IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11th December, 2007

Before:
VIVIEN ROSE
(Chairman)

PETER CLAYTON
ARTHUR PRYOR CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED ("**ORANGE**") Applicant

supported by

VODAFONE Intervener

AND

OFFICE OF COMMUNICATIONS ("**Ofcom**") Respondent

supported by

HUTCHISON 3G UK LIMITED ("**H3G**")

T-MOBILE UK LIMITED ("**T-MOBILE**")

BRITISH TELECOMMUNICATIONS PLC ("**BT**") Interveners

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HEARING: PRELIMINARY ISSUES

DAY ONE

APPEARANCES

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Mr. Graham Read QC, Miss Anneli Howard and Mrs. Sarah Lee (instructed by BT Legal) appeared for BT.

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared for H3G.

Mr. Peter Roth QC and Mr. Ben Lask (Instructed by the Office of Communications) appeared for Ofcom.

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THE CHAIRMAN: Good morning, ladies and gentlemen. Just a couple of points that I want to raise before we start. First, I know that the referendaire has been in touch with you to make sure that we have the correct copy of the contract, the contract that was in force at the time of the relevant events. We appreciate that some of the clauses may not have changed from earlier versions, but there may be occasions on which we want to refer to clauses other than the ones that have been mentioned in the skeletons, and we want to be absolutely sure that we are referring to the correct document.

The second point is in regard Orange's case - we want to be clear what the case is in relation to both subsection (1) of s.185 and subsection (2) of s.185 of the Communications Act.

That is all I wanted to say by way of introduction.

MISS DEMETRIOU: Thank you, madam. In relation to the first point about the contract we did indeed get the message, and have endeavoured to track down all the variations.

Unfortunately, it is not as simple as producing another copy of the agreement that was in force at the time because there have been a number of variations to it. Every time a variation occurs there is not then a consolidated version of the agreement. What we do have here are copies of all the variations. However, in a sense, I am rather reluctant to trouble the Tribunal and the parties with them. They are here if you would like to see them. Now, as far as we are concerned, there is no relevant variation. So, the clauses to which we will want to refer have not, so far as we are aware, been varied. I do not think that BT have any point to make on the variations either. Can I perhaps just give you an indication of the size of the beast? This is the bundle of all the variations that have taken place since the date of the agreement as contained in the bundle (indicated). I am afraid I have not had time myself to go through them all. My solicitors have checked to make sure that as far as they can see there are no relevant variations. It is not, I am afraid as simple as handing up an up-to-date version of the agreement. I am in the Tribunal's hands as to how we play that.

THE CHAIRMAN: Let us see how we get on. If it becomes apparent that other clauses in the agreement are relevant, perhaps your instructing solicitors will be able to check whether the text, as it appears in the annexe to your notice of appeal, is in fact the correct text.

MISS DEMETRIOU: I think that sounds like the most sensible way of proceedings. That is in relation to your first point.

In relation to the second point, I will make clear my case, but Mr. Read has indicated to me that he wants to make a point at the outset before I start. I do not know if this is a convenient time to let him make his point?

MR. READ: Madam, if it is of any assistance we do actually have some disks with what BT thinks is all the relevant terms from the SIA contract going back to 1986 when it was first inaugurated vis-à-vis Orange. So, if anybody wants it in disk form, we have the facility here to do it.

The point I wanted to raise relates in essence to the way that the skeleton argument of Orange now puts the case concerning Ground 1(a) because, as you will recall from the CMC hearing, I hope, there was an issue over that which we thought had become clarified by the letter of 15th November which was sent by Orange, which entirely accepted the way the Tribunal had put Ground 1(a) in the letter of 9th November, I think it was, from the Tribunal. What we apprehend in para. 3 in the way it is set out in Orange's skeleton argument there is that in fact in the new bundle, if the Tribunal has the new compendious bundle of documents, it can be found in Tab A3 at p.46. As you can see, what has happened is that Ground 1(a) in that paragraph has ended up being slightly sub-divided into (i) and (ii). It is in the context of an attempt to vary an existing commercial contract, and not (i) at the point when access to facilities was being granted, or (ii) in order to impose or ensure compliance with any regulatory control. Now, that is expanded on the way the matter was put in the original letter. My concern is principally this: what I think would be unfortunate to say the least in the context of this hearing is if we start having to investigate in any depth Ofcom's regulatory past in respect of dispute resolution - because, of course, that forms one of the core issues when one moves on to the main termination rate dispute appeal later on.

It may be a matter of degree, but I am just flagging it up at this stage not least because Vodafone and T-Mobile are not here today. They have dropped out specifically on the basis of, obviously, what they understood Ground 1(a) to be from the letter of 15th November. I do want to flag up that if we start trespassing too far into what is actually Ofcom's dispute resolution past, then we may start to trespass into the core issues.

THE CHAIRMAN: Mr. Read, that, I think, is part of the reason why I made the point that I made at the outset because my understanding was that (i) there relates to why Orange say this dispute does not fall within s.185(1), and (2) relates to why they say it does not fall within s.1865(ii)(a). So, they are not making a point about the nature of the investigation under the dispute resolution procedure, what they are saying, as I understand it, is that this is not a dispute which relates to rights and obligations conferred or imposed by, or under, this part. I think the reference to regulatory control is a shorthand for that. That was my

understanding of the point. I did not understand it as being a point about what is the test that is to be applied.

MR. READ: Of course, that raises rather interesting questions about how the axis directive and the framework directive respectively operate vis-à-vis s.185(1) and 185(2). I will let Orange develop that and see how it goes, but I wanted to flag that up at the beginning so that lest we move the goalposts as we go along.

THE CHAIRMAN: I think Miss Demetriou has well in mind that we all want to know what she says on those points.

MISS DEMETRIOU: Madam, perhaps I could start by saying that you have summarised our correctly, and that is why indeed we do have the (1) and (2) - they are intended to reflect s.185(1) and (2) respectively. Just in response to Mr. Read, one point: if you could perhaps turn to tab 24 of the bundle, this is the letter that Orange wrote to BT in response to its invitation to clarify its Ground 1, and you will see that what we do in that letter is summarise is reproduce the summary given by the Tribunal in its letter and then we say:

> "This is an accurate summary of Ground 1(a). It is fundamental to this ground that the price in the circumstances of this case was a matter for commercial agreement between the parties and was subject to low regulatory control."

So, madam, in my submission we have flagged the point in (2) in the skeleton argument, it is not intended to be a new point and our case, as I develop it the Tribunal will is as per my skeleton argument so I hope nobody is taken by surprise – I do not think they should be.

With that in mind, as the Tribunal is aware Orange's Ground 1 is that there was no relevant dispute between Orange and BT and Orange puts its case in two ways, which have hitherto been labelled Ground 1(a) and Ground 1(b).

Ground 1(a) "dispute" in the 2003 Act means a dispute which engages Ofcom's regulatory functions and not a purely commercial disagreement between two network operators. That is in essence what we are saying under Ground 1(a). We say that in the present case Ofcom's regulatory functions were not engaged both because first of all (1) BT and Orange had already agreed upon interconnection, so this was not a matter of providing interconnection in the first place; and secondly, the price charged by Orange was not subject to any regulatory control, and we say that this kind of dispute is a purely commercial dispute and it is not what is meant by "dispute" in the 2003 Act. That, in summary, is our Ground 1(a).

We say in relation to that it is not the purpose of the Act to enable Ofcom to act as some kind of commercial arbitrator in the event of any disagreement of whatever nature between network operators.

We then say in summary that if we are wrong on Ground 1(a) we submit in the alternative that there was no relevant dispute within the meaning of the Act because BT referred the alleged dispute outside the contractually agreed referral period, and that is our Ground 1(b) and I will return to that at the end.

THE CHAIRMAN: Just to be clear, under your Ground 1(a) you say that that applies even if BT had complied punctiliously with the timescale set out in clause 13?

MISS DEMETRIOU: Absolutely, so it has nothing to do with the factual circumstances or the contractual agreement in place in this case, other than the fact that there was an agreement in place which ensured interconnection.

What I would like to do, if I may, is approach my submissions in the following way: I would like first to have a look at the factual material and I hope to demonstrate by reference to that that the alleged dispute in this case is purely of a commercial nature. Secondly, I would like to turn to the relevant provisions of the 2003 Act and explain by reference to the underlying European Directives, and it seems to be common ground between all of us that the Act has to be interpreted in accordance with those Directives, so I will explain why dispute in s.185 (1) and (2) means a dispute engaging regulatory issues and does not encompass purely commercial disputes, and I will do that by reference to the underlying European legislation.

Thirdly, I would like to address some of the specific arguments raised by Ofcom, H3G and BT in their skeleton arguments, the arguments made against me, and fourthly, and finally, I will turn to Orange's Ground 1(b). That is the first preliminary issue.

In relation to the second preliminary issue I should flag at the outset that we really have very little to add to what Ofcom has already said in its skeleton argument and perhaps we can address at the end the best way of dealing with the second preliminary issue.

So I would like to start, as I have indicated, with the factual context. As the Tribunal is aware this appeal concerns the charges made by Orange to BT for its mobile call termination services, which we have referred to as "MCT" services in our skeleton arguments. The Tribunal is more than aware by now that MCT is the service necessary for the network operator, in this case BT, to connect a caller with an intended recipient network, in this case Orange. The originating operator, in this BT, pays a charge for this service to

the recipient operator, in this case Orange, and the disagreement in this case was centred around the level of that charge.

The Tribunal has seen from the documentation that MCT rates are a matter of contractual agreement between network operators and similarly the ability of network operators to vary those rates depends entirely upon the terms of the contract they have entered into.

The relevant contract in this case is the parties contracted on BT's standard terms, its standard interconnect agreement, and the relevant agreement was entered into on 23rd March 2001, and the Tribunal has that agreement at tab D.

THE CHAIRMAN: When you say it was "entered into", there is some query over whether actually the 2001 version was a variation of the early version, so can you just be a bit precise about what you mean by it being "entered into" in 2001?

MISS DEMETRIOU: Madam, you are quite right, there was an earlier agreement which this varied, but this was in fact a replacement of that earlier agreement, as opposed to the piecemeal variations that have occurred since then. The earlier version of the agreement between the parties was completely replaced by this version in March 2001. If the Tribunal turns to p.436 of the bundle, you will see there clause 2 which deals with commencement and duration, and clause 2.3 provides that a party may terminate this agreement by giving notice at any time to the other of not less than 24 months.

THE CHAIRMAN: And that we are sure is a clause that was in place at the time?

MISS DEMETRIOU: Madam, I am slightly hampered, perhaps if I might deal with it this way? As far as I am aware that has not altered, but what we will do is make a note of all of these clauses that I am referring to and come back and correct ----

THE CHAIRMAN: That would be very helpful.

MISS DEMETRIOU: Thank you. The next clause that is relevant to look at is at p.444, clause 12. The Tribunal will already have seen clause 13 which this preliminary issue really centres on. Clause 13 deals with services provided by Orange to BT. Clause 12, by contrast, concerns services provided by BT to Orange, and I would just ask the Tribunal to note that under clause 12.2 BT may vary the charge for a BT service and such change automatically takes effect. So clause 12, unlike clause 13, does not contain a so-called "dispute referral mechanism", so the parties here have simply agreed that BT can vary its charges for the services that it provides to Orange.

THE CHAIRMAN: Those charges are regulated.

MISS DEMETRIOU: Madam, there are a plethora of services provided under this agreement which perhaps I can give the Tribunal some idea of the nature of the services provided.

What we have done is to extract from – if I could just hand these up? (Documents handed to the Tribunal) I am afraid what I cannot do at the moment is give the Tribunal the date of this particular document, it is annex C to the agreement, and as far as I am aware it is in force at the moment. But you will see on the first side a list of BT services and on the second side a list of operator services. So there are a multiplicity of services provided in each direction that are covered by this agreement. MCT services are only one of them. This comes from the version of the agreement which was varied on 6th August this year, so it is in services at the moment; these are the services currently being provided, and it is really just to give the Tribunal an idea of the scope of this agreement. As I have indicated clause 12 is different to clause 13 in that there is not the same kind of price variation mechanism as exists in clause 13. Over the page, clause 13 is the provision which applies in this case, because it applies in respect of services provided by Orange to BT. Clause 13.1 is analogous to Clause 12.1. It says that, "For an operator service or facility BT shall pay to the operator the charges specified from time to time in the carrier price list". But, then, the procedure for varying price is very different. So, the Tribunal will have noted that both BT and Orange can initiate a price variation. We see that from Clause 13.2. That is the one that enables Orange to initiate a price variation. Clause 13.3 applies to BT. The way in which that works, if we look at Clause 13.2 the operator can, from time to time, issue what everyone refers to an OCCN - an Operator Charge Change Notice. This notice specifies the proposed new charge and the date on which it is proposed the variation is to become effective. Then, BT has four working days to acknowledge receipt, and then, within a reasonable time, notify the operator in writing of acceptance or rejection of the proposed variation.

Clause 13.3 is a similar provision which applies in respect of BT, although the Tribunal will note that that lays down, rather than saying that 'Orange will within a reasonable time notify the operator of acceptance or rejection', it stipulates that they shall do so within fourteen days of receipt of the notice. If the operator has not accepted the notice within fourteen days of receipt, the proposed variation shall be deemed to have been rejected.

Clause 13.4 covers the position where the other party accepts the proposal. That provides that 'the party shall forthwith enter into an agreement to modify the agreement in accordance with the proposal'.

Clause 13.5 applies 'if the receiving party rejects the proposal' and it provides that in those circumstances the party shall forthwith negotiate in good faith.

Clause 13.6, "If, following rejection of a proposal and negotiation, the parties agree that the notice requires modification, then the party who sent it may send a further modified notice". Clause 13.7 states that, "If, following rejection and negotiation, the parties fail to reach agreement within fourteen days of the rejection, then either party may, not later than one month after the expiration of such fourteen days period, refer the matters in dispute to the Director General (now Ofcom)".

As the Tribunal is aware, it is Clause 13.7 which is in issue in Orange's Ground 1B.

Clauses 13.8 and 13.9 concern Ofcom's role. 13.A states that the proposal takes effect if Ofcom upholds it, and the parties are then required to enter into an agreement to give it effect.

Clause 13.9 states that if Ofcom does not uphold it without modification, then it ceases to be of effect. If Ofcom proceeds to make an order, direction, determination, or requirement following referral, then the party who sent the notice shall send a further notice in accordance with that direction.

Clause 13.10 concerns alterations to the carrier price list consequent upon agreement of a charge.

THE CHAIRMAN: This carrier price list - is that a document that is specific to this particular agreement, or is that a more generally applicable document?

MISS DEMETRIOU: As I understand it, it is something which accompanies this agreement and contains the prices for all the different services which are listed in the document which I handed up. So, if one looks at Clause 13.1 that stages that, "For all operator services the price that BT shall pay to the operator will be those specified from time to time in the carrier price list". Conversely, one sees in Clause 12.1 that, "For a BT service the operator shall pay to BT the charges specified from time to time in the carrier price list". So, the carrier price list contains the prices for all the services, and then if they are varied, the carrier price list has to be amended to reflect that variation. That is what Clause 13.10 goes to. I am told that in its physical form it is a spreadsheet - a very large, involved document because it covers all the services which are listed.

THE CHAIRMAN: Yes. I am not asking to see it. I am just wondering whether it is a document which is in fact external to this agreement because it applies actually to the charges that BT sets for lots of different operators, or whether the carrier price list for this operator could be different from carrier price lists in other SIAs?

MISS DEMETRIOU: What I am being told is that there is one composite document, but that that covers all the prices -- It may be that BT is in as good a position as anyone to explain this.

