12 We agree with the Claimants' Representative that at present there will be a significant
13 degree of overlap in the evidence, both factual and expert, required to resolve the
14 issues of market definition and dominance on the one hand, and issues of
15 abuse -- including effects and quantum -- on the other.

16 The Claimants' Representative highlights competitive price levels, so-called sticky
17 customers and the Defendants' costs, margins and profitability as examples of these
18 overlapping matters. In this regard, we consider further that it is reasonable to
19 anticipate that this degree of overlap is likely to increase following disclosure and the
20 development of expert evidence.

21 Against this background, we consider that the Defendants' suggestion that the
22 underlying data which related to these overlapping matters could be separated from
23 any necessary analysis is unrealistic and unworkable.

24 First, given that the Defendants contend that all evidence necessary to resolve the
25 issues of market definition and dominance is to be led at the proposed first trial, this
26 would suggest that the parties will be required to consider and lead evidence on these

1 matters, which will also be relevant to the issues to be resolved at the second trial.

2 Otherwise, there is an obvious risk to the parties. The Tribunal will be asked to make

3 findings on factual matters without having had the benefit of all the relevant evidence.

4 On the face of it, this would seem to be a difficult process which will prolong and

5 complicate preparations for the first trial. It will also seem likely to increase the

6 evidence that would require to be heard at the proposed first trial.

7 Second, and relatedly, the Defendants do not appear to have considered how the

8 factual findings which underlie any decision on market definition and dominance are

9 to be carried forward to the second trial. We consider it probable that these questions

10 will give rise to arguments about the precise status and scope of findings made at the

11 proposed first trial. It is also likely that these will be both time consuming to resolve,

12 not to mention confusing for witnesses.

13 Overall, in light of the foregoing, we conclude that the impracticability of making

14 a clean split has a result of decisively weighing against the Defendants' application.

15 We are not satisfied that the Defendants' proposed split offers a reasonable or realistic

16 prospect of a substantial saving in either time or money. In particular, we do not

17 consider the Defendants have had sufficient regard to the additional time and cost

18 involved in trying to split the trial. Furthermore, we are not persuaded that the overall

19 difference in the time required to hear the proposed first trial would be so much shorter

20 than a unitary trial as to make it worth undertaking the risks we have identified.

21 In carrying out our analysis we have also considered the arguments advanced by the

22 Defendants as to the palpably weak nature of the Claimant's case on market definition

23 and dominance. We accept that, insofar as a view can be reached as to the merits of

24 the parties' respective cases, that is something which feeds into the process for

25 deciding whether and how the trial ought to be heard. We can also see the force in

26 the argument being advanced by Mr Hoskins. However, we did not consider that

1 sufficient weight could be attached to this point to shift the balance in favour of splitting
2 the trial.

3 First, it is notable that these arguments were not and are not being advanced by way
4 of an application to strike-out or reverse summary judgment. Even the Defendants
5 accept that a reasonably lengthy trial will be necessary to vindicate their position.

6 Second, these arguments are being advanced prior to disclosure and the likely
7 subsequent development of the pleadings and expert evidence.

8 Third, at present, the Claimant's case is supported by an expert report from an eminent
9 economist, whereas the Defendants' argument essentially proceeds solely on the
10 basis of submission. In these circumstances, the Claimant's case is, at this stage,
11 essentially untested.

12 Against this background, we do not consider that we are in a position to reach
13 a conclusion as to the relative merits of the Defendants' arguments. We certainly do
14 not consider them to be sufficiently obvious so as to outweigh what seems to us to be
15 the obvious practical difficulties in splitting the overlapping issues. Accordingly, our
16 unanimous view is that the case should proceed to a unitary trial.

17 So that is our view on the Defendants' application as to a split trial. We move, then,
18 to the question of disclosure. Now, having had the opportunity to consider the parties'
19 respective positions on this and clearly, in light of our view that the ultimate end point
20 is to be a unitary trial, we have reached a provisional view as to how disclosure might
21 be dealt with. What we propose to do is to set that out and then, as it were, if either
22 side wants to push back and suggest that our provisional view is wrong or something
23 else might be proposed, we're very happy to hear submissions on that basis. But it
24 seems to us it might help focus submissions.

25 Broadly speaking, we considered that there was some merit in the Claimants' proposal
26 in dealing with matters in two parts. The first part dealing with what the Claimant

1 described as the pre-existing materials -- and I completely understand that the extent
2 to which they are pre-existing is a matter which is disputed, so I am just using that
3 label for ease of reference rather than anything else.

4 As I understand it -- and I think there may have been some more recent
5 correspondence in the bundle that has just been handed to us -- there is a broad sense
6 that the Defendants have some material that falls within the category of the
7 pre-existing materials with which they would be prepared, voluntarily, to disclose to
8 the Claimant. The date that was given for that was 31 July. We would welcome any
9 voluntary disclosure. We think that is going to be helpful because we consider that it
10 will assist the Claimant in being able to make more focused and useful requests for
11 documentation going forward. So we think that should happen by 31 July.

12 We also consider that 31 July would be a date by which it would be helpful for the
13 Claimant to understand such other information which has not been disclosed, that the
14 Defendants have, which fall within the category of the pre-existing materials.

15 Now, the precise form of the statement in relation to the pre-existing materials, which
16 the Claimant has proposed, I appreciate may be the subject of submission but it seems
17 to us as a provisional view that it would be helpful for the Defendants to produce some
18 statement of their position in relation to this pre-existing material, which could then
19 provide the Claimant with a basis for making specific requests in relation to that
20 material for disclosure.

21 We consider that the Claimant should be in a position to give a specific disclosure
22 request in relation to the pre-existing material by 11 September. So that would deal
23 with the pre-existing material.

24 The final point, of course, in that chain would be the final disclosure. As I understand
25 it, the date I took from the skeletons was 31 October as being a date that had been,
26 I think, proposed from the Defendants' side and at least not pushed back on by the

1 Claimant.

2 The second part of disclosure would flow from, so far as we would envisage it, the
3 finalisation by the Tribunal of a list of issues of disclosure. We think that starting point
4 can start significantly in advance of when the Claimant was proposing it. We could
5 not really see why the Claimant could not produce a high-level list of issues for
6 disclosure by 31 July. Thereafter, the Defendants could respond by -- the date I have
7 provisionally put in is 31 August but I understand that south of the border August is the
8 school holidays. So I put that as a provisional date but if it gets pushed back by some
9 weeks to take account of school holidays, so be it.

10 Then there will be a period of, shall we say, two weeks for the Claimant to either, if the
11 matter can be agreed, finalise the list and what would follow from that, we consider
12 provisionally, would be preparation of disclosure reports and EDQs by the Defendants
13 and thereafter detailed, focused further disclosure requests by the Claimant in the
14 format of a Redfern schedule. So that would come after the list of issues has been
15 either agreed or, if necessary, determined by the Tribunal.

16
17 (1.56 pm)

18 THE CHAIR: So that was our broad sense of a proposed way through the parties'
19 various issues on disclosure. But I am very happy to hear specific submissions from
20 the parties in that regard. I appreciate I have gone through that quite quickly so if there
21 are questions or clarifications I am very happy to take those as well.

22 MR HOSKINS: (Inaudible) or we can just march straight in if that's --

23 THE CHAIR: Yes. Well, I appreciate that because we've gone straight into that after
24 the -- would it assist for the Tribunal --

25 MR HOSKINS: If we just ask the question of our respective clients and --

26 THE CHAIR: Do so.

1 MR THOMPSON: Broadly positive responses on this side, but I'll ask --

2 THE CHAIR: Why don't we just rise momentarily for ten minutes and that will allow

3 this to happen in a slightly more seemly way.

4 MR HOSKINS: Sorry.

5 THE CHAIR: No, not at all, Mr Hoskins. I should have envisaged it. So it's a sensible

6 suggestion.

7 MR THOMPSON: Should we come back at 2.10?

8 THE CHAIR: Yes. We'll do that. Thank you.

9 (1.57 pm)

10 (A short break)

11 (2.09 pm)

12 THE CHAIR: Now, Mr Thompson.

13 MR THOMPSON: I think Mr Piccinin thought he had more to say than --

14 THE CHAIR: Oh, very well.

15 MR THOMPSON: As far as I was concerned, I was just going to say that, insofar as

16 the date for the list of issues has been put forward to the end of July, we're content to

17 work on that basis. I'm very much in the Tribunal's hands. I can either sit down again

18 or we can look at the order and see what variations you might want to --

19 THE CHAIR: Well, if you, between yourselves, thought it made sense for me to hear

20 from Mr Piccinin at first then we're happy to follow that.

21 MR THOMPSON: Let's go that way. Thank you.

22 THE CHAIR: Mr Piccinin, good afternoon.

23

24 Submissions by MR PICCININ

25 MR PICCININ: Good afternoon, sir.

26 I wanted to address you on three topics, I think it is. One is on the statement in relation

1 to the pre-existing material.

2 THE CHAIR: Yes.

3 MR PICCININ: Then I wanted to talk about the response to the list of issues for
4 disclosure and the DRs and EDQs together. So perhaps it's really only two points.

5 In relation to the pre-existing materials. I did just want to have a bit of a look with you
6 at what they are. We have them set out in an annex to a letter that we sent. So it's in
7 bundle C at page 156. That's tab 46. Of course you have the point that this is not
8 a case, unlike most cases in this Tribunal, where there has actually been a prior
9 competition law investigation or prior piece of litigation or really anything like even
10 a breach of consumer law type of investigation where there's a readily available file of
11 materials that can be lifted and dropped. That's not the situation we have here.