My understanding is that it is a composite document, but it covers all the prices charged by BT and charged to BT by all the other network operators. So, the prices which relate to the services provided between BT and Orange in each direction obviously have to be read with this agreement because the agreement refers specifically to the list, and provides for the list to be amended in the event that a variation to the prices is agreed.

MR. READ: I wonder if Clause 1.3 might be relevant on this point, at p.435?

MISS DEMETRIOU: I am very grateful for that. The Tribunal will see from that that the carrier price list, which is listed at 6, forms part of the agreement.

THE CHAIRMAN: Yes. Sorry. Go on.

MISS DEMETRIOU: So, these are the contractual provisions which were engaged in the circumstances of this case. As the Tribunal is aware, the alleged dispute in this case concerned the introduction by Orange of a blended 2G/3G rate in respect of its MCT services.

By way of background, the Tribunal will see from Tab 17 of the bundle that Vodafone had already introduced its own blended rate. One sees at p.582 a letter from Vodafone to Orange notifying it of the blended rate it would charge for MCT service supplies to Orange. That is a letter dated 25th June, 2004 - so, some time before the events in this case. The background to all of this is that Orange was unhappy about the introduction of a blended rate and itself complained to Ofcom. One sees that at p.596 of the bundle. This is a formal complaint - it says in the first paragraph - submitted on behalf of Orange concerning a breach of certain ex ante conditions set by Ofcom on Vodafone in relation to the termination of 2G calls on Vodafone's network, namely price control conditions, etc., etc. Ofcom rejected that complaint by letter of 9th March, 2006. That is to be found at p.603 of the bundle. You will see in the second paragraph that Ofcom there summarises Orange's complaint, stating in the penultimate sentence of that paragraph,

> "On this basis you consider that it is reasonable to infer that Vodafone has not complied with the charge control conditions. For the reasons set out below, we do not agree".

It goes on to say,

"As you are aware, Ofcom's decision in its 2004 statement on wholesale mobile voice call termination was to impose regulation on 2G call termination only, and accordingly the charge control conditions are only imposed on termination of 2G calls. We took the view that it was not appropriate at that time to impose similar controls on 3G call termination. However, Ofcom acknowledge that mobile operators might charge a blended rate for both

2G and 3G calls, so Ofcom goes on for those reasons essentially to reject Orange's complaint. Ofcom's decision at that stage that 3G call termination was not subject to regulatory control is instrumental to our argument on Ground 1A, because there was no disagreement at all between BT and Orange about the 2G element of the blended rate. BT's complaint was about the 3G element, and here we have Ofcom stating in terms that it raises no regulatory issue because Ofcom have not regulated 3G call termination. So having failed in its attempts to squash Vodafone's blended rate, Orange then sought to introduce its own and issued an OCCN to BT on 23rd May 2006, and that is to be found at p.613 of the bundle. As I have described, the effect was to increase the overall previous MCT rate but not to increase the 2G component of that rate.

So BT initially rejected that OCCN, and we see its letter at p.626 of the bundle. BT said this in its letter:

> "I hereby reject the proposed changes for the reasons given below.
>
> "Having now had time to consider your proposed pricing we have decided to reject this proposal. We would be happy to discuss this further should you wish to do so.
>
> We are deeply concerned at the apparent bundling of 2G services which are subject to SMP-based regulation with 3G services, which currently have no SMP.
>
> In parallel, we are concerned that Orange's 3G termination services appears to contain costs for component services that BT's terminating calls do not use and which, therefore we do not wish to purchase. These are significant commercial issues. The proposed increase in BT's cost base, with no associated increment in the value added for BT, is of great concern.
>
> As you will be aware the pre-existing contractual prices will continue to apply, pending any future agreed change."

This is also of importance to our argument because what we will be saying is that the failure of Orange to agree to BT's subsequent OCCN did not result at all in an absence of interconnection because the effect of the contract is that you simply go back to the previous rate and that is what BT is acknowledging there in the final sentence.

THE CHAIRMAN: What is the date of this letter at p.626?

MISS DEMETRIOU: I think that this is a letter which one sees the initial rejection in a form which is at p.617, that does not appear to be dated either.

THE CHAIRMAN: Yes, Mr. Bailey has helpfully pointed out that I think the document at 626 was an attachment to the email of 9th June on p.625, is that right?

MISS DEMETRIOU: That is right. So following this email and attached letter there then followed a period of contractual negotiation between BT and Orange and one sees that at p.627, there is a letter from Orange dated 13th June confirming receipt of BT's rejection, but then suggesting in the final paragraph:

> "I propose that our respective Commercial Managers liaise urgently with a view to co-ordinating dates for a meeting at the earliest opportunity."

Then we have on the following page BT's response of 16th June, and one gets a flavour here from the second bullet point:

> "I will be happy to clarify BT's objection to this OCCN at our meeting. I have noted your assertion that Ofcom appears to be content with this practice. Whilst this may be the case, an opinion which differs from our understanding of the situation, this is not really relevant at this stage of the process as we are discussing contractual rates between BT and Orange and BT is not content with the OCCN's proposals."

Then at the very end: "I look forward to meeting you to further discuss this issue."

Then we see on p.630 there is a proposal for a conference call, that is an email dated 16th June. Then on the following page we see an email of 23rd June from BT to Orange, where BT set out a counter proposal, so this all forms part of the commercial negotiation between the parties. We see at p.632 at the top, para.3 of that email that what is proposed is that Orange issues a new OCCN dated the day after the OCCN issued, to include the 2G/3G blended rates, so here they are agreeing in principle to the blended rates.

> "These rates have already been rejected by BT but both companies will work towards resolving this dispute through the appropriate contractual mechanism."

Then on p.633, the next page, on 3rd July BT wrote to say that it now accepted the rate.

> "Further to the BT plc and Orange PCS Ltd correspondences regarding the above OCCN as a result of a number of internal BT discussions I can confirm that BT will accept the rates identified within Orange's OCCN."

So that is the letter informing Orange that it would accept the rates. The actual countersigning of the OCCN occurred on 10th July, and that you will find at p.638.

THE CHAIRMAN: There is no mention, as far as I can see, in that exchange of correspondence to either a threat of referring the dispute to Ofcom or anybody referring to the deadline in the contract in relation to reference to Ofcom.

MISS DEMETRIOU: That is right. It is purely a question of commercial negotiation between the parties. BT is expressing its concerns ... response to them there is a conference call, and finally BT agrees to the rate.

THE CHAIRMAN: Now, if BT had said in the 3rd July letter, "I'm sorry. We just can't accept this blended rate concept. We want to go back to the settled 2G rate", where would that have left you in terms of Clause 13.7?

MISS DEMETRIOU: On our case that would have left us stuck with the previous rate because Clause 13.7, although it purports to provide a power to refer disputes to Ofcom, the word 'dispute' in Clause 13.7 cannot be construed in a way that expands upon Ofcom's jurisdiction and the legislation. So, unless the failure of BT to agree raised a regulatory issue, then there would be no power, we say, for Ofcom to have handled a reference. The parties would have continued in the previous manner, on the basis of the previous 2G rate. What this demonstrates, in my submission, is the commercial nature of the agreement on price that occurs where there is no regulatory control that is imposed. It is for the parties to agree a price. BT could have refused to accept it, but they did not - no doubt for their own commercial reasons. The Tribunal has seen that there are multiplicity of different services which are provided, pursuant to this agreement, and no doubt those may well have had an impact on its commercial stance in relation to Orange's proposal in relation to this particular service.

THE CHAIRMAN: What puzzles me though is that clearly Clause 13 was drafted before the European directives were adopted, and before s.185 was enacted. So, they must, in referring to the Director-General as the resolver of disputes be referring to some other jurisdiction of the Director-General that then existed - and I do not know whether it still exists - to resolve this kind of dispute. Now, s.185 has come into existence. What do you say then is the effect of the enactment of s.185 on what seems to have been some pre-existing jurisdiction of the Director-General to determine this kind of dispute.

MISS DEMETRIOU: What we say is that s.185 is the beginning and the end of Ofcom's power to consider disputes. Whatever might have happened before, these are now its powers. Everybody agrees. There is no disagreement between the parties that the contract cannot expand upon the powers that Ofcom has under its statute.

THE CHAIRMAN: There are no other powers that it has?

MISS DEMETRIOU: Ofcom has not pointed to any other power, and we certainly say that there is no other power. Ofcom is purporting to exercise its power under s.185 of the Act.

THE CHAIRMAN: So, for example, later on in the contract, the more general review clause, at Clauses 19, and 20, which deal with the service of review notices if parties become unhappy with some aspect of the agreement – there, clause 20.1 - they can refer the review notice to the Director-General to determine the matters upon which the parties have failed to agree. You would say that that also is now limited to cases in which s.185 applies, even if at the time that it was drafted there seemed to have been some more general jurisdiction.

MISS DEMETRIOU: That is what we say. We say that has to be the case. Now, there may be circumstances in which the power under Clause 19 could be exercised, because it may be that one of the parties seeks to terminate the agreement, leading to a loss of interconnection. Now, in those circumstances we say that that might give rise to a dispute which Ofcom does have the power to accept under s.185. But, what we say cannot happen is the terms of the contract to expand Ofcom's jurisdiction under the Act. Now, that is something which we have been accused of saying, but it is not our case.

THE CHAIRMAN: Thank you.

MISS DEMETRIOU: Finally, before I get on to the next stage, which is BT issuing its own notice, perhaps I could just ask you to look at the witness statement of Mr. Annette, served by BT, at Tab 7, p.118. It is re. paras. 19 and 20. The reason that I draw the Tribunal's attention to these paragraphs is because, in my submission, they really do demonstrate the commercial nature of the debate between the parties. One sees in para. 19 the description by Mr. Annette of the event that I have just described.

THE CHAIRMAN: When you say 'the commercial nature of the dispute', could you just explain a bit more what you mean by that, and what you are contrasting 'commercial nature' with?

MISS DEMETRIOU: Absolutely. What I mean is that standing back from the regulatory scheme -- What the regulatory scheme intends is for network operators to reach commercial agreements between themselves unless there is a particular regulatory reason for Ofcom to intervene. So, generally speaking, agreements between network operators are left to the free market. They are a matter for commercial negotiation as are other agreements in other fields which are unfettered by this kind of regulatory regime. So, in my submission, that is the starting point. If one is in the area of that kind of agreement, there is no regulation on price; there is no issue of a refusal of interconnection. The parties are free to negotiate the price which they commercially agree between them which they feel suits them commercially. They are not constrained by any regulatory control. That really is where we are coming from in our Ground 1(a) because we say that the acceptance by Ofcom of this alleged dispute conferred on Ofcom almost a role of a commercial arbitrator because there

was no reason for Ofcom -- there was no basis, I am going to come on to say, in the Act for Ofcom to become involved. The price for these services was purely a matter for commercial negotiation between the parties. There is no underlying regulatory fetter on their ability to negotiate between them.

That is well explained, in my submission, in para. 19 of Mr. Annette's statement. If you would turn to p.119 we see, three lines down,

> "I should make clear that BT was influenced to take this decision of 3rd July 2006 [that is, the decision accepting Orange's rate] by two factors. Firstly, BT was in commercial negotiations with Orange over a completely separate and very substantial project. BT was therefore inclined in all the circumstances not to unnecessarily to 'rock the boat' with Orange. There were also other commercial reasons why BT thought it might, in all the circumstances, be appropriate to accept the rates. However, the second major factor was that only Vodafone and Orange had so far sought a price rise. In particular O2 and T-Mobile had not sought to raise their rates. BT therefore felt financially it could accommodate Orange's rate rises provided O2 and T-Mobile did not also try to go to a blended rate charge".

If you would then just read on to para. 20,

> "However all that changed within literally the next few days when O2 and T-Mobile served OCCNs on BT. Whatever the previous commercial reasons for agreeing Orange's original OCCN, BT felt it had no option but to challenge all the MNOs which were moving to a blended rate".

So, one sees the nature of the considerations that BT was taking into account. So, from para. 19 you see that BT was in commercial negotiations with Orange over a completely separate and very substantial project. This is the kind of commercial to-ing and fro-ing that normally goes on where parties are in a commercial relationship and provide lots of different services to each other. We say it is wholly unwarranted for Ofcom to become involved in that kind of commercial negotiation.

Despite BT's agreement on 3rd July, countersigned on 10th July, as we see at para. 20 of Mr. Annette's statement, BT then issued its own OCCN to Orange on 19th July, just a few days later, seeking to reduce the MCT rate to the previous level - in other words, reversing the change it had just agreed to. We see that at pp.643 and 644 of the bundle (Tab 17). Page 643 is the covering letter. Page 644 is the enclosed OCCN. We see in the second paragraph, "The purpose of this OCCN is to reduce the termination costs charged by

Orange to BT down to 2G only termination costs". In the next paragraph, "In light of recent pricing proposals by the mobile operators to BT, BT feels compelled to address the large increase in its cost base that these proposals will cause". That is what para. 20 of Mr. Annette's witness statement reflects.

At the bottom,

> "As you will be aware, the pre-existing contractual prices will continue to apply, pending any future agreed change".

So, again, BT is acknowledging that the consequence of a lack of agreement is not an end of the agreement, or an end of interconnection - it is simply the application of the previously agreed prices, which in this case is the blended rate.

THE CHAIRMAN: In the middle of the fourth paragraph - "BT is deeply concerned at the apparently bundling of 2G services which are subject to SMP-based regulation with 3G services, which currently have no SMP". That is not quite right though, is it, because SMP relates to the market which is independent of whether it is a 2G or 3G network. I think what they meant was currently unregulated despite the finding of SMP ----

MISS DEMETRIOU: I think that is what must be meant. That is how I read it. I think it is slightly inaccurate shorthand for saying that they are not subject to any price controls.

Then we see at p.668 (moving on a few pages in the bundle) Orange's rejection of this OCCN on the same day, 19th July. That explains in the first paragraph of its reasons for rejection the basis upon which BT seeks to reduce Orange's inbound termination rate would appear to be based upon its unwillingness to accept a 2G/3G blended rate purely for commercial reasons. BT has put forward no substantive legal or regulatory reasons for proposing a reduction to Orange's inbound termination rate.

Then the response of BT is quite interesting because it says in its letter at p.670 of the bundle dated 23rd August, and this is the second paragraph of that letter:

> "With regard to the first point raised on your rejection notice BT does not need to put forward legal or regulatory reasons for proposing a reduction in the Orange termination rate."

And that is right insofar as BT does not need to put forward such reasons to issue a proposal to vary the rate because the contract allows them to do that whenever they want to and for whatever reason, but it is not right insofar as it then sought to refer the alleged dispute to Ofcom. We see at the end of that paragraph BT describing the issues between the parties as being "significant commercial issues".

The time limit contained in clause 13.7 of the agreement for purported referral of any dispute to Ofcom expired on 15th September 2006, I think that is common ground between the parties. So we then see after the expiry of that time limit on 17th October ----

THE CHAIRMAN: Sorry, can we just go back to clause 13.7 and see how this fits in?

MISS DEMETRIOU: So clause 13.7 provides that if the parties have failed to reach agreement within 14 days of the rejection of the charge notice then either party may not later than one month after the expiration of that 14 day period refer the matters in dispute to Ofcom.

THE CHAIRMAN: BT sent the charge change notice. Orange then had four working days to acknowledge receipt and 14 days to accept or reject, but in fact rejected on the first day?

MISS DEMETRIOU: That is right. Then there follows a 14 day period for negotiation between the parties and that follows from clause 13.5.

THE CHAIRMAN: So the time for negotiating in good faith then ran from 19th July?

MISS DEMETRIOU: That is right.

THE CHAIRMAN: So there were 14 days then from 19th July to negotiate under 13.7?

MISS DEMETRIOU: Yes, I see where the Tribunal is getting to, that that does not quite make sense if the expiry was on 15th September.

THE CHAIRMAN: I suppose it depends on whether the fact that Orange only took one day instead of 14 days to decide whether to accept or reject then means that those 13 days then just disappear or whether they still ----

MISS DEMETRIOU: That is right, I think it looks like they have been included in all of our calculations as to when the expiration of the period happens, and that may or may not be right as a matter of construction of the contract but it is not really germane to the present case.

THE CHAIRMAN: No, I am just trying to understand how it works. So either after the rejection on 19th July or after the expiration of 14 days from the service of the notice, the 14 days for negotiation take place, and if there is no agreement then, then the one month period for referring matter to the Director General ----

MISS DEMETRIOU: That is my understanding.

MR. READ: I am sorry, I am not quite as au fait with this bundle because I only got it yesterday, but the answer, I think, to the conundrum is this, it is p.241, madam, which is the email sent from Orange to BT on 1st August 2006, which deals with Orange's response to the BT initiated OCCN 6931 which I think is the one in question.

THE CHAIRMAN: I think you mean p.663.

MR. READ: I am sorry, it is p.663. I am unfortunately not as familiar with this bundle as I would like to be. If one looks at that, that appears to be the date of the rejection of the OCCN. I think the way the system operates, madam, is that the sent date, what happens is that a pro-forma rejection notice is actually sent with the OCCN itself. What then happens is that that is filled in and sent back so the sent date on the rejection notice is actually the date it was originally sent with the OCCN for the other side, in this case Orange, to fill in and send back. The sending back occurs on 1st August 2006. I think that is the sequence. So in other words, 1st August is the trigger date for the 14 day period of negotiation which then leads to the 14th or 15th August, and then the one month period runs after that, which takes you up to 15th September.

THE CHAIRMAN: So you are saying that Orange did not reject the OCCN on the same day?

MR. READ: That is correct, but the reason why a date of 19th July -----

THE CHAIRMAN: Oh I see.

MR. READ: -- appears on the document is because that is the date BT sent it in pro-forma format to Orange. It is confusing, madam, because the sent date is not the date that the rejection was actually sent.

THE CHAIRMAN: I do not want to take up too much time with this, but I think it is helpful to try and see how this works. (After a pause) Yes, I think there is some confusion about the fact that the sent date is actually the date of the sending of the OCCN, not necessarily the sending of the rejection.

MISS DEMETRIOU: I think that appears to be right.

THE CHAIRMAN: But it might be helpful if the parties could agree, maybe over the short adjournment, or overnight, a description of the timing of the different correspondence both in relation to the Orange OCCN to BT and the BT OCCN to Orange.

MISS DEMETRIOU: Madam, we will do that. The next document I was going to take the Tribunal to is at p.676, and this is a letter from Orange to BT dated 17th October 2006. "As you will recall in accordance with procedure Orange responded to BT's OCCN on 1st August", well that does rather endorse what Mr. Read has said. Reasons for the rejection were provided.

> "The procedure under the OCCN now appears to be at an end the contractual proposal for price variation has lapsed. In the absence of any outstanding proposal, there is nothing that remains to be agreed between us.
>
> Given the above we are therefore surprised that BT considers that there is further procedure to follow under this process - clearly this is not the case.

In my submission what that is referring to is that the date under clause 13.7 has expired so the mechanism for varying the price in accordance with BT's OCCN is now *functus*, as it were, and the parties then continue their dealings on the basis of the previous price. As the Tribunal is aware, BT nevertheless sought to refer the matter to Ofcom on 22nd January, more than four months outside the contractual referral period, and BT's referral letter is at tab 20 of the bundle. We see there in the first line that certainly BT's understanding in referring the alleged dispute is that Ofcom's powers to resolve it were those contained in s.185(1) of the Act.

Then on 9th February, Ofcom opened its investigation into the alleged dispute between BT and Orange. We see at tab 14, p.422 Ofcom's letter of 9th February to Orange explaining that it considers that it is appropriate to resolve this dispute "… we have therefore opened an investigation under the Communications Act 2003.

THE CHAIRMAN: So they are not pinning their colours to any particular subsection of s.185?

MISS DEMETRIOU: Not in this letter, but my understanding is – and I am sure Mr. Roth will say if it is otherwise – that Ofcom does seek to derive its powers in this case from s..185 of the Act.

Then we see at tab 23 a letter from Orange to Ofcom dated a few days later on 19th February. This really explains Orange's position leading up to this appeal that Ofcom did not have power to accept the alleged dispute, and one sees over the page – and I will not read them out – paras. 2 to 5, there Orange explains the commercial problems caused to it by the acceptance of the alleged dispute, and they explain that in effect it allows BT to circumvent the contractually agreed mechanism for varying price.

I am sorry I have taken some time to go through the factual material, but I think it is probably necessary to explain the context of Orange's Ground 1. That is what led to Orange's decision to bring its appeal against Ofcom's acceptance of the dispute and it did that on 5th April 2007.

What I would like to turn to now, in the second part of my submissions, is the statutory context, in order to explain why we say dispute is more limited in meaning than is contended for by Ofcom and the interveners. I think I can probably take some of this quite shortly because a lot of it is common ground between the parties and, in particular, everybody seems to be in agreement that the word "dispute" is a matter of statutory construction, that s.185 of the Act has to be construed in the light of the underlying common regulatory framework which comprises the five EC directives, two of which are relevant to the present case. Those are the two contained in the bundle - the framework directive and

the access directive. It is our submission that these directives do not give national regulatory authorities, such as Ofcom, a free-ranging role in this field; that the underlying rationale of the regulatory framework is that regulatory intervention is confined to what is necessary in order to ensure a competitive market. We see that if we turn first of all to the framework directive at Tab 9. You see there the starting point. The first recital states that the current regulatory framework, i.e. the framework in place before this one has been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition. So, the starting point is that there is effective competition by and large.

What the framework directive and the specific directives do is to confer upon national regulatory authorities specific tasks. They provide, in particular, that national regulatory authorities can only impose ex ante regulatory obligations on undertakings such as network operators where there is not effective competition. We see that if we turn to Recital 27. That says in terms that it is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. markets where there are one or more undertakings with significant market power and where national and community competition law remedies are not sufficient to address the problem.

So, that is the starting point - ex ante obligations are only to be imposed where there is no effective competition, and there is then a procedure, as the Tribunal is aware, under the directives for NRAs to designate particular undertakings as having significant market power. There are then restrictions on their ability to impose obligations on such undertakings. So, there is an involved process that has to be gone through. What that indicates, in my submission, is that the national regulatory authorities are not, conversely, entitled to intervene outside those circumstances in order to address prices that are being charged.

We see further, at paras. 1(1), which deals with the scope of the harmonised framework -- Article 1.1 says that the regulatory framework lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the community. So, the starting point is that the NRAs only have the powers that are expressly conferred on them in these directives.

THE CHAIRMAN: You say that this is both a minimum and a maximum of the powers - that it would not be open, in implementing the directive for, say, s.185, to go wider than the directive goes?

MISS DEMETRIOU: Well, there are particular provisions which expressly confer on the member states the power to go beyond what is in the directives. But, where that power is conferred, it is expressly conferred. So, in my submission, the general position is that this is a minimum and maximising, harmonising directive. So, s.185 cannot go beyond the dispute resolution powers contained in these directives. I do not think that that is disputed. I do not think that Ofcom is alleging there is some extra power in s.185 which is not contained in the directives.

MR. ROTH: Yes, we agree with that.

MISS DEMETRIOU: The Tribunal will see at p.194, Ch. 3, which starts just above Article 8, sets out the tasks of the national regulatory authorities. It is important to note that Article 8, which sets out a fairly broad range of policy objectives and regulatory principles, expressly states in para. 1 that,

> "Member states shall ensure that in carrying out the regulatory tasks specified in this directive, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paras. 2, 3, and 4".

So, the objectives are set out over the page in paras. 2, 3, and 4 and are not objectives which the NRAs can alight on at will. They are objectives which they have to pursue when carrying out their specific tasks in the directive. So, they are constrained in their role by the specific tasks conferred by this directive and the specific directives.

THE CHAIRMAN: Would you say that a task includes promoting competition as in para. 2, or do the tasks not include objectives?

MISS DEMETRIOU: No. I would say that the tasks and objectives are separate concepts and we see them juxtaposed in para. 1. So, the tasks are the specific tasks designated by this directive and the specific directives. Those tasks are tasks such as the ability, or the power, to impose ex ante regulatory obligations on undertakings with SMP. But, in fulfilling those tasks, then the NRAs have to comply with these objectives.

So, in this framework directive we see at Article 20 the source, in our submission of Ofcom's power under s.185 of the Act. It is important to note at para. 1 that the power arises -- It says,

> "In the event of a dispute arising in connection with obligations arising under this directive or the specific directives between undertakings providing electronic communications, networks, or services in a member state, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of para. 2, issue a binding decision to resolve the dispute in the

shortest possible timeframe, and in any case within four months except in exceptional circumstances. The member state concerned shall require that all parties co-operate fully with the national regulatory authority".

So, in my submission, the opening words are very important because it provides for a dispute resolution mechanism in the context of disputes which arise in connection with obligations arising under this directive or the specific directives. It is our case that this alleged dispute did not arise in relation to an obligation arising under the directive or the specific directives.

The specific Directive which is in play in this case is the Access Directive, which is at Tab 10. At p.208 is Article 1, which sets out the scope and aim of the access directive. Article 1 concerns the aim of the directive and Article 1.2 concerns its scope. It says,

"This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved".

So, again, we say that the rationale of this directive is that the national regulatory authorities have powers and duties to ensure that certain aims are achieved, namely, interconnection. That is the end of their powers and functions. Once these objectives have been achieved, then they no longer have a role. Again, the rationale of this directive is that national regulatory authorities should only intervene where competition is not effective. Some examples of where we see that are Recital 5, which is at p.204, where it states that,

"In an open and competitive market there should be no restrictions that prevent undertakings for negotiating access and interconnection arrangements between themselves …subject to the competition rules of the treaty. In the context of achieving a more efficient, truly pan-European market with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith".

Then, at Recital 6,

"In markets where there continue to be large differences in negotiating between undertakings then it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the

power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interests of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users".

So, what we see here is that one of the aims of the directive is to ensure interconnection in the first place. That is a function which we say that Ofcom has.

At Recital 14, we see a reference back to the framework directive which lays down a range of obligations to be imposed on undertakings with significant market power.

> "This range of possible obligations should be maintained, but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation".

That is saying that the national regulatory authorities can, where undertakings have SMP impose these obligations, that is all they can do - they cannot overstep that and impose further obligations because that would lead to over-regulation.

We see at Recital 19 an indication of how the dispute resolution powers of the NRAs are intended to function. At p.207,

> "Where obligations are imposed on operators that require them to meet reasonable requests for access to a use of network elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolution procedure referred to in Articles 20 and 21 of the Framework Directive".

We say that is a paradigm access case - that Article 20, the dispute resolution power, is attended to address, where network access is refused in the first place. But, we say that is not this case because network access was assured under the standard interconnect agreement.

Moving forward to Article 4 - so, we have already looked at Article 1, para. 2 - Article 4 sets out rights and obligations for undertakings. The Tribunal will see at para. 1 that

> "Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communication services in order to ensure provision and interoperability of services throughout the community."

So that is the nature of the obligation and right imposed on and conferred on network operators, they have the right to seek interconnection and to negotiate in order to achieve it.

> "Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8."

So moving on to Articles 5, 6, 7 and 8, if the Tribunal could look at Article 8, one sees at para.1 that Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13. But then the effects of paras. 2 and 3 of Article 8 is that the NRA's cannot impose those obligations unless the operators concerned have been designated as having significant market power, and we see that from para.3, which refers back to para.2, which relates to designation of SMP.

Article 5 confers additional powers on NRAs, and these powers apply even where undertakings do not have SMP and one sees para.1 states that:

> "National Regulatory Authorities shall, acting in pursuit of the objectives set out in Article 8 of the Framework Directive encourage and, where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, and stable competition and gives the maximum benefit to end users."

We say that does not directly apply here because there was already interconnection. Then it goes on to say:

> "In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users including in justified cases the obligation to interconnect their networks where this is not already the case."

So even when undertakings do not have SMP Ofcom can take measures to ensure end to end connectivity in particular where there is not already access.

So those in a nutshell are the powers and functions of National Regulatory Authorities under the Access Directive, and we say that none of them is in play in this case, because the factual position in this case is that interconnection is already assured under the agreement between BT and Orange. We have seen, in terms, BT's acknowledgement that in the

absence of an agreement to vary what happens in consequence is that the parties simply carry on interconnecting but at the previously agreed rates.

We say there is no regulatory function involved here of ensuring interconnection in the first place, nor do we say is this a case in which there is any relevant regulatory obligation that has been imposed on Orange. This is not a case in which its prices are regulated to any relevant extent because we have seen that BT had no quarrel with the 2G element of the blended rate, and the 3G element was not regulated at all. So Ofcom has no power to intervene to ensure that any regulatory obligation be imposed or be complied with.

THE CHAIRMAN: Though there was a finding in place at the time that Orange had SMP in relation to mobile call termination, but you say that because Ofcom decided not to regulate the price that that finding of SMP does not then take us into Article 8 territory, we are still looking just at Article 5?

MISS DEMETRIOU: That is exactly what we say because Ofcom has expressly declined to regulate the 3G price so it has decided that it is not appropriate to impose the conditions which it does in theory have the power to impose where an undertaking has SMP, so it has expressly declined to regulate.

Just while it is open, could I ask the Tribunal to read Article 5(4) because this is another power that Ofcom relies on as being an underlying source of the power in s.185.

THE CHAIRMAN: Well do you dispute that or do you accept that it is ----

MISS DEMETRIOU: What we say about that it does not provide a power in the circumstances of this case and we say that for a number of reasons.

THE CHAIRMAN: Well I do not want to take you out of the order ----

MISS DEMETRIOU: I do not mind dealing with it now if that is easier.

THE CHAIRMAN: No, carry on as you intended.

MISS DEMETRIOU: It is against this background that we say s.185 must be interpreted. Section 185 is at p.251 of the bundle. As the Tribunal had already noted, there are two bases for Ofcom to decide disputes, or resolve disputes. The first is that found in s.185(1): "This section applies in the case of a dispute relating to the provision of network access if it is …" and there are then various alternate conditions set out.

THE CHAIRMAN: The relevant one for this case being (a), is that right?

MISS DEMETRIOU: I assume, but our quarrel is not with the conditions but with the meaning of "a dispute relating to the provision of network access."

THE CHAIRMAN: Yes, but for my own purposes is it (a) which is the relevant one?

MISS DEMETRIOU: I assume that that is the one that Ofcom relies on, yes, that would seem the obvious one, it is clearly fulfilled in this case. The Tribunal will by now see that my submission is that interpreted as against the Directives that I have just referred the Tribunal to, a dispute relating to the provision of network access must mean a dispute relating to the provision in the first place of network access.

We say that, as a matter of pure statutory construction if it meant something much broader, if it meant a dispute relating broadly to network access in general, then first of all and most importantly that would contradict the underlying Directives, which are very careful to ensure that National Regulatory Authorities only have defined functions.

Secondly, we say that simply as a matter of statutory construction it would not make much sense because subsection (2) goes on to say "This section also applies in the case of any other dispute if …." And there is then a list of three cumulative requirements. If a dispute relating to the provision of network access actually meant relating to network access then it is difficult to see in t his context what the role for subsection (2) might be, but that is rather a subsidiary point. We say that subsection (2) does not apply here because it is not a dispute which relates to rights or obligations conferred or imposed by or under this Act because there was no relevant right or obligation which was triggered in this case.