12 The pre-existing materials, as they were defined in my learned friend's draft order, are
13 just materials from any of the regulatory processes that led to any of the regulatory
14 documents that are cited anywhere in the claim form. So what we've done is the job
15 of ferreting through them and compiling them into a single list. That's what we've got
16 here in front of you. Some of them are really of, essentially, no relevance at all. You
17 can see that if you go over the page to page 157.

18 You can see that that one is the CMA mobile ecosystems market study, final report,
19 which I know is a document that Dr Bishop is familiar with from another case that was
20 about nothing to do with what we're looking at here. That was all about the big tech
21 issues to do with mobile operating systems and app stores and browsers, which
22 seems to be entirely irrelevant to these proceedings. If I can just show you how it's
23 ended up in this list, if we go to bundle A, just to the claim form at page 10.

24 THE CHAIR: Yes.

25 MR PICCININ: You can see right at the bottom of the page there's footnote 13.

26 THE CHAIR: Yes.

1 MR PICCININ: It's a footnote to CMA June 2022. That is the mobile ecosystems
2 report. You can see the proposition that that is cited for. It's that:

3 "Handsets use mobile operating systems which enable end customers to use
4 applications, including applications used to make telephone calls, send text messages,
5 and access the internet."

6 Then there is another citation as well, which is the following sentence:

7 "iOS and Android are the two main operating systems in the UK."

8 There's another footnote to that report.

9 THE CHAIR: Yes.

10 MR PICCININ: So that seems to be how it's ended up in the list of things that they
11 want us to go away and produce a statement about everything that was provided to
12 the CMA in relation to this investigation. They want us to tell them who the custodians
13 were, they want us to tell them the date ranges, they want us to tell them the search
14 processes that led to the production of all that material. It's simply because it appears
15 somewhere in a footnote to a random proposition that is really very distant from the
16 issues in this case.

17 THE CHAIR: Yes.

18 MR PICCININ: If we just go back to bundle C -- sorry to jump around a bit, but back
19 where we were at that list on page 156, looking at it more broadly, you can see that
20 there are nine publications that they want documents relating to. The earliest goes all
21 the way back to 2017, early 2017, more than nine years ago. Just running through
22 them, contrary to my learned friends' submission in their skeleton, where they
23 described them as substantial formal regulatory proceedings, you see that's not what
24 they are at all.

25 So the first two, for example, are described as research documents that were
26 produced by Ofcom many years ago, reporting on pricing trends in all sorts of

1 communication services, including pay TV and landline, all sorts of things. It was really
2 just a general market monitoring type of exercise. So that's the first two of them.

3 The third one is not an investigation either; it was a complaint. Not even a complaint
4 from a regulator, it was from Citizens Advice. Then there's another document in this
5 list, which is its twin, which is over the page, the CMA document from December 2018,
6 which was the response to that complaint. Again, that was the complaint that covered
7 five different markets: mobile, broadband, cash savings, home insurance, mortgages.
8 These are called "super complaints", that are made to procedure under the Enterprise
9 Act, that the CMA then consults on and responds with its recommendations. So it's
10 also nothing that would meet the description of it.

11 THE CHAIR: I mean, why does that matter, in the sense that essentially what we're
12 doing here is -- I think what the Claimant is trying to do is to find a way of
13 engaging -- addressing the clear information imbalance. They're trying to identify,
14 essentially, a shortcut to -- we've used the shortcut analogy already once today, but
15 they're trying to find a way of identifying what might reasonably be inferred to be
16 documents or exercises, as it were, in which the Defendants are likely to have provided
17 information which will be relevant to these proceedings.

18 Now, the one you're just looking at, the December 2018, tackling the loyalty penalty,
19 is that not squarely engaging at least at some level with the issues with which the
20 Claimant is interested in obtaining information? So the fact that it was or wasn't a -- the
21 precise status of it, that seems to me irrelevant. What's relevant is that your clients
22 will have provided information. That information will -- so the Claimant says -- and
23 I appreciate you dispute this, but we can come back to that. The basis of the argument
24 is: that information will be more readily accessible and therefore easier to hand over
25 than going through the hoops of everything else we're going to have to deal with.

26 MR PICCININ: I understand that, sir. There are really three points. One of them is

1 | just a practical point --

2 | THE CHAIR: Yes.

3 | MR PICCININ: -- that because of the type of regulatory processes that these were,
4 | because of the type of documents that they were, they don't result in the production of
5 | a discrete file of materials that are sitting on a shelf, that can be pulled off, in the same
6 | way that other types of formal regulatory proceedings, like Competition Act
7 | investigations generally do. So that's just --

8 | THE CHAIR: That's better than nothing, isn't it?

9 | MR PICCININ: No, no, sir --

10 | THE CHAIR: But, I mean, I -- let's just go back to the point you made earlier, where
11 | you said, "Well, there's not been prior litigation or prior investigation". I appreciate
12 | we're in a slightly rarefied environment here, but that's the normal daily business of
13 | the courts.

14 | MR PICCININ: I agree.

15 | THE CHAIR: So it's great when there's been a prior investigation and someone's done
16 | all the work. We're not there now, so we have to work our way, practically, of dealing
17 | with it.

18 | MR PICCININ: I strongly agree with that. To be clear, I hope this is clear: I'm not
19 | resisting the provision of the information that is readily available.

20 | THE CHAIR: Yes.

21 | MR PICCININ: So where the information is readily available and is on the topic of
22 | these proceedings -- and we've already done the work, we didn't just sit on our hands
23 | and wait. We've done the work of going out and looking for it. We've all identified
24 | what we can, that's readily available, and we're happy to provide it. So that's not the
25 | burden of my submission.

26 | The burden of my submission is that because of the nature of these proceedings, it's

1 not as simple as just going to the shelf related to these particular documents and
2 pulling it all off. The weight -- when you then come to the question of, "What else
3 should you do?", and you've asked that we produce some sort of statement relating to
4 the material that we're not producing --

5 THE CHAIR: Yes.

6 MR PICCININ: -- perhaps I should just cut straight to the point and say what our
7 proposal on that would be. One of the proposals that we've made is that we should
8 review the material that is readily available and provide the material that is relevant to
9 the issues in the proceedings, and my learned friends are opposed to that because
10 they think they should be the judge of what's relevant and not us.

11 So one thing we could do to provide some reassurance on that is, when we provide
12 the materials at the end of July, we can provide a statement that explains the extent
13 to which we've withheld material that we've been able to find as being irrelevant, in
14 a way that enables them to engage with that so that they can say if they disagree and
15 then there can be a dispute in essentially the way that you propose, sir.

16 THE CHAIR: Or they can just ask you for it and --

17 MR PICCININ: Exactly. Yes. Then either we can just give it to them or there can be
18 an argument that you resolve. So I don't have a problem with anything of that.

19 Where it gets more difficult is when you're talking about material that we haven't been
20 able to find, in terms of it not being readily available. That's where the submissions
21 that I was making to you before come in, because these materials are not so relevant,
22 or so liable to be productive of relevant material, as to warrant the first step in the
23 proceedings that involves a significant piece of work being done, going ferreting
24 around, conducting searches, looking for these materials specifically, rather than, as
25 you said, sir, approaching this case in the way that you do in ordinary civil litigation,
26 which is by asking what are the documents that are most relevant to the case and that

1 it's reasonable and proportionate to go away and get.

2 THE CHAIR: But I think, I mean, it sounds to me then that, and it may be we're slightly
3 at cross-purposes, because it would certainly then seem that one thing that the
4 Defendants would be in a position to do is to say, "Well, here is the information we
5 considered relevant. We haven't given you this information because we don't think it's
6 relevant. If you dispute that, this is some information about it. We can have an
7 argument about that if we need to".

8 MR PICCININ: Yes.

9 THE CHAIR: "As regards these other things, we have done the following, taking the
10 following reasonable steps, we haven't found anything else".

11 MR PICCININ: Yes.

12 THE CHAIR: The Claimants are in a position, as you point out in your submissions,
13 but they have the end product. They have the reports --

14 MR PICCININ: That was my next point.

15 THE CHAIR: So they can say, "Okay, well, have you taken reasonable steps? What
16 about these other things? You could have done this or you could have done that".
17 But I think, the point about this is, the Claimants seem to me, and I'll hear -- we will
18 hear what Mr Thompson has to say about it, but they have to be reasonable too.

19 If we're talking about you producing this material in essentially 30 days' time, then
20 there is a degree to which, you know, you've had these requests for some time, you've
21 considered them and you've taken steps and so on and so forth. But you can report
22 on where you've got to, as it were, within that time period, and at that point, the
23 Claimant, first of all, they'll have the benefit of information they currently don't have,
24 they'll have information about -- they'll have, as it were, the known unknowns of the
25 information that you're not giving them, and they'll know what steps you've taken in
26 relation to other material. That will inform them, once they've gone through the

1 process of considering that, of any further specific requests they wanted to make about
2 what's being described as the pre-existing material.

3 MR PICCININ: Yes.

4 THE CHAIR: I mean, is that -- that's broadly your submission, is it?

5 MR PICCININ: Would you mind if I just turn around for a moment --

6 THE CHAIR: Please do.

7 MR PICCININ: -- to see if anyone's telling me no?

8 That is our position.

9 THE CHAIR: Yes. Well, so that's on -- that was the first thing. I'll hear -- why don't
10 I hear from you on everything, and I can hear from Mr Thompson.

11 MR PICCININ: Yes.

12 THE CHAIR: So that's what you're saying in relation to that. Does that bring us on to
13 the --

14 MR PICCININ: To the approach. To the --

15 THE CHAIR: The DRs and EDQs and all --

16 MR PICCININ: Yes. Exactly. Yes. Really, the submission that we've got -- that we're
17 making here is that we're happy with two-thirds of what you're proposing, in a sense,
18 which is the list of issues for disclosure and requests for further disclosure, which there
19 obviously needs to be.

20 THE CHAIR: Yes.

21 MR PICCININ: We can see how that is productive. It's the bit in the middle that didn't
22 seem to us to be useful, which is the DRs and the EDQs, and I want to show you why.
23 Then the other thing I would say is that in relation to the list of issues for disclosure, if
24 you take the approach that we're proposing, which is not to have the EDQs and DRs,
25 then you can just combine the list of issues for disclosure with the disclosure requests
26 themselves. That allows us to cut to the chase so that we're not spending time and

1 money arguing about things that don't matter, so arguing points on the list of issues
2 for disclosure that don't end up actually becoming operational, if you see what I mean,
3 in the sense of resulting in different disclosure actually being ordered.

4 Because it's important in these procedures that we keep our eye on the ball. The only
5 thing that matters at the end of a disclosure exercise is the order that you make as to
6 what disclosure needs to be given, but the route that you took to get there doesn't
7 really -- doesn't produce any documents.

8 THE CHAIR: Yes.

9 MR PICCININ: The submission that I have about DRs and EDQs is that they actually
10 just are not useful documents in a case like this, in order to help the Class
11 Representative to do the thing they need to do, which is formulate requests for
12 disclosure, like categories of documents that they want. The problem with debates
13 about this is that they usually happen in the abstract, and that's certainly what we've
14 seen in this case, with the Class Representative throwing up his hands and saying,
15 "I don't know what documents you have, and therefore, I need something. A DR and
16 EDQ is something, so please give me a DR and EDQ".

17 What I wanted to do was actually to have a look at what is in, in particular an EDQ
18 first, but then a DR as well.

19 THE CHAIR: Yes.

20 MR PICCININ: And then to explain why, although they may be the solution in other
21 types of case, like a simple breach of contract claim, that can be very useful, they can
22 be useful as a means of summarising repositories that have already been gathered in
23 cases where there has been prior litigation. I'm not trying to limit the set of cases
24 where they can be useful --

25 THE CHAIR: Yes.

26 MR PICCININ: -- but this is not one of them.

1 Now, I don't know whether you have -- it looks like you do have copies of the
2 White Book in front of you. If you don't, I have printed out the EDQ. I could hand up
3 a few copies, if you find --

4 THE CHAIR: Can you give us the reference in the Book?

5 MR PICCININ: I think it's page 970.

6 THE CHAIR: In volume 1?

7 MR PICCININ: In volume 1. (Pause)

8 THE CHAIR: Yes.

9 MR PICCININ: Just double checking it's the same in the hard copy.

10 THE CHAIR: It appears to be.

11 MR PICCININ: I'll just pass the copy to my learned friend. So questions 1 and 2 are
12 actually just asking for the Defendants' proposals for a type of search-based
13 disclosure, you know, what date range do we consider our searches should cover, and
14 "Please identify the custodians or creators of electronic documents whose repositories
15 of documents we consider should be searched".

16 Question 3 then requires us to tell them which forms of electronic communication were
17 in use during the date range. For example, did we use email? Then on what media
18 the emails are stored and are they backed up, that kind of information. Question 4
19 then asks whether we used other types of documents during the relevant period, for
20 example, did we use any Word documents? Did we use any Excel documents? Do
21 we have electronic images and similar questions about how those are stored?
22 Question 5(c) is about database systems. Then 6 goes back to the Defendants being
23 asked to make their proposals for keyword searches to be made.

24 Then questions 7 to 9 go on to ask for proposals about any other types of automated
25 searches beyond just keyword searches. Then 10 to 12 ask the Defendants
26 essentially about any problems that they anticipate might arise in those kinds of

1 exercises. 13 and 14 are questions about document retention. Questions 15 to 17,
2 to do with the details of how inspection will be provided, like in what format will the
3 documents be produced. That's really it, because then, after that, it moves on to
4 part 2, which is proposals that the Defendants make for the other parties for the
5 Claimant, the Class Representative, to provide disclosure.

6 We say that that is just not geared towards this type of case at all, it certainly
7 isn't geared towards helping the Class Representative to come up with sensible
8 categories for disclosure in a case like this. But questions about file types that we use
9 are just completely uninteresting in a case like this. The Class Representative doesn't
10 need to descend to the level of asking for document extensions, you know, ".doc" or
11 ".docx" or ".xls". That's no part of making a request for a disclosure for categories of
12 documents in a case like this.

13 But likewise, questions about exactly how the documents are stored, on which
14 systems are they stored, are not very interesting at this stage either, again. But that's
15 really our problem as to how we'll go and find the documents they're looking for, not
16 theirs.

17 Then the rest of it, the bit of it that you might think would be of some help, would be
18 our proposals for what searches should be carried out. But that process, and the
19 reason this is adopted, in, for example, a breach of contract claim -- I did one earlier
20 this year where there was an issue about rectification -- is so you know exactly what
21 types of documents you're looking for. You're looking for all the documents concerning
22 the negotiation of the agreement.

23 Since you already know that, the real question is: well, exactly what keyword searches
24 are you going to do to pull up all of those documents? Which people in the company
25 are you going to search the files on in order to come up with those documents? You
26 can see how a defendant could produce useful proposals along those lines in a case

1 like that where it's already clear what the types of documents are, or the categories of
2 documents are, that you're looking for.

3 Sometimes, as I've said, they've also used these documents for a different purpose.
4 In the type of case where you've had prior litigation, then sometimes you produce an
5 EDQ that, effectively, just identifies the repositories that you already have from the
6 previous litigation, and tells people what kind of documents they can find in that. But
7 here it just isn't going to serve any useful purpose.

8 THE CHAIR: I mean, I understand the broader submission. Where I'm not following
9 it is: why wouldn't the keyword searches be of assistance?

10 MR PICCININ: There's two points. One is that it's not clear to what extent, if at all,
11 keyword searches are going to be required.

12 The second point --

13 THE CHAIR: Who's going to know that other than you? The Claimant's not going to
14 know that, are they?

15 MR PICCININ: Well, what we need to know, to know whether keyword searches are
16 appropriate and if so, what those keyword searches should be, is what kinds of
17 documents they're looking for.

18 THE CHAIR: They don't know what kind of documents you have. So that's why
19 they -- I mean, I understand possibly for -- well, we started with the EDQ. The EDQ,
20 as I understand it, is to accompany the disclosure report, which is more general. The
21 procedure that we're envisaging is that by the time we get to the Defendants filling in
22 either of these documents, they will have had the list of issues determined.

23 MR PICCININ: Yes.

24 THE CHAIR: So they have the list of issues, which says, "These are the disclosure
25 issues. Tell us what categories of documents you have that are likely to have
26 documents which relate to these issues, which have been determined. Tell us, are

1 they electronic? Give us the proposed keyword searches that you proposed".

2 So, I mean, you're looking right at the end of the process and saying, "This isn't going
3 to make much sense". But what I'm putting to you is the procedure that the Tribunal
4 felt would be appropriate – this is the end of the process. It's also requiring the
5 Defendants to disclose information, or to provide information to the Claimant, which
6 actually, ultimately will assist the Defendant, because rather than getting bogged down
7 in ill-informed, very broad requests, you get more specific requests that follow on from
8 your filling in of these documents.

9 MR PICCININ: Sir, there are two points. Again, one is the distinction --

10 THE CHAIR: Sorry, I know that I interrupted you before you got to your second point
11 last time.

12 MR PICCININ: That's all right. I think that this is a helpful exchange.

13 Your point, if I've understood it, is that there will be a list of issues for disclosure.

14 THE CHAIR: Yes.

15 MR PICCININ: That will tell us what the issues for disclosure are. We can then go all
16 the way down to the end of the process, because the DR and EDQ come next in your
17 proposal.

18 THE CHAIR: Yes.

19 MR PICCININ: So from the issues for disclosure, we're supposed to go as far as to
20 say, "custodians", and, "search terms".

21 THE CHAIR: I think that we start off by saying, "categories", and, "documents".

22 MR PICCININ: Well, sir, that's the issue, right? Because you can identify issues for
23 disclosure in the sense of, I don't know, this is really the Class Representative's job
24 rather than mine and I don't want to put words in their mouth but, you know, the
25 fairness of the prices, or the issues of transparency, or whatever they might be. I don't
26 know how they're going to formulate the issues for disclosure but the thing we really

1 need to know is what types of documents they want to use in order to prove their case,
2 because they could approach this case primarily through the lens of data, for
3 example --

4 THE CHAIR: I suppose that this is probably the nub of it. Ultimately, what the
5 Tribunal's, I think, provisional view is that you need to tell them what categories of
6 documents you have first -- I appreciate that you're pushing back on that and saying,
7 "No, they need to guess what categories of documents they want to use, or they need
8 to make an informed judgment on which categories of documents they want to
9 use" -- and I think our provisional view is: you should provide that information first at,
10 not at a micro level of detail, but at a reasonable level of detail, and then they can
11 inform it. I think that if you're trying to get to a situation where they have to tell you the
12 categories of document they want to use without knowing what categories of
13 documents are available, I think you're going to have a lot of work to persuade us of
14 that.