We also make a purposive point which is that if the Tribunal looks at s.186 over the page, Ofcom's powers to decline to consider disputes are very limited indeed. We see at subsection (1) that this section applies where a dispute is referred to Ofcom under and in accordance with s.185. Subsection (2) states Ofcom must decide whether or not it is appropriate for them to handle the disputes. That appears at first sight to give Ofcom a broad discretion. But then we see at subsection (3) that unless Ofcom considers that there are alternative means available for resolving the dispute that a resolution of the dispute by those means would be consistent with the Community requirement set out in s.4 and that a prompt and satisfactory resolution of a dispute is likely if those alternative means are used for resolving it. Their decision must be a decision that it is appropriate for them to handle the dispute. So their power to decline to handle a dispute is quite limited, and requires them if they are going to do that to go through a reasonably extensive factual analysis of whether or not there are alternative means of deciding it and whether those means are effective and so on and so forth.

We say for those reasons it would be undesirable in principle for any commercial dispute between parties to an interconnection agreement to amount to a dispute for the purposes of the Act, because we say that this would result in Ofcom dealing with a large number of

disputes which it is really not its function to deal with because they raise purely commercial issues.

THE CHAIRMAN: The provisions of the Directives are expressed in terms of empowering the NRA to determine disputes but are they also conferring an entitlement on the parties to have their dispute resolved by the Regulator? Is that why s.186 is limited?

MISS DEMETRIOU: Well in my submission it does appear to be conferring a right on the parties to refer – if you look at Article 20 of the Framework Directive, that states in terms that:

> "The National Regulatory Authority concerned shall, at the request of either party, issue a binding decision to resolve the dispute in the shortest possible time frame."

So really my submission is that what one has here is an ability of either party to refer a dispute to Ofcom. Ofcom is then compelled to consider it, and not only to consider it but to consider it within a very short time frame. We say that when one looks at what is envisaged it cannot be the case that the parties are entitled to compel Ofcom essentially to act as a commercial arbitrator between them if they cannot agree on something like price, in circumstances where price is not regulated and the absence of agreement on price does not lead to any loss of interconnection. I anticipate that what Mr. Roth might say is that there was a regulatory obligation in play here, and that that regulatory obligation comprises the end to end connectivity obligation imposed on BT, but we have a very short answer to that, which is that the disagreement in this case between BT and Orange did not engage that end-to-end connectivity obligation. One sees the obligation at Tab 18 of the bundle. This is Ofcom's statement. At p.714 under Ofcom's conclusions, we see at para. 4.2 what the nature of the obligation is. It is an access-related obligation which applies to BT, which requires BT to purchase whole narrow band core termination services from any PECM that reasonably requests in writing that BT purchases such services. It is true that in the second bullet point the obligation on BT to purchase such services is subject to a reasonableness condition. So, if a party turns up and says to BT, "We require you to interconnect" and asks for some exorbitant price, BT can point to this as a defence to its obligation to provide interconnection.

We say that factually quite simply it was not triggered in this case because there was already interconnection. The absence of the agreement to vary on the terms proposed by BT did not jeopardise continued connectivity.

THE CHAIRMAN: Was there any obligation on Orange to allow BT calls to be terminated on its network?

MISS DEMETRIOU: I think the answer to that is 'not'. That results from the fact that Ofcom in the statement have stated in terms that they did consider whether or not to impose and end-to-end connectivity obligation on all network operators. In fact, BT was pressing them to do that. But, they expressly declined to do it in their statement. So, the converse ----

THE CHAIRMAN: So, there is no regulatory obligation on Orange to provide this service to BT.

MISS DEMETRIOU: That is certainly my understanding. Mr. Roth is nodding. We say that this obligation would only be engaged if there was a failure to agree interconnection at the outset, or if the agreement had, for example, been terminated pursuant to its terms and the parties were unable to agree on a new agreement. So, if interconnection was disrupted ---- For all those reasons we say that this is not a case covered by s.185 of the Act.

Just turning to Article 5(4) of the access directive - because I have not dealt with it yet and Ofcom does rely on it - that can be found at p.210 of the bundle, Tab 10. We say it does not assist in this case for two reasons. First of all, the power to intervene at the request of either of the parties must be exercised in accordance with the provisions of this directive. We see that ... In other words, we say that in a similar way to Article 20 of the framework directive, it does not give Ofcom a freestanding power to intervene, but it requires member states to ensure that NRAs - because this is an obligation expressly imposed on member states - that they must ensure that NRAs have the power to intervene in order to carry out their regulatory functions under the directives.

THE CHAIRMAN: I do not think though that your interpretation was how the United Kingdom interpreted the directive when it was implementing it, because I think they did implement it by introducing a particular section to give Ofcom a freestanding power.

MISS DEMETRIOU: I think maybe we are slightly at cross-purposes. By 'freestanding power' -- I accept that it has a freestanding power in the sense that s.185 confers a freestanding power to intervene, but the purpose of the intervention -- It can only intervene for a regulatory purpose. That is my point. So, perhaps it was slightly inaccurate to describe it as a freestanding power.

THE CHAIRMAN: If you look at s.105 of the Act -- It may be that you consider this when we break for the short adjournment, but my understanding is that that section was enacted in order to implement the part of Article 5(4) which deals with intervention at Ofcom's own initiative.

MISS DEMETRIOU: Madam, perhaps I could return to it, but I would say that my first reaction is to say that s.105 is limited by the terms of s.105(1) which says that, "This section applies

where it appears to Ofcom that a network access question has arisen and needs to be determined". So, in my submission, that is consistent with my interpretation of Article 5(4) because my interpretation of Article 5(4) is that there has to be a regulatory reason for intervention. So, NRAs have a power to intervene, but they can only do so in order to fulfil their objectives under the directives. That is consistent with s.105.

THE CHAIRMAN: In order to perform their tasks under the directives, I think you would say, rather than ... (overspeaking) ...

MISS DEMETRIOU: You are quite right - their tasks. A network access question, in my submission, must mean a question about the provision of network access.

THE CHAIRMAN: I see that point, but it seemed to me that the point that you made in your skeleton, which is what I understood the point that you were now saying, which seemed to be that the reference to intervening at its own initiative was limited to an SMP situation ----

MISS DEMETRIOU: I did not mean to convey that impression. My submission is that it is limited to either an SMP obligation or that there are certain specified circumstances outside SMP situations where Ofcom and the other NRAs have specific regulatory tasks, and one of them is to facilitate access in the first place. So, that task does not only arise where an undertaking has SMP.

THE CHAIRMAN: So, do you accept then that the national regulatory authority is supposed to have power to intervene at its own initiative in the same range of circumstances in which a dispute can be referred to it by the parties?

MISS DEMETRIOU: I do. That is really the limit of my submission. I am sorry if I have over-complicated it. What I was intending to submit is that Article 5(4) does not include a greater range -- it does not expand the substantive range of disputes over which Ofcom has jurisdiction.

The second point that I wanted to make is that Article 5(4) expressly applies in the absence of agreement between undertakings. So, with regard to access and interconnection, the national regulatory authority is empowered to intervene in the absence of agreement between undertakings. That, in my submission, must mean in the absence of agreement relating to access and interconnection. So, where they have not agreed on access and interconnection there is a power to intervene.

THE CHAIRMAN: Are you making a point about whether it means in the absence of an agreement rather than in the absence of agreement?

MISS DEMETRIOU: My point is that in the absence of agreement relating to the provision of access and interconnection -- So, it cannot mean in the absence of an agreement on whatever matter ----

THE CHAIRMAN: I see. Yes. You are saying it is not a power in the absence of agreement on any topic ----

MISS DEMETRIOU: No.

THE CHAIRMAN: The absence of agreement has to relate to whatever Article 5(4) relates to.

MISS DEMETRIOU: Exactly. Essentially, what we are saying is that Article 5(4) does not extend the substantive range of disagreements over which Ofcom has jurisdiction. It is to be interpreted in that sense commensurately with Article 20 of the framework directive. Of course, it is more specific because it relates specifically to access and interconnection.

THE CHAIRMAN: I thought that you accepted that s.185(2) at least was not limited to pre-contract situations, if I can put it like that.

MISS DEMETRIOU: That is right.

THE CHAIRMAN: So, insofar as s.185(2) applies when there is already in existence a contract between the parties, what obligation under the directives is that implementing as far as the UK is concerned.

MISS DEMETRIOU: Article 20 of the framework directive. In my submission the starting point in terms of dispute resolution is Article 20 of the framework directive which applies to disputes which arise in relation to interconnection and access. It is the framework directive. So, it expressly applies in relation to matters which come within the specific directives including the access directive. So, that is the position which expressly deals with dispute resolution.

Article 5(4) is expressed in slightly different terms because it talks about intervening -- interventions.

THE CHAIRMAN: Let me just make sure I understand this. As far as Article 20, para. 1 is concerned, in the event of a dispute arising in connection with obligations arising under this directive ----

MISS DEMETRIOU: -- or the specific directives.

THE CHAIRMAN: -- or the specific directives, what then is the obligation in connection with which a dispute can arise which requires a resolution of a dispute once interconnection has already been established?

MISS DEMETRIOU: For example, there may be a price control which has been imposed on one of the parties. Let us take the example of 2G-only interconnection prior to the blended rate.

2T MCT services were regulated in terms of their price. So, there was an agreement between BT and Orange, and an example of a situation in which s.185(2) might arise is if Orange had sought to increase its prices in a way which threatened to contravene the price control that had been imposed by Ofcom. Then, BT could legitimately say, "This disagreement relates to a regulatory obligation that has been imposed by Ofcom".

THE CHAIRMAN: That would not be an excluded dispute.

MISS DEMETRIOU: It does appear actually that that would be an excluded dispute, madam. I am looking at (a) ----

THE CHAIRMAN: (a) is obligations imposed on communication provided by SMP apparatus conditions.

MISS DEMETRIOU: That is different. That is quite right. Could I perhaps come back to that?

THE CHAIRMAN: I would like you to. If you accept that s.185(2) can apply in relation to disputes once an interconnection agreement is established where one finds that from the directives if you are right in saying that actually s.185 cannot go beyond what is required by the directives. But, perhaps you can come back to that.

MISS DEMETRIOU: Where one finds it in the directive, I say, is Article 20 because that refers to disputes arising in connection with obligations arising under the directive ----

THE CHAIRMAN: Those obligations might be nothing to do with interconnection at all.

MISS DEMETRIOU: No, they might not be, but they would include obligations relating to interconnection. So, if a dispute arises in connection with an obligation relating to interconnection, then we accept that Article 20 of the framework directive confers power on the national regulatory authority to resolve it.

THE CHAIRMAN: In the event of a regulatory obligation to interconnect.

MISS DEMETRIOU: In the event of a regulatory obligation.

THE CHAIRMAN: But, because Orange was not subject to a regulatory obligation to interconnect ----

MISS DEMETRIOU: -- factually it was not a dispute arising out of an obligation arising under the access directive. In summary, in a nutshell, our case is that there are two relevant types of obligation that arise under the access directive. One is the obligation to interconnect in the first place; one is the various regulatory obligations that Ofcom can impose. We say that neither of these were engaged in this case because there was interconnection and interconnection was assured, and the price was not a regulated price. We say that in those circumstances this is not a dispute arising in connection with obligations arising under the directive - it was purely a commercial dispute.

What I wanted to do thirdly was turn to some of the specific arguments made against me by Ofcom, H3G and BT.

THE CHAIRMAN: Perhaps you could just clarify - as far as s.185(2) is concerned, you have made your point now, which is the point that you made in the skeleton about this dispute not relating to rights or obligations conferred or imposed by, or under, this part. In your notice of appeal at para. 43 you made a slightly different point in relation to the meaning of dispute. I just want to check that those are points that were then dealt with in the skeletons of some of the other parties, particularly H3G, I think. I just want to check where we are with those points now.

MISS DEMETRIOU: As far as Ground 1(a) is concerned, I imagine, madam, that you are referring to the reference to the nature of the agreement between the parties and where they have agreed a contractual mechanism for resolving of disputes.

THE CHAIRMAN: I have read your para. 43(a) as saying that s.185(2) does relate to disputes about existing contracts, but only if there is a disagreement about the rights and obligations arising under that contract, whereas in this case the dispute is not about the interpretation of the contract, but about whether a proposed variation should be accepted, or not.

MISS DEMETRIOU: In my skeleton I am putting the point in a slightly different way, which is to say that it is not so much whether or not the disagreement relates to the rights and obligations under the contract, but it is whether or not the disagreement relates to a regulatory obligation - an obligation which arises pursuant to the directives and pursuant to the act.

THE CHAIRMAN: Perhaps I could ask you this: the point that you have just summarised - is that the only point on which you are relying in relation to s.185(2)?

MISS DEMETRIOU: In relation to Ground 1(a), yes. We make a slightly different point in relation to Ground 1(b).

THE CHAIRMAN: Yes. That is helpful. Thank you.

MISS DEMETRIOU: Madam, turning to the position of Ofcom, BT and H3G, their position appears to be that the disagreement between BT and Orange constitutes a dispute within the meaning of the Act because in a broad sense it relates to access and interconnection. We make really three points in relation to that, and I will make them briefly because it really follows from everything that I have said so far. First, we say, for the reasons that I have given, that it is inconsistent with the statutory language because s.185(2) refers to disputes relating to the provision of network access. We say that means network access in the first place. Section 185(2) applies only if a dispute relates to regulatory rights or obligations.

We say that that is just a question of statutory language - statutory construction. Secondly, for the reasons I have given, we say it is inconsistent with the purpose of the regulatory framework which is to confer specific regulatory functions or NRAs, and for the rest to leave relations between network operators to the free market. We say that if one gives a very broad construction to 'dispute' that involves conferring on Ofcom jurisdiction to intervene in disagreements which are purely commercial and have nothing to do with regulation.

Thirdly, we say, also for the reasons which I have given, that this would lead to undesirable results in practice. This is really the s.186 point.

So, in relation to the specific arguments made against Orange, Ofcom's defence at para. 39 highlights five different situations -- it posits five different factual situations. It goes on to characterise our position as being that 'only Situations 1 and 5 could give rise to a dispute within the meaning of the Act'. This is at p.37 of the bundle, Tab 2. Paragraph 39 posits five different factual situations. It then, at para. 40, characterises Orange's position as being that on our case only Situations 1 and 5 would constitute disputes. We accept that. We agree with that. That is right. That is a correct characterisation of our position. What we dispute is Ofcom's point later on at para. 45 where it says that distinguishing Situations 1 and 5 from the other situations makes no sense and leads to absurd results because the dissatisfied party, Ofcom says (in this case BT), would simply be able to terminate the agreement in order to generate a proper dispute which could then be referred to Ofcom. We say that that is not an answer because whether or not that occurred would depend on two things: it would depend on the termination provisions of the agreement - so, whether or not the party concerned could actually terminate if the other operator did not agree to its price variation. We say in this case that it could not. Of course, if it sought to terminate, then Orange would have all its private law rights, and could take action against BT if it sought to terminate in those circumstances.

We say, secondly, that that idea is wholly divorced from the real commercial position, which is that we say it is unlikely, as a matter of commercial reality, that one party to an agreement of such importance and such complexity, and which covers such a multiplicity of different services going in both directions would seek to terminate the agreement simply because the other party did not agree to its price variation proposal. We say that particularly in the circumstances of this case where nine days earlier BT had agreed to Orange's price. We say that in those circumstances it defies commercial reality to say that that is ----

THE CHAIRMAN: The commercial reality of this situation is that the parties were operating under a contract which had a termination clause which, as you showed us at the beginning, only enables termination after twenty-four months. In such a contract you would then expect there to be some kind of variation mechanism because you have a contract which is expected to continue indefinitely subject only to termination on two years' notice, in which there are prices for various things. So, one would expect there to be a price mechanism, and there the price mechanism is, and the price mechanism in the contract envisages that in the event of a disagreement there will be a reference to an arbitrator (to put it neutrally). What you are saying now is that since the enactment of s.185 that right has been taken away from the parties and because they then did not re-negotiate the agreement, they are now stuck with an agreement under which prices are set for two years at a minimum without being able to take any step to either bring the contract into line with what is happening with other mobile network operators, or to reflect the changing nature of the market in which they are operating. That does seem rather an odd situation for them to have got themselves into.