15 MR PICCININ: Yes. The difficulty there is in us guessing: what categories of
16 documents are going to be relevant to the way that they want to advance their case?
17 That's the difficulty.

18 THE CHAIR: But it doesn't matter how they want to -- you just tell them the categories
19 of documents you have that are relevant to the list of issues, don't you?

20 MR PICCININ: Well, that may not be what they're looking for at all is the point.

21 THE CHAIR: In which case they will find out when they get the list of issues and they'll
22 make their requests. If they say, "Well, what about these other categories of
23 documents?", so be it. That can happen. But it still seems to me that the starting point
24 still requires disclosure by the Defendants of the categories of documents that you
25 consider to be relevant, because you ultimately know which documents you have and
26 which you don't have.

1 MR PICCININ: Sir, it's true that we know what documents we have, and what we don't
2 have, in a very general sense. What we haven't done is a disclosure exercise in this
3 case. Trying to define what categories of documents are going to be relevant to the
4 case that the Class Representative wants to run is the difficulty.

5 If it's done the other way around, the Class Representative says, "Well, this is the type
6 of thing I'm looking for; do you have it?", and then it's straightforward to answer that
7 question. But trying to sit there with a blank page and think, "Gosh, if I were the Class
8 Representative, how would I want to go around running this case" -- yes, I -- (Pause)
9 In terms of data, for example, Dr Davis's report is replete with categories of data that
10 he wants, and we can obviously move from us, from the Defendants, and we can
11 obviously move straight to a discussion with them about that. So he's not had any
12 difficulty in identifying what kind of data he wants to use to --

13 THE CHAIR: I mean, perhaps a middle ground would be this, then, if the Claimant,
14 insofar as they're aware of categories, could non-exhaustively say, for example, "What
15 about this?" --

16 MR PICCININ: Together with a list of issues for disclosure.

17 THE CHAIR: -- that would assist you. But equally it would be non-exhaustive so if
18 there were other information that you were aware of that they haven't mentioned, then
19 equally you would be required to tell them that.

20 MR PICCININ: That sounds like a very constructive way forward. But what we're
21 really just trying to do here is avoid wasting people's time.

22 THE CHAIR: I understand that, but I think there's also that -- and this may actually be
23 the nub of it -- you prefer that your time wasn't wasted. I mean, I understand your
24 point.

25 MR PICCININ: Yes. We certainly don't want our time to be wasted, so that is true.

26 THE CHAIR: I understand that.

1 We haven't gone to the disclosure report; do we need to do that?

2 MR PICCININ: It is really the same point, sir.

3 THE CHAIR: I'm very happy not to if you don't wish to take us there.

4 MR PICCININ: The other point that I did need to make, though, was about the timing.

5 THE CHAIR: Yes.

6 MR PICCININ: I think the proposal that you made was that the Class Representative

7 should produce the draft list of issues for disclosure by the end of the month, and then

8 we would have the month of August to respond to it.

9 THE CHAIR: Yes.

10 MR PICCININ: And as you anticipated, that just isn't really workable.

11 THE CHAIR: So what date would you like? When would you think you're in a position

12 to respond?

13 MR PICCININ: An extra two weeks after that. So I think that that takes you to

14 mid-September.

15 THE CHAIR: Mid-September. Very well.

16 MR PICCININ: In the scheme of things in this case, it's not going to --

17 THE CHAIR: No. Just to follow that through, what I'd envisaged, which broadly

18 models the timings that the Claimant had set out, was that if -- and it can all be pushed

19 back by two weeks -- if when you come back it can be agreed, so much the better.

20 I've said this already, but just to emphasise it -- it's really a point for the

21 Claimant -- I think that what the Tribunal has in mind is not an excessively lengthy,

22 excessively detailed document, but a relatively high level document setting up the

23 issues. But one way or another, whether it's agreed or whether we have to determine

24 it, we get to a point whereby you will have the list of issues, and let's say, and I'll hear

25 what Mr Thompson has to say, "indicative categories", and you will then prepare

26 a response to that.

1 Now, the two questions that arise then, one is the time within which you will be able to
2 do that; the Claimant has suggested 14 days. Also the nature of the documents that
3 are to be prepared, what they're looking for, is the disclosure reports and EDQs. Now,
4 do I understand that your reluctance to populate those is driven in the sense that: if
5 you are having to do that against a completely blank canvas, you're quite resistant to
6 it. If there is some indication, or you're given some indication, then you're prepared to
7 do that. What's your position in that regard?

8 MR PICCININ: The submission I was making to you before is that large parts of it
9 aren't really very useful. Now, I understood what you said to me, which is identifying
10 the categories of documents that we have that are relevant to the issues in the case
11 or the issues for disclosure is something that has some use. I think that really is,
12 effectively, a disclosure report. The EDQ, when you start to get into all the details
13 about, were they emails and were they Excel spreadsheets and what systems were
14 they stored on, that seems less useful to us. It seems like we're just spending time
15 and money without helping the Class Representative.

16 THE CHAIR: Well, I'll hear what Mr Thompson has to say about that, but that's useful.
17 Then the Claimant has suggested 14 days to complete that. Do you --

18 MR PICCININ: 14 days for ...?

19 THE CHAIR: This would be 14 days for you to complete these reports following either
20 the determination or the agreement of the list of issues.

21 MR PICCININ: Yes, I see.

22 I think that is too short for us to do it in a way that is constructive. If we could make it
23 a month.

24 THE CHAIR: Very well. Does that conclude your submissions at the moment? Let
25 us hear from Mr Thompson and then if there are points you want to come back on, we
26 can do that. Does that make sense?

1 MR PICCININ: Yes.

2 THE CHAIR: Mr Thompson.

3

4 Submissions by MR THOMPSON

5 MR THOMPSON: I'm grateful, sir.

6 I mean, I don't think there's anything I'm going to say that's particularly surprising. We

7 are obviously not interested and doubt that any of these particular Defendants

8 responded, possibly in relation to pay TV, but I'm doubtful in relation to mortgages. So

9 I doubt if they've got any material that's, as it were, irrelevant. If they do, we're not

10 interested in it.

11 THE CHAIR: I mean, are you content, then, in relation to the so-called pre-existing

12 material that we proceed as was discussed between myself and Mr Piccinin? In other

13 words, just to be clear about it, they will produce to you by the end of this month

14 material which they have which they consider to be relevant. They will tell you about

15 the material which they have which they don't consider to be relevant so that, if you

16 want to ask them about that, you can do so and they will tell you what they've done in

17 relation to the material they haven't been able to find.

18 MR THOMPSON: Yes. The material that appears to be strikingly relevant, which they

19 say they can't find for some reason. That's obviously a very different category. We

20 might have questions about that. The irrelevant stuff they can't find, we're not

21 interested in.

22 THE CHAIR: But insofar as there's material that you think is relevant and they've been

23 unable to find, in a sense, there may be further discussion about that.

24 MR THOMPSON: Yes.

25 THE CHAIR: But, in a sense, you need to know what that is, before you can ask the

26 question.

1 MR THOMPSON: One might ask how hard can it be? We might say, given the nature
2 of these Defendants and their resources, we might find it difficult to believe they can't
3 find something which seems highly material. But at this stage, I can't anticipate that.
4 It seems to me there may be some grey areas around it but the broad shape of it
5 seems to me fairly clear and I think very much the line that the Tribunal was taking
6 with Mr Piccinin.

7 I mean, so far as the EDQs issue goes, I think he did recognise that Dr Davis has
8 given some indication of the type of material and, in characteristic style, it's quite
9 specific in fact. That's in section IX of the report. Pages 367 to 368, and then there
10 are annexes, et cetera. So I don't think the Defendants will be in much doubt of the
11 type of material that Dr Davis is looking for.

12 THE CHAIR: I think what Mr Piccinin was suggesting, it seemed to me -- on the face
13 of it sounded quite sensible -- was that insofar as you're setting out a list of issues for
14 disclosure --

15 MR THOMPSON: Yes.

16 THE CHAIR: -- that insofar as, let's take that example, there are particular categories
17 of information that Dr Davis has already identified.

18 MR THOMPSON: Yes.

19 THE CHAIR: Then you could even by reference say, "This is our topic for disclosure
20 by reference to what Dr Davis says in annex whatever it happens to be". So then,
21 there's a kind of connection between the issue of disclosure and the categories of
22 documents that are envisaged at the moment.

23 MR THOMPSON: Yes. I mean, it may not be suitable to this type of case. There are
24 obviously some types of cases where defendants hold some stuff in hard copy up to
25 a certain date and then they have it in a different format in another date. There's no
26 point in us asking for documents that don't exist in one format if they're in fact held in

1 a different format.

2 THE CHAIR: Yes.

3 MR THOMPSON: As I understand it, part of the purpose of an EDQ is to avoid that
4 sort of time wasting. Likewise, in relation to disclosure reports, there's no point in our
5 asking people for things that simply don't exist or never did exist. If the Defendants
6 can point us in the direction of the suitable custodians for certain types of documents,
7 then that will make the whole thing run much more smoothly than if we just fire off our
8 guns at random and they say, "You've missed" or, "You've hit".

9 THE CHAIR: But you're not pushing back, then, on Mr Piccinin's proposal -- or my
10 proposal, actually -- which was that in your list of issues, because it would start off as
11 being a draft joint list and then they will respond, whether it actually becomes a joint
12 list or whether we have to fix it one way or the other. But that list of issues will give
13 indicative categories of documents.

14 MR THOMPSON: Yes. (Pause)

15 THE CHAIR: Mr Alty is saying where you know them, where you are aware of them,
16 then you can indicate.

17 MR THOMPSON: Yes. I mean, I think a list of issues could mean different things.
18 But I think if you're intending that under each issue there'll be an indication of the type
19 of document we'll be looking for, then we can do our best by the end of the month. But
20 I suspect there'll be some to-ing and fro-ing --

21 THE CHAIR: Of course.

22 MR THOMPSON: -- especially if the Defendants are a little more forthcoming about
23 what they've got. But, yes, I think that process can certainly work from our point of
24 view. It's what might be called an iterative process.

25 THE CHAIR: Yes, absolutely.

26 MR THOMPSON: We're not saying that whatever we ask for on 31 July will

1 necessarily be our final word on the subject.

2 THE CHAIR: And the list of issues is clearly iterative because the Defendants
3 respond, then you either agree or you respond again and then, if necessary, it comes
4 back to the Tribunal and we will --

5 MR THOMPSON: Yes. Some things will be a dead end and some things will turn out
6 to be a train of enquiry which we haven't phrased quite correctly, and they come back.
7 But hopefully we will at least make some progress and minimise the number of things
8 we need a ruling on from the Tribunal. That all seems eminently sensible. I may say
9 so.

10 THE CHAIR: Do you have any other submissions you want to make on that?

11 MR THOMPSON: No. I think the timetable, we obviously set out a timetable in the
12 draft order we put forward. At some point, I don't know whether it's going to assist to
13 go back to that to see what needs changing, or whether we see how we get on and
14 then do the best we can at the end of the day.

15 THE CHAIR: Well, I think what I am minded to do, subject to the use of the other
16 members of Tribunal, would be just to gather up where I think we've got to, not least
17 for the transcript. Then that will set down what we think the timetable is. Insofar as
18 that's not what you think the timetable is on either side of the bar, then we can flush
19 that out and work out what the answer is going to be.

20 MR THOMPSON: Can I just check nobody else wants me to say anything else now.

21 (Pause)

22 THE CHAIR: Mr Alty asked the question, Mr Piccinin was, I think, querying the value
23 of the EDQ. What's your submission in that regard?

24 MR THOMPSON: Well, I think our general submission, I think in another case
25 a counsel had said that they don't want it to be like a game of battleships where we
26 fire off pointless artillery at non-existent boats. The purpose of the EDQ, I think, is to

1 give us a sense of what is the useful format in which material is available. I didn't
2 myself find Mr Piccinin's pushback on that issue particularly compelling. It seemed to
3 me that it's the type of issue that arises in many cases, where one works through the
4 issues and one finds out what documents are available and then the Claimant is in
5 a position to select. The difference being here that there's obviously a considerable
6 asymmetry. As has been put, you've got three large, well-resourced companies who
7 know this business inside out and know exactly what they've got, and you've got
8 a Class Representative who, at the current stage, knows what he can see from the
9 Ofcom materials, from Dr Davis's research. He doesn't know very much at all about
10 what's behind the curtain of any one of these large Defendants. So I don't think I can
11 take you much further than that at this stage.

12 THE CHAIR: Thank you.

13
14 Reply submissions by MR PICCININ

15 MR PICCININ: Just on that, the one thing we didn't talk about is what actually is in the
16 disclosure report. If we could just get that open. It's in the authorities bundle E at
17 page 1050, which will be tab 21 for those in hard copy.

18 THE CHAIR: Yes.

19 MR PICCININ: So it's rule 60(1)(b):

20 "(i) describes briefly what documents exist or may exist that are or may be relevant to
21 the matters in issue in the case;

22 "(ii) describes where and with whom those documents are or may be located;

23 "(iii) in the case of electronic documents, describes how those documents are stored;"

24 Then you've got the costs and the directions to be sought regarding disclosure. So
25 that's the way that the Tribunal defines a disclosure report. I think what Mr Thompson
26 hasn't done is identify any need for anything that doesn't fit into those categories. The

1 more specific things in the EDQ which frankly come from a different era, you know,
2 "Do you have Word documents? Do you have Excel spreadsheets", are really just not
3 a good use of anyone's time.

4 I've seen so many of these hearings where you have a folder full of these DRs and
5 EDQs and then you get to the disclosure hearing and nobody touches them.

6 THE CHAIR: I mean, I suppose it may be a case of, insofar as it's felt that an EDQ
7 will add something to what's been provided in the disclosure report, then it may be that
8 such further detail can be sought and provided.

9 MR PICCININ: And provided. Indeed. If this if there's something that they need to
10 know, it would just make it more practical than that. So if there's something that they
11 need to know in order to carry out the next steps that you've ordered, they should ask,
12 and we're all under a duty to co-operate.

13 THE CHAIR: Very well. What I'm minded to do is, subject to (inaudible) Tribunal, is
14 for us to rise just so we can, as it were, pull together our view on this. Then we can
15 then provide that to the parties thereafter. So what I'm suggesting is we take our
16 mid-afternoon break slightly early (inaudible).

17 Thereafter I think there are two broad topics that we need to deal with: one is further
18 procedure, and the second one is the issues arising out of the amendment.

19 MR PICCININ: Yes.

20 THE CHAIR: (Audio distortion) So if we rise now and we sit again in 15 minutes or
21 so, we'll deal with those matters then. Thank you.

22 (2.54 pm)

23 (A short break)

24 (3.09 pm)

25 **Judgment re disclosure**

26 THE CHAIR: We are grateful to counsel for their submissions and response to our

1 original thoughts.

2 What we are minded to do is to, first of all, just running through the chronology of it,
3 by 31 July, for the Defendants to produce the voluntary material which they have
4 indicated they will disclose voluntarily and to provide information to the Claimants in
5 relation to the other so-called pre-existing materials, specifically that insofar as they
6 have material -- they have located material which the Defendants consider to be
7 irrelevant, they will describe what that material is, and insofar as they have been
8 unable to locate information, they will describe the steps they have taken in that regard.
9 Also on 31 July, the Claimants will produce a joint list of issues for disclosure,
10 indicating categories of documents where those are known, for example, by reference
11 to the categories identified by Dr Davis.

12 By 18 September, the Defendants will respond to the list of issues for disclosure and
13 the Claimants will produce specific disclosure requests relating to the so-called
14 pre-existing material.

15 By 30 October, the Defendants -- that is a Friday, as opposed to a Saturday -- will
16 produce the material sought.

17 In relation to the list of issues, if the list of issues can be agreed, it should be finalised
18 by 2 October. 28 days thereafter, the Defendants should prepare disclosure reports,
19 and six weeks after the disclosure reports have been prepared, further disclosure
20 requests should be made by or on behalf of the Claimants' representative.

21 That timetable is slightly different if it cannot be agreed, because in that case 2 October
22 would be the date for the Claimants' representative to respond, 16 October would be
23 the date by which the Defendants have to confirm whether there is a dispute, and
24 30 October would be the date for short written submissions to be prepared to be
25 submitted to the Tribunal. Thereafter, the timetable would be as before, 28 days for
26 disclosure reports, six weeks for further disclosure requests.

1 We intend to list a further CMC towards the end of January, beginning of February, of
2 next year.

3
4 (3.18 pm)

5 THE CHAIR: So that would be the orders that the Tribunal was minded to make in
6 respect of disclosure. Before I move on to consider further procedure, Mr Thompson,
7 is there any point you wish to make?

8 MR THOMPSON: There's only a query about, if in the unlikely event that harmony
9 doesn't break out and we come to the Tribunal --

10 THE CHAIR: Yes.

11 MR THOMPSON: -- when do the six weeks and the four weeks run from?

12 THE CHAIR: The six weeks and the four weeks -- sorry, the four weeks and the six
13 weeks, yes, they run from the date upon which the Tribunal has issued its ruling on
14 the list.

15 Mr Piccinin.

16 MR PICCININ: There is just one part of that I wanted to query, which is, I think you
17 said 30 October --

18 THE CHAIR: Yes.

19 MR PICCININ: -- the Defendants would produce the material sought by the Class
20 Representative in relation to the pre-existing materials.

21 THE CHAIR: Yes.

22 MR PICCININ: And I didn't quite follow that, because the process was going to be that
23 on 31 July, we give them the materials that were found and we explain the things that
24 we've not been able to find or withheld.

25 THE CHAIR: Well, what I had in mind there was, insofar as the Claimants seek, for
26 example, the information that you, Defendants, considered to be irrelevant --

1 MR PICCININ: Yes.

2 THE CHAIR: -- then insofar as Claimants still want to see it, then they make that
3 request because the timetable envisages the specific disclosure request relative to the
4 pre-existing material to be submitted on 18 September.