MISS DEMETRIOU: Two points in response to that. I do see that it is slightly odd. Two points in response. The first is the point upon which we are all agreed - that one cannot construe the Act in the light of what the parties have agreed between them. So, if the parties have wrongly purported to confer power on Ofcom, then the fact that it makes the agreement slightly unwieldy or less commercial in nature cannot have an impact on what the meaning of the Act is. So, if they have got it wrong, they have got it wrong.

The second point really follows on from that, which is that there are contract review provisions, which, madam, you pointed out under Clause 19. One of those, from recollection, applies where there has been a material change not envisaged by the parties. So, presumably the realisation, if I am right, that Clause 13.7 does not operate in the circumstances of this case might be such a material change which prompts them to re-negotiate their agreement.

One notes anyway that there does not seem to be any difficulty with Clause 12 where there is not a right on Orange's part to vary the prices. Orange is stuck with the prices which are contained in the agreement for services provided in the other direction.

That is really what we say in relation to Ofcom's point at para. 45 of the skeleton.

BT refers to two authorities. One is the *H3G* case which is in the authorities bundle at Tab 7. Perhaps you could have BT's skeleton argument open at Tab 6, para. 16, p.89. They rely on paras. 1 29 and 130 of this Tribunal'[s decision in the *H3G* case. Turning to that at

p.131 of tab 7 of the authorities' bundle. It is interesting to note at para.129 that Ofcom were at this stage submitting that it says here:

> "As part of his argument in this appeal Mr. Roth sought to argue that Ofcom did not have that power …"

the dispute resolution power

> "… unless it had first made an SMP decision in relation to the party seeking to charge the price. This, if correct, would take the possibility of dispute resolution out of the picture …"

So it is interesting to note that Ofcom at that stage were arguing in favour of an even stricter construction of s.185 than we are, because we accept that it is not only where an undertaking has been designated as having SMP, but it also might arise if there is another obligation that arises under the Directives. So the Tribunal at 131 was responding to that submission and it said at 131:

> "We consider this reasoning to be wrong. Under the Access Directive the NRAs have at least two sorts of powers. The first are powers to take steps to ensure end-to-end connectivity; the second are powers to intervene where SMP has been found. A power to determine a dispute as to connection is capable of falling within both, so it is certainly capable of falling within the former."

We accept that reasoning, in fact, it is entirely consistent with what we say because we say that these are indeed the two sorts of powers that arise that Ofcom has under the Access Directive, but we say on the facts of this case neither of them are engaged. So that is what we say about the H3G case.

THE CHAIRMAN: Was that case dealing with the point about the new contract during contract point.

MISS DEMETRIOU: I am sorry, madam?

THE CHAIRMAN: It was not dealing directly with the question about whether the dispute resolution can arise only before interconnection has been established.

MISS DEMETRIOU: No.

THE CHAIRMAN: I raise it because it is relied on by Mr. Read, and we say it is consistent with our construction of the Act. The second case relied on by BT ----

MR. ROTH: Just to clarify that, it was … the contract there, it was just assumed by all the parties before the Tribunal that this distinction pre-contract did not arise. Orange was not a party to that.

THE CHAIRMAN: The point was not argued?

MR. ROTH: No, it was not argued, it was just assumed and Orange, of course, was not party to that.

MISS DEMETRIOU: Thank you. The second case relied on by BT is referred to at para.15 of their skeleton argument and it is an ECJ Judgment, and that is at tab 9 of the authorities' bundle. What BT says about that is that it concerned a dispute between Telefónica, O2 and Czech On Line, who had entered into an interconnection agreement in January 2001.

> "In February 2003 COL sought to amend the agreement to enable ADSL interconnection but the parties failed to reach agreement. COL referred the dispute to the Czech NRA who accepted the dispute and decided in COL's favour imposing an interconnection obligation. Although the questions referred to the ECJ related to the NRA's powers to impose an interconnection obligation and transitional arrangements pending the accession of the Czech Republic, the court did not raise any objection to the Czech NRA having jurisdiction and held that it did have power to impose the obligation in question."

We say that is a very fair summary of the case, so we do not quarrel with the summary, but we say it does not raise any inconsistency with our case, because that is clearly a case insofar as anything can be drawn from it, because the ECJ did not address the point, but it was clearly a case where although there was a pre-existing agreement a different kind of interconnection was sought, so they wanted to vary the agreement to ensure a different kind of interconnection. There was a lack of agreement on that and we say that is precisely the kind of dispute which is a proper dispute for the purposes of the Act because it potentially raises a question as to access and interconnection in the first place.

THE CHAIRMAN: So you accept that although that was in the context of varying an existing agreement that was simply by chance in a way because they were talking about starting interconnection for a different service?

MISS DEMETRIOU: Madam, yes. It is true that it is fundamental to my argument that there was an existing agreement between BT and Orange, but the reason it is fundamental is not because the legislation on its face draws a distinction between an existing agreement or no existing agreement, it is because the consequence of having an existing agreement was that interconnection was ensured. That is really why I referred to there being an existing agreement. Equally, the consequence of a failure to agree on price was not that the agreement terminated, it was that interconnection continued to be provided but at the old rate.

THE CHAIRMAN: So that if there was a dispute between Orange and BT trying to add in some additional service to this contract as there presumably has been in the past since a lot of these services did not exist at the time the contract came into being, if, for example, there had been a dispute about the introduction of voice over internet protocol multi-media service calls, if there had been a regulatory obligation in relation to interconnection to that, you would accept that that fell within s.185(1) even though because of the existing contractual relationships it is dealt with as a variation of a contract rather than as a new contract?

MISS DEMETRIOU: Absolutely, so subject to the caveat which you made, which is that assuming that there is a regulatory obligation to supply such interconnection, so assuming that for example ----

THE CHAIRMAN: Well I am not sure that is right because it would then be a s.185(1) dispute rather than a 185(2).

MISS DEMETRIOU: It might well be a s.185(1) dispute if Ofcom properly considered that under the Directives part of its regulatory function was to ensure that kind of end to end connectivity, if Ofcom legitimately took that view and one of the parties asked to vary the agreement so as to include that end to end connectivity and the other party said "no", then that would be a dispute for the purposes of s.185; we say probably s.185(1) because it relates to the provision of network access in the first place. So in a sense there is no magic in the fact of there being an agreement in existence, it is the consequence of the existence of the agreement which is important for the purposes of my argument.

Madam, that really wraps up what I wanted to say on Ground 1(a) and I think I can deal with Ground 1(b) very, very shortly. What I do emphasise is that this an alternative argument, and it is also an argument about the statutory meaning of "dispute". It is not concerned with the conduct of the parties in the particular case. We recognise that the actions of the particular parties in any particular case cannot determine the meaning of "dispute" in the Statute. So it is for that reason that we have always said the question is one of legal argument only and that is why it is capable of determination as a preliminary issue. So we agree with Mr. Read that the factual material which that he has adduced is not relevant, his primary position is that it is not relevant and we agree with him it is not relevant, so we have not sought to cross-examine his witnesses and we have not sought to adduce any evidence in response. So even though we do not agree with everything that is said we say it is not relevant for the purposes of this point.

The short point is this: that in determining whether there is a relevant and genuine dispute for the purposes of the Statute Ofcom is entitled to have regard to the terms of the contract between the parties and whereas here there is a contractual mechanism for the parties to resolve disagreements, then Ofcom should have regard to the fact that it has not been exhausted. In this case we say that BT was not entitled to refer the dispute to Ofcom under the terms of the contract because the referral period had expired. So the mechanism provided by the contract in those circumstances, if BT wanted to push forward with its aim of lowering the price again, was for BT to issue another OCCN which it could have done at any time, and that would have triggered a further period of negotiation. That was never permitted to happen because BT pre-empted it by referring the dispute out of time. We say the point really is as short as that because there is a contractual mechanism for resolving disagreements then Ofcom is entitled to expect that the parties will adhere to the contractual means for resolving disagreements, and if they attempt to circumvent them and they do not use them then there is not a genuine dispute for the purposes of the Act.

THE CHAIRMAN: But they say that the dispute was the dispute that arose in July/August and is still 'rumbling on' if I can put it like that by the January, or had not been resolved.

MISS DEMETRIOU: That is what they say, but what we say is that under the terms of the contract that was no longer a live dispute and if, as a matter of substance BT wished to progress it and to keep it live there was a contractual means of doing it which was to issue another OCCN in the same terms, and that would have triggered a period of commercial negotiation, but that commercial negotiation was never given a chance. It could have resulted in agreement, in the same way that BT initially rejected Orange's OCCN, there was commercial negotiation that worked, this could have worked too. We say that where the parties have agreed a contractual means for resolving disagreement then Ofcom must look to see whether they have used that contractual means, otherwise there is not a genuine dispute for the purposes of the Act – that is our point under 1(b).

THE CHAIRMAN: When you say that Ofcom should have regard to the contractual position, what is your case actually as to how it affects Ofcom's jurisdiction in the strict sense?

MISS DEMETRIOU: I can see that there are two ways of putting the point, and one of them is not for today because one of the ways of putting the point is analogous to Orange's Ground 2, which is that under s.186 is a relevant consideration for Ofcom to take account in determining whether or not there is an alternative means of resolving the dispute. So Ofcom should look at the circumstances, look at the terms of the agreement rather than the factual circumstances as such and say "This agreement provides a mechanism for resolving

this dispute, which is the issuing of another OCCN and a period of contractual negotiation. I appreciate that is not a point for today because it goes beyond the first preliminary issue in this case. The way to put it for the purposes of today is that it goes to the meaning of "dispute", so "dispute" must mean a genuine disagreement and in assessing whether or not there is a genuine disagreement between the parties then what they have agreed in their contract is relevant. So where the parties have agreed a means for resolving disagreements then unless they exhaust those means there is no genuine disagreement because they have provided a mechanism for resolving them.

THE CHAIRMAN: You seem to be trying to express the argument in a way which avoids the question of whether the one month period for referring the matter to Ofcom was still binding contractually if that is possible in the light of Ofcom' statutory jurisdiction because that is the issue to which a lot of the factual evidence goes.

MISS DEMETRIOU: That is right.

THE CHAIRMAN: This one month period was in fact not adhered to by either party and had in fact become unworkable in the current regulatory climate. But now you seem to be putting the point slightly differently to say that there was no dispute because they did not issue an OCCN in the January, but I am not sure that you can divorce that point entirely from the question as to whether the July OCCN was still capable of being a dispute even though the month had passed.

MISS DEMETRIOU: Well, madam, I do seek to distinguish it. If in the Tribunal's view it cannot be distinguished then I accept the point fails because we accept that it is not Ofcom's role to examine the precise factual circumstances of the case and to examine whether or not a contractual clause continued to be binding and we accept that. We do say that it can be distinguished because we say that the consequence of having a one month referral period – in effect there are two aspects to the mechanism, one is a compulsory period for negotiation and the other is if that fails there is a power to refer to Ofcom under the contract. We say that the commercial negotiation period is very important and that it works in this case in relation to Orange's proposal.

We say that what Ofcom is entitled to do is to look at the terms of the contract without examining any further whether or not they continue to be binding as a matter of private law between the parties, and that Ofcom can say that there is a contractual mechanism here for resolving your disagreement which is that you are empowered to issue another OCCN, and that leads to a period of compulsory commercial negotiation and unless you go through that

process there is no disagreement because you have agreed otherwise. That is really the extent of our point.

THE CHAIRMAN: Yes, thank you.

MISS DEMETRIOU: Madam, that really brings me to the end of my submissions, and as I indicated at the outset, in relation to the second preliminary issue we do not really have very much to add to what Ofcom said. As a practical matter we do think it would clearly be desirable and render the conduct of appeals much more efficient if Orange could have raised these grounds of appeal in a notice of appeal after the determination, that clearly would have been the more efficient process and we think as a matter of practicality and desirability that the parties should have that option, and for the reasons given by Ofcom in its submissions we think that it is open to the Tribunal to rule that the parties do have that option.

Ofcom draws a distinction between Orange's first ground of appeal and its second ground of appeal, and although we can see the force of that we can think perhaps there might be an alternative way of analysing it, which is that what Orange's second ground of appeal essentially has to come down to because there is a certain discretion inherent in s.186, so Ofcom has a duty to accept disputes – perhaps "discretion" is the wrong word, it has to address its mind to a series of questions. Our Ground 2 is that it wrongly did that. I think that in effect our Ground 2 is tantamount to something in the nature of an irrationality challenge – it has to be – or a challenge on public law grounds in the nature of Ofcom not taking account of a relevant consideration – that kind of thing; it cannot be a pure merits' challenge. In circumstances where it is alleged that Ofcom has acted irrationally in accepting a dispute then we see that as being rather analogous to a jurisdictional question, because if Ofcom accepts a dispute in an irrational manner then it cannot have been intended that it would accept it under the Statute. So we do not quite see the difficulty that Ofcom do in distinguishing grounds 1 and 2, but otherwise we are in agreement with Ofcom's submissions on the second preliminary issue.

So unless I can assist further, madam, those are my submissions.

(The Tribunal confer)

THE CHAIRMAN: No, I think that is all. Thank you very much, Miss Demetriou. I think that is a good moment to pause for the short adjournment, so we will reconvene at 2 o'clock.

(Adjourned for a short time)

MR. ROTH: Madam, the two preliminary issues that the Tribunal has to decide are, of course, extremely different. The second one is, indeed, really not adversarial at all in that I think

everyone is seeking to find a sensible solution to a difficulty that appears to arise from a potentially strict view of the rules. I shall deal with the two issues in that order.

The first issue on which Miss Demetriou addressed you this morning - although we disagree with Orange and Ofcom, it is also perhaps not quite as confrontational, at least from Ofcom's perspective as might appear on the papers I say that in the light of these preliminary observations - that, first of all, Ofcom has no desire to enlarge its dispute resolution jurisdiction beyond that which is required strictly by the statute. Secondly, the UK statute, as I think everyone agrees, is to be interpreted in the light of the underlying community directives, and it is not intended to give any broader dispute resolution jurisdiction than is required, or indeed entitled by the directives. Thirdly, the position that Ofcom takes in this case of course reflects its understanding of what the statute, interpreted in the light of the directive, requires, and no more.

On some matters Ofcom does have a degree of flexibility - for example, whether to take a case referred for dispute resolution to be resolved itself, or to send it off for ADR. Miss Demetriou read to you s.186 of the UK statute, again reflecting what is in the directives, which says that Ofcom could decide that there are alternative means available within the specified time period. That is at s.186(iii) at Tab 11. In a sense it is a one-way discretion. If there no alternative means available, they have to take the dispute, but if there are alternative means available they are not bound to refer it to ADR, but they can.

Secondly, Ofcom, when a dispute is referred, can decide that it should wait longer to see if the parties have had sufficient opportunity to negotiate in good faith before Ofcom agrees to handle the dispute. That is something that you find in the recital to the framework directive. I think one of the recitals which actually perhaps was not read this morning - and I will come back to it later, but perhaps it is worth looking at it on this point - is at Tab 9 of your bundle, at p.190. Recital 32. It also incidentally, gives an example of another kind of obligation not concerned with interconnection or access, which was canvassed this morning in your question.

> "In the event of a dispute between undertakings in the same member state in an area covered by this directive or specific directives, for example, in relation to obligations of access and interconnection, or to the means of transferring subscriber lists [so, there is another kind of obligation wholly different] an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. NRAs should be able to impose a solution on the parties.