5 MR PICCININ: Yes.

6 THE CHAIR: What I have in mind is they make that request and, I suppose insofar as
7 it's not disputed, then --

8 MR PICCININ: It's not disputed.

9 THE CHAIR: Yes.

10 MR PICCININ: And if disputed, then we'll just bring it to the attention of the Tribunal.

11 THE CHAIR: Yes. Absolutely.

12 MR PICCININ: Exactly. I understand.

13 THE CHAIR: I'm grateful. Very well. Is there anything else from your side, Mr
14 Piccinin?

15 MR PICCININ: No.

16 THE CHAIR: Very well.

17 (3.14 pm)

18
19 **Judgment re further procedure**

20 THE CHAIR: In terms of further procedure, I think I am right in saying that neither
21 side, neither Defendants nor Class Representative, seek any further orders at this
22 stage running to trial.

23 We are minded to fix a date for the trial, that the trial will be listed for the first available
24 date after 1 February 2029, but it cannot be sooner than that because of other -- I think
25 both parties were talking about the end of 2028, but the Tribunal currently has, I think,
26 three trials currently listed for that time, so the first available date therefore is

1 1 February.

2 Once we have dealt with our business today, we would expect the parties to liaise over
3 the formulation of the order and would expect the parties to indicate and agree a date
4 for the starting point of that trial after February 2029.

5 Now, in relation to the CMC in January, February of next year, there are a number of
6 matters that the Tribunal wants to be on the agenda for that hearing.

7 The first one, obviously, will be any outstanding matters of disclosure. The second
8 one will be: we expect parties to liaise, and insofar as they cannot agree, to indicate
9 their proposed orders for trial. Under that heading, we will expect to be addressed by
10 the parties in relation to permission for expert evidence, and we wish the parties to
11 indicate the areas and topics in respect of which they will seek to lead expert evidence
12 in sufficient detail to enable the Tribunal to satisfy itself that the expert evidence by
13 both sides is going to meet in the middle, as it were.

14 We are not interested in expert evidence which is going to pass like ships in the night.
15 We want to have sufficient detail as to the areas of evidence in respect of which
16 expert's assistance is sought, such that we can reach that conclusion.

17 We also have a specific issue in relation to the Defendants, and that is, it seems to us,
18 superficially at least, that it would be appropriate in this case for one expert to be
19 instructed, as it were, in each discipline, in each relevant discipline, by the Defendants,
20 rather than four experts. Insofar as the Defendants do not agree that that is the case,
21 we would expect to be addressed on that at the hearing.

22
23
24 (3.15 pm)

25 MR PICCININ: Sir, when you say "first available", do you mean first available and
26 convenient date, then?

1 THE CHAIR: Yes. Well, I mean, within reason.

2 MR PICCININ: Within reason, of course.

3 THE CHAIR: If there is a dispute about that, no doubt we'll come back, find out about
4 it and we'll have to make a decision about it. But we're expecting parties to co-operate
5 in that regard. It's so far away one would have thought even counsel as eminent as
6 this will be able to find space in their diaries for it.

7 Mr Thompson.

8 MR THOMPSON: I don't think you gave any indication of a time estimate, but I'm
9 content to --

10 THE CHAIR: Ten weeks.

11 MR THOMPSON: Ten weeks?

12 THE CHAIR: Yes. Thank you.

13 (3.16 pm)

14

15 Judgment re further procedure (continued)

16 (3.18 pm)

17 THE CHAIR: So, that's where we are in terms of further procedure. Does either side
18 seek any other orders in respect of further procedure?

19 Mr Thompson? (Inaudible) Mr Piccinin, and I don't know if you still have a joint
20 mandate, as it were, but ...

21 MR PICCININ: (Inaudible) trying to collect points by looking around, but no, that's all
22 fine. Obviously, you may well hear from us on ...

23 THE CHAIR: I mean, you'll be free to apply in any event, so ...

24 MR PICCININ: Exactly. We've heard the indication that you've given.

25 THE CHAIR: Thank you. That's very helpful. Well, that, then, I think brings us on to
26 the last matter with which we have to deal this afternoon, and that is the question of

1 the proposed amendments.

2 Now, as we understand it, but I appreciate we may not understand it fully, there are
3 essentially -- there's much that's agreed, that in relation to the motion to amend there
4 is no disagreement that the Claimant should be allowed to amend in the terms that
5 have been agreed, both in relation to the date and in relation to the other, I think it's
6 the first amendment, which is the slightly more controversial one. That's a matter of
7 agreement.

8 There is a question mark over the costs of the application, and then there's also
9 a question mark, as we understand it, that's been raised in Mr Williams's skeleton, as
10 to the wording of the first amendment. Are we right that those are the only issues that
11 are, as it were, contentious now? I don't know who's going to start. Mr Williams, do
12 you want to?

13 MR WILLIAMS: I think those are the only issues that are contentious, subject to an
14 overlap with the last issue I dealt with in my skeleton argument, an ultimate issue about
15 the indirect contract.

16 THE CHAIR: Ah, yes.

17 MR WILLIAMS: Which is not the same issue.

18 THE CHAIR: No.

19 MR WILLIAMS: But as a matter of process, we've said we want to amend to deal with
20 that issue --

21 THE CHAIR: Yes.

22 MR WILLIAMS: -- and we think it would be efficient for us to build those amendments
23 into the same process of amending the defences consequential on this amendment.
24 So it's not a contentious issue in relation to the Claimants' application, but it's just
25 something we need to sort out (inaudible).

26 THE CHAIR: Yes, yes. And is that contentious? Do the Claimants challenge that?

1
2 Submissions by MR THOMPSON

3 MR THOMPSON: May I first deal with amendment 1?

4 THE CHAIR: Yes.

5 MR THOMPSON: I think the only contention, such as it is, is between myself and
6 Mr Williams. I think harmony is broken out between myself and Mr Piccinin and
7 Mr Hoskins that, indeed, they've slightly been in the back seat on this whole issue.
8 I think they're content to go along with the amendment as agreed and to treat it as
9 costs in the case. So I think the only issue is that Mr Williams wants - I'm not quite
10 sure whether he actually wants to make an amendment, but if he were to want to make
11 an amendment, he might have an issue about costs. I think, more generally, he's got
12 an issue about costs.

13 To my mind, what he's actually trying to do is make a very late application to amend
14 his defence in unspecified terms, which, to my way of thinking, is an unattractive
15 submission to have made at 5.00 pm or whatever it was yesterday. At the moment,
16 I don't know what it is that he actually wants to amend, and my general view is that it
17 would be preferable, if this is a real issue, for it to be pursued at the next CMC and
18 possibly after disclosure, because we don't really know what it is he wants, and it would
19 all become much clearer if he would disclose his contract so that we could understand
20 what it is he's talking about.

21 But at the moment it's unsatisfactory --

22 THE CHAIR: It sounds to me as if we should hear from Mr Williams in that regard.
23 There was one matter that the Tribunal had about the formulation of the first
24 amendment.

25 MR THOMPSON: Yes.

26 THE CHAIR: Just looking at the wording of it, we're slightly troubled that it perhaps

1 didn't convey the position as clearly as might be otherwise desired, in the sense that
2 as we understand it, what the amendment is seeking to do is to make clear that
3 a relevant customer who has who entered into at least one CHA contract, at any point
4 really, but at a point both before or after the beginning of the relevant period, but in
5 respect of whom that contract has come to an end and they have made a payment
6 after the beginning of, or during the relevant period, that person would fall within the
7 category.

8 MR THOMPSON: Yes.

9 THE CHAIR: It's just the use -- the phrase "had" seemed slightly confusing to us, and
10 what we were going to propose was a slightly different wording. Of course, it's
11 a matter for you, but looking at the relevant text, where it reads currently "Any Relevant
12 Customer who ...", what we are proposing is one deletes from there until the words
13 "into", so it reads:

14 "Any relevant customer who being a party to at least one Combined Handset and
15 Airtime Contract with one of the Defendants ..."

16 And then just reads on. Then get one gets to (ii):

17 "... pursuant to the Combined Handset and Airtime Contract(s) in the Relevant Period
18 made one or more periodic payments in excess of the SIM Only Price after the expiry
19 of the Minimum Term ..."

20 The point being that having the reference to the relevant period before the reference
21 to the contract and using the verb "had" didn't seem -- still seemed to leave open the
22 question whether, as it were, having of the contract was during the relevant period or,
23 as we understood it, possibly before the relevant period. Just merely changing the
24 tense didn't seem to clarify that point.

25 MR THOMPSON: Well --

26 THE CHAIR: I can appreciate --

1 MR THOMPSON: We've obviously considered various minimal changes and thought
2 this was as minimal a change --

3 THE CHAIR: I can see why you might have thought it was minimal. I just wonder if,
4 erring on the side of minimalism, you possibly strayed into being less clear than is
5 desirable, given that this is to be read, as it were -- at least one would hope to be
6 understood by many people who will not be legally trained.

7 MR THOMPSON: Yes. I mean, I think we all now understand what the problem was,
8 that having amended the relevant period, it had this curious knock-on effect into the
9 class definition, and if, in the relevant period, it had been pushed into (ii), that would
10 have been another way of addressing it. I think that's, essentially, what the Tribunal
11 is putting to me. So I certainly have no objection to it. I think that we suggested it in
12 a footnote to our skeleton as a different formulation.

13 THE CHAIR: I didn't come across -- I think you're responding to Mr Williams, who
14 makes a similar kind of point. You said that you're content to consider the alternative
15 wording that the Tribunal thought might assist, and I think that we've taken up that
16 opportunity to give you our view. I can appreciate that it might be a lot clearer,
17 I suspect, if, after this hearing, Mr McGivney provides the wording to the parties to
18 ensure that you can see precisely what we're talking about.

19 MR THOMPSON: Yes. I think that we all understand the underlying issue, which is
20 there's at least a potential ambiguity about the alignment between the claims that were
21 certified.

22 THE CHAIR: And you're reserving, all parties are reserving, their positions as to what
23 may or may not be the limitation consequence. You said there are none; Mr Williams
24 says there are, but that's not a matter for today.

25 MR THOMPSON: Yes. I don't know what Mr Hoskins thinks about this, if at all.
26 I mean, our position is that given that nothing has been conceded about there being

1 new claims, then the appropriate order is costs in the case, because it will come out
2 at trial.

3 THE CHAIR: Why don't you hear --

4 MR THOMPSON: It might be a matter for Mr Williams because he's a connoisseur of
5 this whole question.

6 THE CHAIR: Why don't I hear what motions Mr Williams -- applications Mr Williams
7 is making and then you can respond to that.

8 Mr Williams.

9 Submissions by MR WILLIAMS

10 MR WILLIAMS: So we've sought what we say is the usual order in relation to the costs
11 of the amendments; that is, for the Class Representative to pay the costs of and
12 occasioned by the amendments.

13 THE CHAIR: Is this solely on behalf of your clients and the other Defendants don't
14 seek that; is that right?

15 MR WILLIAMS: Yes. As you know, we've made the running on this issue.

16 THE CHAIR: Yes.

17 MR WILLIAMS: And yes, it's only us that seek this order. But just to be clear, this is
18 the costs of and occasioned by the amendment. It's not the costs in relation to the
19 application for permission to amend where the Tribunal has seen where that's ended
20 up with the order.

21 THE CHAIR: Yes.

22 MR WILLIAMS: We accept that those costs are costs in the case. They've ended up
23 being costs of case management, and we're not seeking them even though, we say,
24 we could have done if we'd wanted to take a different position about that. The order
25 we're seeking --

26 THE CHAIR: (Inaudible) yes, tell me.

1 MR WILLIAMS: Yes. So the order we're seeking is the conventional order where
2 a party amends their statement of case and so puts the counterparty to the costs of
3 dealing with the amendment. I wouldn't have usually thought it was necessary to
4 develop that submission on authority, but given that the order has been fought tooth
5 and nail, I have brought along Court of Appeal authority to support the proposition that
6 this is the usual order. I don't know if you want to see it.

7 THE CHAIR: I don't think we need to go to that at the moment. I'll hear what
8 Mr Thompson has to say. I mean, at first blush that would certainly seem consistent
9 with one's experience of practice.

10 MR WILLIAMS: Yes. Well, the case is at tab 4 of bundle E. It's a Court of Appeal
11 case, and the observation that's made is that this is a judicial practice with which
12 anyone familiar with contentious litigation will be familiar, which is the point you're
13 making to me, sir. So we don't say that this is an absolute, but we do say that it's the
14 usual order, and it's the order which should be made unless there's good reason to
15 the contrary.

16 Here, there's no good reason not to make the order. We pleaded our defence on the
17 basis of the class definition as it stood. The Class Representative has said in
18 correspondence, "We disagree with the arguments you want to make in your defence",
19 but that's mixing up the costs of and occasioned by the amendment with the ultimate
20 cost of trying the issue.

21 THE CHAIR: Yes.

22 MR WILLIAMS: The reasons why we would ordinarily get our costs in this situation
23 apply, because we're being put to work as a result of an amendment by the Class
24 Representative.

25 THE CHAIR: Yes.

26 MR WILLIAMS: You've also got my point from my skeleton, which I won't take up time

1 on now, which is that the reason we're here is because the Class Representative has
2 made an error. I'm not making this submission to embarrass anyone, but just looked
3 at in the cold light of day, and looking at the language of the pleading, the class
4 definition, as it was proposed at the last round of amendments, was too narrow to
5 encompass the claims that the Class Representative wants to bring forward, and that's
6 why they brought this amendment forward. There's been a lot of talk of ambiguities
7 and clarification, but when it comes to it, the pleading is clear: it only covers CHA
8 contracts that were entered into in the relevant period.

9 If I can just show you one letter which we do refer to in our skeleton argument, it's at
10 bundle C, tab 33, page 105. This was part of the early correspondence between the
11 parties in relation to the proposed amendment. In fact, it's a letter from
12 Charles Lyndon, dated 19 May to O2. If you just read to yourself paragraph 7 and
13 paragraph 7.1. (Pause)

14 Then down to the words, "entered into from 1 October 2015", you'll see about seven
15 lines down. It says:

16 "The current wording of the class definition appears to exclude such claims, on the
17 basis that it may be read to encompass only claims that arise in respect of CHA
18 Contracts that are entered into from 1 October 2015 ..."

19 So that was the explanation for the amendment and we agreed.

20 THE CHAIR: Yes.

21 MR WILLIAMS: That's why this application has been brought forward. So we say that
22 really compounds the case for us to have the cost of application by the amendment,
23 so I don't really have more to say than that.

24 THE CHAIR: What, then, do you seek in relation to your amendment in terms of an
25 order from the Tribunal? None at this stage -- you're just giving notice --

26 MR WILLIAMS: Can I hand something up? What we seek is a timetabling direction

1 and nothing more than that, because what would happen under the CR's order and
2 absent -- sorry, there's only one of those -- (Pause)

3 For this issue, the Tribunal would make an order which gave permission for the Class
4 Representative's amendment, and for consequential amendments to the defence.
5 (Handed)

6 And the consequential amendments to the defence would go in with the permission of
7 the Tribunal.

8 THE CHAIR: Yes.

9 MR WILLIAMS: But because we are contemplating bringing forward amendments in
10 relation to additional matters, we don't presume that we're going to get permission for
11 those or that we're going to get consent. So we need to put forward a draft amendment
12 to the Class Representative, and our proposal, in the interest of efficiency, is that we
13 do that at the same time as when we provide our amendments, consequential and
14 defence.

15 So if you turn through this order, you can see in paragraph 9 that that's the order that
16 the Class Representative has proposed to deal with service of amendments
17 consequential on the amendments to the class definition.

18 THE CHAIR: Yes.

19 MR WILLIAMS: And then you've got tracked changes, which are proposed changes
20 to incorporate a process whereby we bring forward the amendments in relation to
21 indirect contracts at the same time as our consequential amendments.

22 You'll see, sir, from paragraph 11 that that provides for the Class Representative to
23 consent, or object, to the amendment. So just to be completely clear, this isn't an
24 application for permission to amend; it's simply a timetabling issue. Our suggestion is
25 that we deal with this issue efficiently so that we've got one round of amendments
26 rather than two.

1 THE CHAIR: Yes.

2 MR WILLIAMS: Then there's a process whereby, if the Class Representative
3 consents, they then serve a reply. If they don't consent, then they need to give
4 reasons and we follow the usual process from there.

5 So it's not an 11th hour application for permission to amend to make unspecified
6 amendments. It's very far from that. It's simply a matter of process to allow us to deal
7 with this efficiently whilst we're already making amendments to our defence. So I hope
8 that that explains the position.

9 THE CHAIR: Yes. That's helpful.

10 MR WILLIAMS: In terms of what the issue is, we did set it out in outline in our skeleton
11 argument. I don't know if you want me to --

12 THE CHAIR: Just briefly.

13 MR WILLIAMS: So the claims, as made at the moment, are claims made in respect
14 of CHA contracts, which are bundled contracts relating to the acquisition of handset
15 and airtime.

16 THE CHAIR: Yes.

17 MR WILLIAMS: And the current pleading proceeds on the basis that where
18 a customer goes to a retailer like Carphone Warehouse, or another indirect seller, and
19 they enter into a transaction whereby they obtain a device and airtime, they thereby
20 enter into a contract.

21 THE CHAIR: Yes.

22 MR WILLIAMS: We say that that isn't actually what happens in that scenario. What
23 happens in that scenario is that the customer acquires a device from the reseller and
24 airtime from the MNO. This is not a new point in the sense that this point has already
25 been pleaded by other Defendants. We've said in our skeleton argument, candidly,
26 that when we put together our defence, we were still carrying out factual investigations

1 in relation to this point, so we didn't deal with it then. But we now want to cover it
2 because we're about to move to disclosure.

3 THE CHAIR: Yes.

4 MR WILLIAMS: Obviously, it makes sense that the points that we put in issue are
5 pleaded out in advance of disclosure, so we've tried to propose an orderly process to
6 do that.

7 THE CHAIR: Yes. That's helpful. So, Mr Williams -- sorry, Mr Thompson.

8 Reply submissions by MR THOMPSON

9 MR THOMPSON: Well, it is an unusual situation in relation to the first point on costs
10 in that our understanding -- it appears not to be disputed by O2 and BT -- is that there
11 doesn't seem to be any need for any amendment. If there is, then it's something that'll
12 only be determined at trial. But on both -- all the parties have contested --

13 THE CHAIR: If it's not necessary, Mr Thompson, then you don't need to make it, but
14 you are making it, and I understand that. But it just seems to me, you know, that you're
15 making the amendment and you're doing so clearly because you don't fancy your
16 chances, or you prefer not to proceed to trial, without having the amendment in place,
17 which is fine, but that is an amendment that has arisen essentially because the initial
18 wording was open to ambiguity. You've chosen to clarify that, but why shouldn't the
19 Claimants bear the cost of doing that at this stage?