I read on, though it is not relevant to the point I am making at the moment,

> "Intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications, networks, or services in the member states should seek to ensure compliance with the obligations arising under this directive or the specific directive".

The point I was referring to at the moment is the point about negotiation in good faith but failed to reach agreement'. Ofcom will, where appropriate, say that, "You have referred a dispute to us, but we don't think you've made an attempt to negotiate in good faith yet. Go away and do that, and come back if it doesn't work". So, Ofcom certainly does seek to let operators seek commercial agreement where that is possible. But, when it comes to the jurisdiction of Ofcom to handle a dispute at all, that is not a matter of discretion - that is a matter of obligation.

We agree with Orange that Ofcom is not acting as a commercial arbitrator resolving any kind of dispute between parties, or between communication providers. It is clearly acting as a regulator, performing statutory obligations. Where we disagree with Orange is that Ofcom considers those obligations cannot be construed quite as narrowly as Orange has suggested and submitted.

If I can deal first with the EC legislation and then the UK legislation? I can do it fairly quickly because it was opened to you extensively this morning. The EC obligations on dispute resolution come in two places - Article 20 of the framework directive and Article 5, para. 4 of the access directive. Article 20 of the framework directive, which is at Tab 9 (where we just were), p.199, "In the event of a dispute arising in connection with obligations under this directive or the specific directives between undertakings ----" So, all of Article 20 is dealing with a dispute arising in connection with regulatory obligations. One will come back to some of its details in due course, but you will see that it is a fairly tight timetable in para. 2 about half way down the paragraph: "If after four months ... the party seeking redress shall issue a binding decision ----" There is the four month deadline. At the end of that provision there is a binding decision to resolve the dispute in the shortest possible time, in any case within four months that is translated into the domestic statute. That is Article 20, and that is the provision to which the recital in para. 32 of the preamble that I just read to the Tribunal refers. Any area covered by regulatory obligations - hence the example given of transferring subscriber lists. It could be nothing to do with access, but it could be to do with access and interconnection. Those are the two examples in the recital.

Then there is the access directive - Article 5, para. 4 at Tab 10 at p.209-210. Article 5 states at the top, "Powers and Responsibilities of the NRAs with regard to access and interconnection". It begins, as you heard this morning, that,

> "NRAs shall, acting in pursuit of the objectives set out in Article 8 of the framework directive, encourage and, where appropriate, ensure, in accordance with the provisions of this directive, adequate access and interconnection and inter-operability of services, exercising that responsibility in a way that promotes efficiency, and gives the maximum benefit to end users".

Then it goes on to say that they can impose certain obligations which include the end-to-end connectivity obligation. Then at para. 4,

> "With regard to access and interconnection member states shall ensure that the NRA is empowered to intervene at its own initiative where justified, or, in the absence of agreement between undertakings, at the request of either of the parties involved in order to secure the policy objectives of Article 8 of the framework directive, and in accordance with the provisions of this directive, and the procedures referred to in Articles 6,7, 20, and 21 of the framework directive".

So, the procedures for dispute resolution in Article 20 that you saw are incorporated by reference to an Article 5(4) dispute resolution. But that does not mean, of course, that Article 5(4) is simply replicating the jurisdiction in Article 20. If it were, there would be no point having it. It is added to that jurisdiction, enlarging it in certain cases.

There is, therefore, we say, an overlap between Article 5(4) and Article 20 because, as we say, an Article 20 resolution will cover a dispute about a regulatory obligation for access and interconnection. That will fall within Article 20, but it will also, being a dispute about access and interconnection, come within the wording of Article 5(4) of the access directive whereas a dispute about some other regulatory obligation which has nothing to do with access and interconnection, Article 5, para. 4 of the access directive will not be engaged at all and that will be purely Article 20.

Also we say - and this is where Article 5, para. 4 adds to the Article 20 - that Article 5, para. 4 is not restricted to a dispute about regulatory obligations. It is a dispute with regard to access and interconnection in general. If it were restricted to regulatory obligations about access and interconnection, well, that is already within Article 20 and it would be superfluous.

THE CHAIRMAN: What do you say is then the meaning of 'in accordance with the provisions of this directive'?

MR. ROTH: It has got to be done in accordance with the provisions of this directive ---- It arises in a number of senses. First of all, the general objective as in Article 5, para. 1, ensuring adequate access and interconnection, promoting efficiency, etc. Further, if, in the course of a dispute resolution the NRA cannot for example impose the kind of obligation that comes under this directive under Articles 8, 9, 10, 11, and 12 without complying with the requirements of Article 8 in doing so. It would have to comply with the procedural requirements set out in the provisions of the access directive to do so. So, it must follow the provisions of this directive. It is not a sort of, "You can do anything you like in resolving this dispute. If you want to do some of the things that relate to the SMP condition, you have got to go through what Article 8 requires and various other variants concerning SMP". So you cannot override the requirements of this directive that are set out elsewhere.

Those two EC regulatory enactments of dispute resolution are given effect to ----

THE CHAIRMAN: Before we leave Article 5(4) -- Your submission in relation to that is that any absence of agreement with regard to access and interconnection can be referred to the NRA, and the scope of the kinds of disputes that can be referred is not, in your submission, then qualified by either the subsequent words of para. 4, or by para. 1 of Article 5. Is that your submission?

MR. ROTH: That is correct, yes. As I say, for the general objective which is ensuring adequate access, interconnection and inter-operability, and so on, but it is not confined in any further way. The relevant recital is para. 6 in the preamble, tying in with that at p.205. "-- It is appropriate that a framework should mark ... NRA should have power to secure where commercial negotiation fails adequate access and inter-operability of services in the interests of end users". That is general. Then in it says that in particular they may ensure end-to-end connectivity by opposing proportionate obligations on undertakings that control access to end users. That is a particular example of the end-to-end connectivity obligation, but the general power is securing adequate access and interconnection and inter-operability of services.

THE CHAIRMAN: I think Miss Demetriou relied on that as a pointer in her favour that it is then limited to securing access and interconnection rather than subsequent disputes about the terms of interconnection and access.

MR. ROTH: I think that is an explanation of the kind of dispute, but we do not regard that as words of limitation on para. 4 - the general power. All of this is with regard to ensuring that access and interconnection takes place and occurs. I will come back to her point, saying, "Well, in that case, once you have an agreement on access and interconnection the dispute

resolution is engaged". That superficially has a certain attraction, but when one comes to examine what exactly can create disputes on access interconnection, we say does not work and would not achieve that statutory purpose. But, as regards the sort of overriding purpose of dispute resolution under the directives, I do not think we particularly disagree. We say, "Yes, it is to secure, but access and interconnection takes place and continues".

Before developing that particular point as to, "Why then is it not just, as it were, at the outset?" can I just first take you to the domestic statute and then come back to that issue? Again, I can do it fairly quickly because it was gone into this morning. Of course, one starts with s.185 at Tab 11. As has been noted before, of course there is a distinction between subsection (i) and subsection (ii). It is not, however, the same distinction as between Article 20 and Article 5(4). The UK legislator has expressed things under a slightly different sort of format. I have to say that to my mind it is a rather clearer format than the provisions of the directive to give effect to them. S.185(1) is dispute relating to the provision of network access of various kinds. Subsection (2) is any other dispute if it relates to rights or obligations conferred or imposed by or under this part.

Pausing there for a moment, if the dispute concerns the provision of a network access, whether or not it is pursuant to an obligation, it comes within s.185(1). That catches network access disputes whether pursuant to obligation, or not. So, it covers Article 5(4) of the Access Directive, but it also covers disputes relating to access and interconnection pursuant to an obligation; it covers the overlap that would come within Article 20 of the framework directive. They are all disputes relating to the provision of network access.

The other disputes that come within Article 20 of the framework directive that do not relate to network access - such as the example given in the recital of the provision of subscriber lists - that is all covered by s.185(2).

You note that in subsection (3) any of the parties to the dispute may refer it to Ofcom.

Perhaps a rather important subsection (8), the definitions.

> "For the purpose of this section –
>
> > (a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be, provided in a particular case".

I mention that because it is clearly there envisaging not only a situation where network access has not yet been provided but may be provided, but a case where network access is being provided and there is dispute as to the terms on which it is being provided.

THE CHAIRMAN: You say that 8(a) must be a definition relevant to s.185(1) because s.185(2) does not deal with disputes that relate to the provision of network access; is that right?

MR. ROTH: Exactly. 8(b) is relating to s.185(2). Then there is s.186 that I have already referred to you.

I can jump over now to s.190 - what Ofcom can do; what its powers are in resolving disputes. S.190 is an exhaustive statement of its powers. S.190(1) makes clear that Ofcom's only powers are those conferred by this section. Subsection (2) sets out its main power, except for another kind of dispute - radio spectrum management disputes. There are rights and obligations, terms and conditions between the parties to the dispute. One notices:

> "(d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment".

So, that appears to be envisaging a situation where no doubt pursuant to a contract, monies have been being paid, and then there is a dispute, and then there is a retrospective adjustment, again indicating the situation where the parties are in commercial dealings with one another already - otherwise, you would not have that provision if it was purely prospective, shall we say. That also supports our construction of what we say in any event are the natural words of 'the provision of network access' in s.185(1).

Picking up a point, madam, that you raised this morning, I said a moment ago that the UK draftsman has not simply copied, as one can see, the provisions in Article 20 and Article 5(4) of the EC directives, but has re-cast them in a way that does, to my mind at least, seem rather more logical. The 'own intervention' which is set out in Article 5(4) is, indeed, we say, given effect to in a quite different provision, and that is s.105 (which you referred to earlier).

Section 105(1), "This section applies where a network access has arisen and needs to be determined, and it would be appropriate for them to exercise their powers". That is picking up the other part of Article 5(4) of the access directive.

THE CHAIRMAN: Just looking at s.185, the requirement in s.185(2) that the dispute relates to "rights or obligations conferred or imposed by or under this Part" – that is an implementation of the requirement in Article 20(1) that the dispute arises in connection with obligations arising under this Directive or the specific Directives.

MR. ROTH: Except for disputes relating to obligations regarding network access. That bit has been dealt with ----

THE CHAIRMAN: Yes, but that is not limited to cases where access is a regulatory obligation because Article 5(4) of the access directive is not so limited.

MR. ROTH: Miss Rose, on my right, tells me I should look at s.105(6) - and I am sure she is right - which defines a "network access question" – "question" means a question relating to network access or the terms or conditions under which it is or may be ----

THE CHAIRMAN: That reflects the s.185(8).

MR. ROTH: Exactly. The same formulation.

Before turning to putting these provisions in context for the present case, could I just deal with one matter that Miss Demetriou sought to rely on this morning? That related to a letter from Ofcom to her clients concerning a previous matter. It is in your bundle at Tab 17, p.603. I think it was said that this shows the approach of Ofcom as to when it will and will not get involved. This is the letter to Orange's legal vice-president, I think. It complained about Vodafone's compliance with price control conditions.

> "Thank you for your complaint, dated 20th February, 2006 alleging Vodafone is in breach of the charge control conditions relating to mobile voice call termination; and that Orange has suffered loss or damage as a result. Let me reassure you that we take very seriously the possibility of a breach of the SMP conditions by an operator and the importance of Ofcom ensuring these conditions are met and are understood to be met by all parties".

This is not dispute resolution at all. This is a complaint. As you see on the next page, the penultimate paragraph of the letter,

> "As Ofcom previously observed whilst not currently the subject of ex ante controls, if 3G call termination rates are being charged ... raise this with Ofcom under competition law. In the light of this and the above, Ofcom does not consider that it would be appropriate for it to grant Orange consent to bring an action under s.104 of the Communications Act".

So, this was, with respect, nothing to do with s.185. This was to do with s.104 of the Act. If you have s.104, you will see that that is the obligation of anyone subject, among other things, to an SMP condition. This is s.104(1),

> "The obligation of a person to comply with –
>
> (a) the conditions set under section 45 [that is the SMP conditions] which apply to him [and various other things]

... shall be a duty owed to every person who may be affected by a contravention of the condition or requirement".

Then, at (4),

"The consent of Ofcom are required for the bringing of proceedings by virtue of subsection (1)(a)".

That is the section being referred to. There was a complaint made, which is a complaint I think under s.94, that Vodafone is in breach of charge control conditions. That is discussed there. Ofcom decides, as set out in the letter, that Vodafone is charging a blended rate and in Ofcom's view it does not breach the SMP conditions and therefore it will not give consent under s.104(4) to Orange bringing proceedings about that. So that is what that was concerning; that is yet another part of this complex regulatory framework, but it is nothing to do with s.185.

THE CHAIRMAN: Well I think it was being relied on in support of the point that the 3G charge, (which is what is in contention between BT and Orange) is not regulated and that is confirmed by Ofcom in this letter and that is why it is said it does not fall within s.185(2).

MR. ROTH: Well if that is all that is being relied on then I perhaps misunderstood it, but certainly everyone I think accepts without the need for this letter that the 3G charge was not at this time subject to regulation and that is common ground.

THE CHAIRMAN: You also accept the fact that there had been a finding of SMP does not affect the question as to whether the 3G charge was under regulatory control – or whatever the wording of s.185(2) is ----

MR. ROTH: Yes, we accept it was not. I had thought, wrongly perhaps, that something more was taking out of that.

THE CHAIRMAN: Well perhaps, Miss Demetriou, you can confirm the position?

MISS DEMETRIOU: I was only relying on it for the short point that you identified, madam.

MR. ROTH: Well I am sorry for taking up time on it, because that is then agreed.

Putting that framework then in the context of the decision of this case, given that the purpose of ensuring interconnection, which one agrees is the general purpose, the main objective is that that is not interrupted. Interruption or disruption can of course arise in a number of ways. It can a rise, indeed, when parties cannot agree on a contract for access at all. It can arise when the parties who have a contract between them for interconnection serve notice terminating that contract. It may be short or a long contractual period of notice, that will depend on their contractual arrangements, that is entirely outside Ofcom's control. But Ofcom would be concerned and there would be concern in terms of the main objective

ensuring interconnection if with two parties to an interconnection agreement one of them served notice terminating on the other, because that threatens to bring it to an end, and Ofcom does not want to wait until the notice period has expired and the access is actually interrupted. Clearly, it wants to ensure that interconnection continues.

Another possibility is when the parties to a contract that expires by fluxion of time, without any notice being served, failed to agree either before it expires or at the time it expires or on terms for a new contract, or a most striking example would be if one party to a contract for interconnection just breaks it and stops giving access. Any of those situations of course would threaten interconnection, and there would be an obvious concern.

The first of those when parties do not enter into an agreement at all is not controversy in the sense Orange accepts "well that will come within Ofcom's power", but we say that as a matter of policy .. interconnection the policy of this regulatory framework it is just as undesirable from the regulatory point of view to be confronted with any of the other situations. The interpretation of Ofcom's jurisdictions must be informed by these concerns.

Equally, we submit that whether or not Ofcom has jurisdiction under the framework, and therefore under s.185, when a dispute is referred to it by one party it cannot depend on the detail of the contractual arrangements as between the parties. For example, if the contract were to say that each party agrees that it will not, under any circumstances, refer disputes to Ofcom under s.185, well Ofcom could not be bound by that. It would not be deprived of jurisdiction on that basis.

There is a contrast here in the Statute, again reflecting the Directives, which emerges from s.187. In s.187 legal proceedings about referred disputes, you see in subsection (1):

> "Where a dispute is referred or referred back to Ofcom under this Chapter, the reference is not to prevent –
>
> (a) the person making it,
>
> (b) another party to the dispute,
>
> (c) Ofcom, or
>
> (d) any other person
>
> from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute."

"Legal proceedings" is defined in subsection (5) as "civil or criminal proceedings in or before a court", but this right of either party to the dispute to start a civil action, that is subject to contractual exclusion because, as you see from subsection (5), subject to s.190,

para.(8) and to any agreement to the contrary binding the parties to the dispute, subsection 190(8) is an actual determination of the dispute.

THE CHAIRMAN: Is this s.187 provision in some way creating some cause of action that can be tried by the court, or is it only referring to legal proceedings with respect to any matters under dispute where those matters relate to, for example, a breach of contract or where there is some underlying cause of action? We were not clear whether this was an alternative to 185 in terms of a different form to which a dispute could be referred, even if there was no breach of contract?

MR. ROTH: We say it is definitely not creating any cause of action. It is simply preserving such right as there may be – if there is – under an existing cause of action which would probably, as you surmise, be a contract, but that can still be exercised, but being contractual – subject to any contractual exclusion of that right – and it says that if there were such a private action started the court could stay the determination by Ofcom of the dispute while that is being resolved.

THE CHAIRMAN: So if one is arguing, as here, over a proposed variation of a contract, where there is no suggestion that a party is in breach ,the other party just does not accept the variation of the contract, that, under ordinary principles would not create any cause of action which entitles a party to take the other party to court to force them in some way to accept – there is nothing in the contract which says that you must accept a reasonable variation?

MR. ROTH: That is right, and s.187 does not create any such right.

THE CHAIRMAN: It would not assist you in that.

MR. ROTH: What it is doing is reflecting in a more extended way, as domestic legislation often does, Article 20 para. 5 of the Framework Directive, which says:

> "The procedure referred to above shall not preclude either party from bringing an action before the courts."

So it just makes clear that the dispute resolution does not of itself take away any right you might have to a private action. The particular point I was making, in the context that I was dealing with it, is that it is notable that there parties can make an agreement to the contrary because their contract can say: "We will not take private action, we will only leave it to the statutory framework, but there is no equivalent to s.187(4) of course in s.185. You cannot, in your contract limit or exclude the s.185 dispute resolution. Although that may be said to go more particularly to what has been called "Ground 1(b)". The point we make is a slightly broader one that the whole conceptual approach is one that is not derived from what

may be said (or not be said) in the particular contract between the parties. It is about the broad power, s.185 reflecting the Directives of disputes about the provision of network access, which as I was indicating a moment ago can arise in a number of ways including where you have an existing contract. I will come back in a moment to the five hypothetical cases.

I should say, however, also, that Ofcom submits that in this case this is a dispute arising in connection with a regulatory obligation, and so it also comes within Article 20 of the Framework Directive – it still of course stays within s.185(1), and the regulatory obligation that is relevant is the end to end obligation upon BT, because what happened here is that BT is claiming by its notice that it should not be obliged to purchase MCT from Orange at a particular price; BT is saying that price is unreasonable, that is the dispute it is referring. The fact that there is no obligation on Orange, as Miss Demetriou strongly submitted – quite rightly – there was not the relevant obligation, but there was an obligation on BT, we say that does not preclude this from being a dispute arising in connection with a regulatory obligation.

THE CHAIRMAN: So you say you have jurisdiction under both 185(1) and 185(2)?

MR. ROTH: We do not submit that, madam, because we say that we have jurisdiction under 185(1) because that covers disputes relating to the provision of a network access whether pursuant to regulatory obligation or not, so we say it is within 185(1), because that covers all network access ----

THE CHAIRMAN: Yes.

MR. ROTH: If somehow we were wrong on that, then it would still be relating to a regulatory obligation and therefore if it is not within 185(1) it would be within ----

THE CHAIRMAN: Oh, I see, because s.185(2) – they are mutually exclusive.

MR. ROTH: They are mutually exclusive, unlike the EC provisions these two are mutually exclusive.

THE CHAIRMAN: Yes.

MR. ROTH: We say the fact that there is no obligation on Orange does not preclude this from being a dispute arising in connection with a regulatory obligation. It does not have to be an obligation on both parties, it is enough if it is on one of them that is relevant to the dispute. You can see how that is reflected in the actual determination that Ofcom made at the end of the day, which you have at tab 27 of the bundle, at p.794, paras. 4.3 and 4.4. This is referring to the draft determinations which you will see are then confirmed. 4.3 as set out in s.3 on 13th September 2006 Ofcom imposed the end to end obligation.

> The end to end obligation requires BT to purchase the wholesale narrow band call termination services unless the terms and conditions, including charges, which are proposed are unreasonable. As mobile call termination wholesale narrow band call termination Ofcom considers the end to end obligation is relevant to the dispute to the extent that each of the MNOs has made a request to BT to purchase mobile call termination. In the draft determinations Ofcom and considered that in the case of the disputes between BT and each of T-Mobile, 02 and H3G the end to end obligation applies in light of the clear request for the purchase of wholesale narrow band call termination by the MNO, leaving the OCCN it has issued to BT, which has been rejected by BT.
>
> In the case of the disputes between BT and Orange Ofcom also applied the end to end obligation on the basis that the issue of the OCCNs by BT amount to a refusal to purchase mobile call termination on the existing terms which were originally proposed by the relevant MNO."

Then at para.4.16, under the heading of "Disputes between BT and each of Vodafone and Orange",

> "Ofcom therefore considered the end to end obligation applied equally to each of the disputes and considered whether the disputed charges, that it's the charges of the MNOs which BT has paid, and which are higher than the charges BT proposes it should pay were reasonable in each case.

And that is how Ofcom approach ed it in its determination.

THE CHAIRMAN: So you interpret an OCCN issued by BT as BT saying "Having regard to our end to end connectivity obligation we no longer consider the existing price set as being a price which we are bound to accept as reasonable by our end to end connectivity obligation?

MR. ROTH: Well, certainly if it is then referred to Ofcom for resolution, yes, exactly. That provision, the obligation, it was really at the heart of Miss Demetriou's argument that this case has nothing to do with regulatory obligations and we say that is mistaken, because it does. Our primary position is, of course, that it is within s.185(1)(a) which, to say it again, embraces disputes about regulatory obligations relating to the provision of network access. The words: "relating to the provision of network access", especially when construed in terms of the definition in subsection (8)(a) are not precluded by the fact that there is a contract in place and interconnection is occurring, because one party to that contract in referring the dispute to Ofcom is dissatisfied and is seeking to change the terms of network access. Whether they have served notice terminating the contract, or whether that notice

period is short or long, or whether they have agreed not to serve notice but have done so in breach of some contractual provision or some contractual mechanism for serving notice we say cannot be decisive. Whether the contractual mechanism allowed them to vary the terms or bring the contract to an end again cannot be decisive because once that becomes decisive you get into the whole question of looking at the contractual framework – what are they entitled to do? At what period? If it says "You can serve four weeks' notice of termination", should Ofcom then take the dispute because interconnection could come to an end in four weeks? But if it says two years' notice, should it not take the dispute because two years is a long time and a lot can happen? That is not the role of the Regulator. What the Regulator will do, however, before agreeing to handle the dispute is to say "I want to make sure that you have in good faith sought to negotiate", and that is reflecting the wording in the recital to the Framework Directive. But if there has been a good faith attempt at negotiation and it has failed, and Ofcom is satisfied by that, then it has to take the dispute – certainly it has jurisdiction to take the dispute – it has then the limited discretion under s.186 to send people off to alternative dispute resolution, or mediation or whatever. So the fact that there is interconnection occurring at the time the dispute is referred to Ofcom does not deprive it of jurisdiction and we say we can illustrate that by looking at the five hypothetical cases – some less hypothetical than others – that we set out in our defence at para.39 which is at tab 2, p,37 where we set out five alternative situations. The first:

> "where parties who have not interconnected fail to agreed on the terms on which access is to be provided."

And that Orange accepts, that is a dispute relating to the provision of network access. The last, at the bottom:

> "where the parties are supplying interconnection on agreed terms but one of them serves notice terminating the contract .. and they fail to agree on the terms of a new contract."

and that, Orange accepts, gives rise to a dispute relating to the provision of network access. But Orange does not accept that any of cases (2) to (4) give rise to a dispute concerning the provision of network access, including, if we take case (3) where the parties are supplying interconnection on agreed terms, but the contract includes an express provision for variation by notice in the event that the counterparty accepts the variation and reference to Ofcom for resolution in the event that he does not, and that you may think rather reflects the contractual position here. That, Orange says, does not constitute a dispute relating to the

provision of network access. I think on the basis that under the particular terms of this contract, although they cannot reach agreement and the matter is referred, interconnection has to continue and that is the default position – I think that is why it said it does not. We say that is all rather disingenuous because that is, of course, the basis in this case on which interconnection was provided in the first place. As you indicated this morning, madam, to suppose that parties would have agreed to an agreement for interconnection for an unlimited period, subject to a long period of notice – 24 months – without a mechanism for price variations is, we say, rather fanciful.

THE CHAIRMAN: Well I think the point was that the mechanism for price variation appears to have been drafted at a time when the Director General's dispute resolution powers were rather broader than it seems that both you and Miss Demetriou now submit that they are, but the contract mechanism has not been brought up to date to reflect the narrower powers of s.185. I think that is how the point is put.

MR. ROTH: Well then there is no evidence before you of the position prior to the 2003 Act from either side, but there was a similar regulatory regime in the '84 Act I think it is – the old Telecommunications Act – reflecting the old EC Directives involving regulatory dispute resolution and that is why this could be put in the contract one expects, and that is why it refers to Oftel and not to Ofcom. Oftel no more than Ofcom was acting as a contractual arbitrator, and it would only act pursuant to its regulatory obligations, and we absolutely refute any suggestion that they were broader under the old Act than they are under this Act. We say that any of these situations could threaten the effective position for network access because without them people would not agree in the same way to make arrangements that they do make for network access to take place, and that is why the wording in the statute relating to the provision of network access is helpfully defined in s.186(8)(a) is put broadly, and it does not say: "A dispute that threatens to bring network access to an immediate end, or threatens to jeopardise the provision of network access in the short term. It does not say "jeopardise" or "threaten" at all – it just says "relating to the provision of network access." Miss Demetriou said that Ofcom should not be getting into commercial disputes and these are commercial matters between the parties, but what are disputes? The disputes between communication providers relating to network access are basically of two kinds – there are technical disputes saying "It does not work for some technical reason" that I would never be able to explain, or it is a commercial dispute about the price or the contractual terms or whatever, so of course they are commercial disputes.

The concern that if we are right this opens the floodgate to all kinds of little arguments coming to Ofcom, then the last thing Ofcom wants to do is open any floodgates – it wants to have as few of these disputes as possible, I can assure the Tribunal of that. But there there are a number of safeguards. First of all it is a bit fanciful to think that parties would wish to go through this whole procedure on trivial matters; secondly, if it seems trivial if they have not made a good faith attempt to negotiate Ofcom will send them away to do that first. Thirdly, there is the s.186 power to say "Go off and mediate". It is all when all fails then, yes, Ofcom would have to deal with it, but it has certainly not been the experience that since the Act has come in that Ofcom has been flooded with an odd, trivial dispute. These are not consumer cases, these are communication providers who act on the whole in a fairly sensible way. Nor can it be said that any of these disputes that Ofcom is now dealing with be regarded as trivial. They may be about only a few pence per call, but one has only to look at the resources deployed by all the mobile network operators in the case that is now pending before the Tribunal to say that these are very far from trivial disputes. They are clearly of major import to the parties concerned.

THE CHAIRMAN: The point that you make about whether disputes about a variation in price threaten interconnection, or continued interconnection, that is in the context of the industry where continuing open-ended contracts are, I suppose, required – interconnection is regarded as a continuing fact?

MR. ROTH: Well it is a continuing fact as regards BT because it is under an obligation. It is a continuing fact regarding the other mobile network operators connecting with BT, one thinks because it is in their commercial interest, BT being the large fixed network in this country, to connect with BT. But it is in their commercial interest – that is ultimately subject to price and BT's end to end obligation is subject to the proviso that the terms are reasonable. So if any of those, on either side, fail it will not take place, and BT would, I am sure, if it were felt that it was being required to pay a price by an operator that it found was totally unreasonable and exorbitant, it would say "I won't do it, and I do not have to do it because my end to end obligation is limited by a criterion of reasonableness". So although it has taken place it could stop and if the contract on variation said you are entitled to serve a variation notice and if it is rejected then you can bring the contract to an end on four weeks' notice. No doubt it would. That would happen. It is only because there is this particular contractual framework with its built-in references to Ofcom that that risk has been avoided. What would happen if that contractual framework, as the logical result of our submissions, actually does not work and cannot be operated, I have no idea. Ofcom would

have no idea. But, there would clearly be a likelihood that if it was found to be inoperable, no doubt the contracting parties would come up with some different framework that would protect their rights. But, ultimately, one feels reasonably confident that neither the mobile network operators, nor BT with its circumscribed end-to-end obligation would sign up to something that left them with a continuing requirement to interconnect at whatever price. If it were not this mechanism, but a mechanism saying, "Unlimited contract. Serve a price variation notice. If accepted, price changes. If not accepted, you can serve one month's notice terminating the contract", that would be another possible reasonable mechanism. Then, of course, we get pretty close to Case 5 in the hypothetical enumeration of cases in our para. 39. The contract comes to an end, in which case it is said, "Well, yes, then Ofcom can intervene".

So, paradoxically, what we are being told here is that we have not got that situation - Ofcom has not got jurisdiction, even though in this contract the parties have actually, it seems, come up with some sort of mechanism where they recognise that Ofcom does have jurisdiction. So, it is a slightly perverse result, we submit.

So, we say that the whole approach is indeed seeking to ensure not just the original establishment of interconnection, but the maintenance of interconnection, and the continuation of interconnection. That is firmly within the objectives set by the framework. Ofcom does not, of course, automatically know what is the price level at which a party would consider that it is no longer in its commercial interest to continue interconnection. It certainly would not know that before it got into a dispute - not at the stage of having to decide whether it has jurisdiction, or not.

THE CHAIRMAN: The termination period of twenty-four months in this contract - is that something that is set by the regulator, or is that something which is just ----

MR. ROTH: No, it is not. This what they agreed. As I understand it - and I am sure Mr. Read will correct me - this is the BT standard interconnect agreement. I think it may be that the mobile-to-mobile interconnect agreements, which are the subject of some of the other dispute appeals -- They are not on this agreement. They are on, I think, a different standard agreement. (After a pause): Yes.

Incidentally, while mentioning that, the other disputes with BT are also, I think, where the determination covered – the second determination – three mobile-to-mobile disputes, two of which ----

THE CHAIRMAN: ... (overspeaking)... Orange and O2, I think.

MR. ROTH: Yes. Two have been appealed. One not appealed. Those appeals are pending. In those cases, where it is mobile-to-mobile, it is a network access dispute, but there it does not relate to regulatory obligations because there there is no end-to-end connectivity. So, it brings out the contrast.

That really is all I need to say, subject to your questions on Ground 1(a).

On Ground 1(b), which is a purely contractual argument - that the OCCN – I am sorry I got what I just said wrong. There were two MNO to MNO disputes - both have appealed. I thought there were three, but there were two.

Ground 1(b) is purely contractual - namely, that BT did not follow the contractual mechanism correctly. I think, to be fair to Miss Demetriou, she did advance it as an alternative. It appeared to be, perhaps, a bit of a fall-back argument. It would involve really Ofcom looking at the detail of the contractual requirements and whether they had been correctly followed, or not; whether, if there was an obligation to serve notice in a certain number of days, had it been waived by conduct by the other party? Are they estopped from taking the point? One had only to listen to the discussion at the very outset of this appeal to see the difficulty that even Orange had of actually working out what are all the terms of the contract in the first place. All of that would have to be clear to Ofcom to decide whether it has jurisdiction if this was correct. We say that what BT in its skeleton argument rather colourfully characterised as 'admin hell' that would result from that -- we say that is a pretty fitting description. It could not possibly be the basis on which a statutory jurisdiction on Ofcom -- It would turn Ofcom indeed into a contractual arbitrator which is clear on all sides Ofcom is not, and which this Tribunal emphasised it is not in its judgment in the *H3G* appeal a couple of years ago (para. 135 of the *H3G* judgment).