20 MR THOMPSON: Well, you understand the history of this, that I think it can't be
21 disputed that these claims and these Claimants were part of the broad case from the
22 start. All we're saying is that those claims were certified both in the judgment and in
23 the order and that the Class Representative, on behalf of his class, wishes to make
24 sure that these Claimants aren't what I've called orphan claims.

25 THE CHAIR: I quite see that. I'm sure that the costs aren't insignificant, but I suppose
26 I'm struggling to understand why it should not be the case that you should bear the

1 costs of an amendment that is entirely something that is being driven by the Class
2 Representative's desire to change his case at this stage. For whatever reason the
3 background.

4 I mean, ultimately it's arisen because one amendment was made and you felt that that
5 amendment didn't adequately - left a question of ambiguity and so on and so forth.
6 We don't need to get into whether it's at fault or not. I'm just purely looking at it from
7 the basis of who is responsible for the costs of this particular chapter of proceedings.
8 I can't see how it cannot be said to be the Claimant.

9 MR THOMPSON: Well, I think maybe I'm making a slightly different point which is that
10 either, as you'll recall, in the distant past the applications that were made, neither of
11 the applications on limitation had anything to do with the date on which the contracts
12 were entered into. None of the defences have been based on that question. They've
13 all been based on when the claims arose, which was the issue that was pursued in
14 those applications. That continues to be the case.

15 It's not clear to us on what basis there could be any amendments, why we should be
16 required to pay for amendments which are, in effect, superfluous and which may be
17 found to be superfluous at trial. That's the point but I don't want to belabour the point.
18 I mean, on the other question, and we don't at this stage want to go into all the
19 correspondence --

20 THE CHAIR: I'm grateful for that.

21 MR THOMPSON: -- but we've received a number of letters about this resellers point.
22 It's true that Mr Hoskins's client has pleaded out the issue in more detail than the
23 others. Our general position, now that we're on the brink of disclosure, is that we can't
24 conceivably engage with this question, let alone consent to any amendments, without
25 having seen any of the relevant contracts.

26 So various assertions have been made in the defences and in the skeletons as to the

1 effect of various contracts that have been mentioned. But although, as I think we've
2 handed up, the rules envisage that documents relied on -- unless, as far as
3 practicable -- be appended to the defences, we still haven't seen anything.

4 So apart from the very late nature of this application and it's very open-ended nature
5 because, if you see it, the actual wording is that insofar as the Defendants wish to
6 make amendments in a manner that is not permitted by paragraph 9 above. So that's
7 an extremely open-ended request made during the course of this hearing, as far as
8 I'm aware. I hadn't seen it until lunchtime today. That's really a very inappropriate
9 way, particularly given, if I may say so, the somewhat obstructive approach that has
10 been taken to our amendment. To suddenly turn up with another proposed
11 amendment, completely unspecified and expect us to say, "Yes, that's fine".

12 THE CHAIR: But I don't think they are expecting you to say, "That's fine". In the sense
13 that I think what Mr Williams is proposing, as I understand it, is that if you want to say,
14 "No, it's not fine and we don't consent", then that's fine, as it were. You will be able to
15 do that and we will deal with it, no doubt, at the next case management hearing if not
16 before.

17 I think all this is doing is setting out an orderly timetable in which Mr Williams' client is
18 to put their amendment forward and for you to have a proper opportunity to consider
19 it and put forward such responses as you wish to. If you wish to object to it, you'll be
20 able to do that.

21 MR THOMPSON: With respect, a much simpler approach would be, if Mr Williams
22 wishes to amend his defence, to put in a properly evidenced application for the next
23 CMC so that we can all look at it. This is just a recipe for to-ing and fro-ing between
24 solicitors which we've already had quite a lot of it in relation to this amendment. I can't
25 see any particular purpose in this exercise. I don't see what prejudice there would be
26 if Mr Williams would formulate the amendment he wanted to make and then apply to

1 the Tribunal for permission to do it in the usual way, as has been done in this hearing.
2 There's also a procedural question in that there's provision for if Mr Williams wishes,
3 in fact, to make any amendments to his defence, for us to reply to it. He's now
4 suggesting that this procedure will cut across that exercise. So it's a sort of
5 unnecessary bureaucratic complication, in my submission. But I can see it's late in
6 the day and the Tribunal may wish to take the line of least resistance. But in my
7 submission it's not a particularly well-formulated application and very late.

8 THE CHAIR: Thank you.

9 MR THOMPSON: I don't think I can say anything more about that.

10 THE CHAIR: No, no. That's helpful.

11 Mr Williams, anything you want to say further?

12 MR WILLIAMS: I don't think so. We're simply trying to do this in an efficient way.
13 Whenever we do this, we need to put it forward to the Class Representative first to
14 see whether they consent.

15 THE CHAIR: Yes.

16 MR WILLIAMS: Obviously, it's not the case that we would simply apply directly to the
17 Tribunal at the CMC. We would follow a process a bit like this and we're simply
18 proposing to do it whilst we're making amendments to our defence anyway. Insofar
19 as Mr Thompson says he can't possibly consent to our amendments before disclosure,
20 I mean, with respect, that's not a cogent objection to an amendment. We're trying to
21 put the pleading in order before we give disclosure so that the issues are clear on the
22 face of the pleadings in advance of disclosure. That's the point of this.

23 Of course, disclosure will then be given against the pleadings. But it's not the usual
24 process for a party to say, "Well, I can't consent to an amendment until I've seen all
25 the disclosure". It's the other way around. It's the pleading that triggers the disclosure.

26 THE CHAIR: Thank you.

1 I think what we will do is just very briefly rise to reach a view on this and we will come
2 back and give you our view on the two matters that are before us: the question of costs
3 and the question of the amendment by (inaudible). So we will sit again in 15 minutes.

4 Thank you.

5 (3.44 pm)

6 (A short break)

7 (3.54 pm)

8 THE CHAIR: Thank you. I'm grateful to counsel for their submissions. There are two
9 very short points. I think, as was clear from my discussions with both Mr Williams and
10 Mr Thompson, I struggle to see a basis upon which it would not be the case that the
11 costs would fall to the party who caused them to be incurred. On that basis, we will
12 grant Mr Williams' application for the conventional costs order flowing from the
13 Claimant's Representative's amendment.

14 As to the second point, it seems to us that there is some value in having a procedure
15 set out in the order and we do not see that there is any prejudice to the Claimant's
16 Representative in proceeding in that way. If anything, it seems advantageous to the
17 Claimant's Representative to have a timetable set down in terms of which the
18 amendment, which Mr Williams' clients seek to make, requires to be produced in
19 accordance with that timetable. So we will allow that timetabling direction to be
20 included in the orders to follow from this hearing, along the lines set out in the
21 document that has been provided. As to the terms of that order, we would expect
22 parties to liaise in a normal way, to agree the wording setting out the various matters
23 that we have dealt with today.

24 But so far as the Tribunal is aware, that deals with all the matters that are before us
25 today unless there is anything else that the parties wish to raise at this stage.

26 Mr Thompson?

1 MR THOMPSON: We're only considering about the timetable for our replies, if any, if
2 we do consent to these amendments. I suppose there would be a question about the
3 costs of those replies if we are required to make any.

4 THE CHAIR: The timetable -- I don't know if you've had an opportunity to see this,
5 Mr Thompson -- I think paragraph 11 suggests that you have a week to confirm
6 whether you consent and, if not, to provide reasons.

7 MR THOMPSON: Given that we don't know what they are at all, whether that could
8 be two weeks.

9 THE CHAIR: Mr Williams, I doubt you can take any issue with that. No.

10 MR WILLIAMS: That's fine, sir.

11 Then paragraph 14 deals with replies and it provides for replies to be filed within
12 three weeks of service of the amended defences. Now that's one provision but,
13 obviously, it might be running from different dates for each of the defences.

14 THE CHAIR: Yes.

15 MR WILLIAMS: So we did try to cater for that. I appreciate Mr Thompson's catching
16 up to some degree. If they want to propose some other mechanics, then they can let
17 us know. But it is catered for in this.

18 THE CHAIR: It seems to me that I imagine that those instructing you, Mr Thompson,
19 no doubt guided by your counsel, would be able to propose something to the
20 Defendants and to agree some kind of timing in relation to this. If it can't be resolved
21 and it comes back to the Tribunal, be under no misapprehension, we will simply fix it
22 in what seems to us a reasonable time. But unless it's going to assist parties for us to
23 sweat over the minor details of this --

24 MR THOMPSON: No, no, I'm sure it will not.

25 THE CHAIR: Are you content we proceed on that basis?

26 MR THOMPSON: Yes, I am. I did, perhaps slightly tongue-in-cheek, raise the

1 question of costs but I didn't want to take it any further.

2 THE CHAIR: I think that would be a matter that it would fall for you to raise once they
3 have been incurred, as it were.

4 MR THOMPSON: Yes, we can come back on this if and when the situation has arisen.
5 I'm grateful.

6 THE CHAIR: Thank you.

7 For the Defendants, is there any other issue you wish to raise? (Pause)

8 Well, thank you. We're very grateful to counsel for their submissions on all of the
9 issues. We've managed to get through a significant amount and, of course, we had
10 feared that it might even take two days. So I'm extremely grateful to you. Thank you
11 very much.

12 (3.59 pm)

13 (The hearing adjourned)

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