That concludes, subject to any questions, what I was going to say on the first issue.

I will turn therefore to the second preliminary issue, which of course is very different.

THE CHAIRMAN: So, your case on s.185(1) is that this is a dispute relating to the provision of network access. That wording is broad to reflect the breadth of Article 5(4) of the access directive. For s.185(i) does not need to refer to Article 20 of the framework directive; is that right?

MR. ROTH: That is absolutely right. We say in fact in this case that it also comes within Article 20 because it concerns the end-to-end obligation on BT so that if one does have to refer to Article 20 to get into s.185 -- we are saying you do not, but if you did -- well, that is satisfied as well.

THE CHAIRMAN: Thank you.

MR. ROTH: Moving to limitation, I think part of the difficulty which arises is that the rules on time for appeal in the Tribunal rules, which were framed for the Competition Act and the Enterprise Act of course now operate in this really very different jurisdiction under the Communications Act which nobody could have had in mind when those rules were drawn up. The question is how, then, one can get it to work in a sensible way that is efficient for the commercial parties, the regulator, and indeed the Tribunal. This is a situation where there are two stages of decision-making. That does seem clear. S.186 of the Act involves the taking of a decision - s.186(2). "Ofcom must decide whether or not it is appropriate for them to handle the dispute and unless ... they must decide that it is appropriate to handle the dispute". Having made such a decision, they then have to inform the parties - subsection (4). So, there is a formal decision that is being taken under s.186. That is a decision which is subject to appeal. One has only to think of the case where Ofcom says, "No. We're not going to handle this dispute". The party would be entitled to appeal that. It clearly comes within the scope of appealable decisions in s.192(1) of the Act. In that respect it is different from the sort of preliminary steps in an investigation. I think it is BT which has referred in its skeleton to the narrow scope of what is an appealable decision in community law, and ... in a statement of objections is not an appealable decision. That is, of course, right. Indeed, a statement of objections under the Competition Act is not an appealable decision. But, a s.186 decision - we do not see any way of suggesting that that is not an appealable decision.

So, how can one get the rule to work sensibly? The time for dealing in Rule 8 is, of course, subject to exceptional circumstances. We find it difficult to suggest that the fact that you are appealing a s.186 decision or a decision on jurisdiction, because s.186, if Ofcom decides it will handle the dispute, it is, by implication saying, "This is a dispute within our jurisdiction. It must be implicit". The party may want to challenge that, but they want to wait and see what happens in the dispute, and if it is decided in their favour, then they are not going to bother. We do not think that could come within the concept of exceptional circumstances as interpreted by the Tribunal in its recent decision in the *Hasbro* case. That was a case where the legal representatives (the solicitors of Hasbro) were saying that it would make much more sense, given that the OFT is taking two related decisions - one on, I think, distributors and one on retail - that they put out the one decision, and they would like to appeal them both together and be able to form grounds of appeal much more sensibly when the second decision has been seen. Therefore, this constitutes exceptional circumstances, they say, and can the Tribunal declare that time for appealing should run

from the second, related decision? The Tribunal, in judgment by Sir Christopher Bellamy, said, "No, you cannot say that it is impossible for you to get your notice of appeal out. You can do so. You should. Maybe later you will need to amend it. When the second decision comes out maybe the two appeals will be consolidated. That can be dealt with under case management powers. But, it is not exceptional circumstances. They must be construed [those words] very narrowly". In the light of that we do not think we can rightly seek to persuade you that these are exceptional circumstances.

You have seen, I hope, in our defence, which is at Tab 2, in the discussion of the second preliminary issue, starting at p.18, setting out Rule 8, that we think it is important to actually ask, "Well, what actually are the grounds of appeal?" Ground 1 - which is the first preliminary issue - is a challenge to jurisdiction. The issue can be therefore raised on the basis of the s.186 decision, because that is an implicit decision on jurisdiction, but we say that a party in challenging jurisdiction could also challenge jurisdiction when the final dispute resolution comes out because if there is no jurisdiction to make that determination, that is a matter that can be raised late in the day as well as early in the day. A party should not be precluded from challenging jurisdiction later on the basis that they could have challenged it earlier.

THE CHAIRMAN: So, they challenge it in that circumstance not by challenging the initial decision but as one of the grounds on which they challenge the final decision. So, by challenging the 7th July decision on a number of grounds of this, that, or the other manner, one of those grounds would be that there was no jurisdiction.

MR. ROTH: That is right. We say that they should be, and are, as a matter of law, entitled to do that. You referred the parties, I think yesterday, to the Financial Ombudsman case, *Bunney -v- Burns Anderson*. We think that it is right that if there were a determination of charges here and one party was adversely affected by the determination -- say that in the Orange/BT dispute Ofcom said, "Yes, Orange, you can charge more" and BT did not like that, BT, if it just refused to pay -- How is the determination enforced? Well, it is enforced, I think, by private action in the courts under s.190(2)(d) - enforceable by the party with regard to payment. So, it is not enforceable by Ofcom. It is enforceable by the party to whom the sums are to be paid. Section 190(2)(d). So, in theory, that is right, we suspect, that when faced with an injunction or faced with an action for payment in the High Court, the Defendant could say, "Oh, but there was no jurisdiction to do this in the first place". That may be, but that, with respect, does not help on the issue that one is concerned with here, because the party may say, "Well, I don't want to wait until that situation arises. I want to

appeal the determination and I want to appeal it in this Tribunal". On that *Bunney -v- Burns Anderson*, with respect, we do not think helps.

THE CHAIRMAN: It indicates that it would be rather strange if you could appeal against the 9th February decision on the basis of no jurisdiction. You could raise the question of jurisdiction at an even later stage if BT refused to pay and Orange took them to court under s.190(2)(d). So, it would be strange if the only circumstance in which you could not raise the point was in a challenge to the final determination.

MR. ROTH: Yes. I fully accept and adopt that. It suggests, as it were by inference, that it ought to be not directly applicable, but it enables that sort of argument, by analogy, to proceed.

THE CHAIRMAN: It is also useful in that the *Bunney* is one where it would have been apparent to the company that the initial decision would adversely affect it. So, one is not talking about some by-law that is passed, and some time later somebody wants to challenge it because later facts have brought it about that they are adversely affected by that bye-law when they could never have realised that that was going to happen within the time limit for judicially reviewing the by-law. Here, it was clear to the parties that the assumption of jurisdiction by Ofcom would have some effect on them, but that was also the case in the *Bunney* decision.

MR. ROTH: There they could have gone to judicial review knowing the result. Here, for a time initially Orange did not know the result and if this is decided against my submission the parties may have to go to the trouble of taking out appeals and issuing notices of appeal which it turns out they never wished to pursue. That seems wholly undesirable. *Bunny* did not even concern, as you say, that situation.

If I can jump from Ground 1, where we say that one can do it in the appeal against the final determination, to ground 3. Ground 3, of course, forms one of the core issues. Ground 3 - Orange is saying that Ofcom erred in considering that BT's end-to-end connectivity obligation is a relevant consideration in relation to the MCT charges that Orange can levy on BT. That is their ground 3. But, they bring that in this appeal, not against the final determination where that is argued about, but against the decision accepting the dispute, and agreeing to handle the dispute because in its letter, and the notice it published on its website, Ofcom said that it regards that as relevant. We say not only is that a matter that should be appealed against the final determination, but we actually say that that is not something that can be appealed at all because that is not a decision under s.186 - it is just a preliminary view as to the scope of the dispute. It is done not pursuant to any statutory obligation, but it is done pursuant to Ofcom's administrative guidelines that it will publish that sort of notice.

We say that clearly that can be done in the appeal against the determinations. That, in a sense, is all you have to decide. But, we do go further and say that in fact it was premature.

THE CHAIRMAN: Except Orange have not brought an appeal against the final determination.

MR. ROTH: But what we say is that they could not appeal this point on the basis of the s.186 matter because that is a decision under s.186, and it is not anything more.

That leaves me with Ground 2 which, just to remind ourselves, does relate to the s.186 decision. Ground 2 is saying that it was not appropriate for Ofcom to handle the dispute because it should have found that there were alternative means of handling it. That, Miss Demetriou fairly said before lunch, is really sort of judicial review kind of irrationality ground of appeal, because Ofcom is not under an obligation under s.186(2). It has a discretion not to handle it if certain circumstances are present. Although it is a judicial review kind of appeal, in the sense that it is a rationality appeal, or irrelevant circumstances, we still have some difficulty characterising that as saying, "Well, if Ofcom handles the dispute and does not send it to ADR, and if that was an irrational decision, that means that Ofcom has no statutory jurisdiction", that is slightly stretching the concept, we think, of statutory jurisdiction. It is not saying, "It's not a dispute. It is not within s.185". It is accepting, "Yes, it is a dispute within s.185, but you erroneously did not send it off to ADR". Whether that is a challenge to the jurisdiction that really says, "Well, the determination that you then make is one that is invalid", we have struggled with. We would be delighted if one of my friends who speak after me can say, "Well, that is quite clearly in the same category as Ground 1".

THE CHAIRMAN: So, on that second round, you accept that it is a decision that there is no available alternative and therefore Ofcom should determine it. That is a decision under s.186 and is appealable.

MR. ROTH: Yes.

THE CHAIRMAN: As to the question of whether if it is not appealed at the end of the day after the final determination Orange could say, "Well, you should not have continued with this investigation at all" or, "You shouldn't have carried out this investigation because there was an alternative route" ----

MR. ROTH: They would have to say there was an alternative route and s.186(3)(c) - prompt and satisfactory resolution of the dispute is likely if there are means or resolving it. It is a slightly odd thing to bring, saying, "That is what you should have found and did not, and now ----" – it could be done.

THE CHAIRMAN: Is it the same as saying that if there are alternative means available for resolving a dispute consistent with Community requirements, etc., that then gives Ofcom a discretion to accept it? It does not have to accept it because the conditions in subsection (3) are satisfied, but nonetheless it could accept it in a situation, as here, for example, where it is in the process of dealing with a number of very similar disputes where there is no alternative means of resolving the dispute and it makes sense to deal with this one in conjunction with it, even though subsection (3) may be satisfied.

MR. ROTH: Yes. It is not under a duty to refer it to alternative means. It is under a duty, if there are no alternative means, to take it. If there are alternative means, and paragraphs (a), (b), and (c) are satisfied, then it has a discretion. Ground 2 is saying, "Well, in this case they were, and you should have exercised your discretion in that way". We think that is rather different from saying, "No jurisdiction". That is why we have said that that is treated differently.

The fact that therefore time limit would apply and you would have to serve a notice of appeal on that limited point, of course, that does not mean that the appeal has to be heard. You then get into the situation - as indeed was dealt with very sensibly in this case - that at the case management conference it is up to the parties to persuade the Tribunal whether it should be heard now, before the final determination -- whether that make sense as in some circumstances it might; whether it should be stayed, as was Orange's appeal in this case, but that is a case management question.

THE CHAIRMAN: Yes. But, if the reason why we are dealing with this preliminary issue is to see where the parties can, in future, avoid having to bring those kind of protective appeals, what you are saying is that if they want to raise a point which is a second ground, then they would still have to raise -- bring an appeal rather than leave it to the final determination. But, if they are prepared to limit themselves to a pure jurisdiction point (if I can put it like that) as to whether the dispute falls within s.185, or not, they would not have to bring a protective appeal because that can be dealt with as a ground of challenging the final determination.

MR. ROTH: That is exactly the position. As I say, I think everyone here is trying to help find a way through this. That is how we have analysed it.

Those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Roth.

MR. READ: Madam, can I say that when looking at Ground 1 of Orange's notice of appeal we are broadly in agreement with what Ofcom have indicated in submissions. I will not

therefore go at length through the detail again. Can I try and sort of bring this up to a higher level by looking really at the whole basis of the Ground 1 appeal? That is quite a narrow point - namely, whether there was a dispute under s.185 to s.191. We say the starting point for this is to look at the word 'dispute' and then see if there is anything that constrains the ordinary normal meaning of that word. The starting point, we say, is that 'dispute', in the ordinary sense of the word, has a very broad meaning. It means disagreement or controversy, or something like that. You have in the respective skeleton arguments various definitions from the Shorter Oxford English Dictionary and from the Oxford English Dictionary itself.

We say that if you look at it in that context, in the broader context, it is very difficult to see how there was not a dispute going on between BT and Orange. BT was complaining about the rates for 3G mobile call termination being blended into a composite rate with the 2G prices. That was not just the position vis-à-vis Orange - it was across the whole of the mobile network market.

What we say Orange is trying to do is to take the ordinary meaning and constrain it by tying it back to the contractual relations between the parties because whether you are looking at Ground 1(a) or Ground 1(b),they ultimately are all tied back to this issue of it being dependent ----" Whether there is a dispute or not is dependent upon the precise nature of the contractual relations between the parties. Of course, in Ground 1(b) they are effectively saying, "Well, you have to look in detail at the contract definition and see whether there is still a dispute live under the contract". But, in Ground 1(a) they are also saying in terms that, "You have to look and see whether you are dealing with ----" I will just deal with three situations at the moment.

First, it is a new attempt to negotiate interconnection access. Secondly, whether it is an attempt, when interconnection access has already been agreed, simply to vary some part of it. Thirdly, whether or not the interconnection access that was there has terminated and there is a need to impose a new agreement in its place.

Now, Orange's argument is to the effect that the first and third of those do fall within s.185, but the second one does not. We say that if you are looking at it from an ordinary normal, common-sense approach, then it is odd in the extreme that the word 'dispute' within s.185 should be constrained by this formulaic approach to the contractual relations between the parties. That, we say, really ought to be the starting point because when you are construing statutes, the starting point really ought to be, "What is the ordinary meaning of the word that

is being used?" Here we say the ordinary meaning of 'dispute' is a disagreement or a controversy, and that is precisely what was going on between BT and Orange.

I will not take you to it, but we have cited in BT's skeleton argument at para. 8 the case of *Pinner -v- Everett*. I should just mention that although that is a case dealing with a criminal matter, it is cited in **Bennion** on Statutory Interpretation as being a leading exposition of the fact that unless something else requires it, you should give words the ordinary meaning in their context.

We say there is a further reason why that is particularly relevant here - because one is looking at the jurisdiction of a regulatory body. Again, I do not think it is in dispute between the parties that parties cannot, by reference to their contract, either restrict or expand the extent of that regulatory jurisdiction. Again, I have set the authorities out in some detail, and other authorities have been set out in Ofcom's defence. I will not take you to those.

We say that that fact in itself is another reason that points very strongly against the suggestion that the interpretation of the word 'dispute' in s.185 should be given this formulaic interpretation dependent upon the precise contract between the parties. When one goes to s.185 itself, we say you simply ask a series of questions about this, and the answers are, we respectfully submit, obvious: does this dispute have reference to the provision of network access? Yes. BT and Orange are having a disagreement about the price at which the provision of that network access should be fixed. Is such pricing outwith the provision of network access? No, because that is what we say the *H3G* case decided. Is there anything else in the rest of s.185 that suggests you must look beyond the ordinary meaning towards the basis of the contractual relations of the party? We say, "No, and to the contrary" - s.185(8), which Mr. Roth took you to earlier, plainly indicates that it cannot be envisaging a situation where you have to have a new agreement being disputed. It plainly applies where there is an existing agreement, but there is some form of dispute that arises under it. So, we say that there is really nothing in s.185 that gives this constrained meaning that Orange now suggest. We say that is entirely consistent with the *H3G* case, which you were taken to earlier on. I think it would be helpful just to go back and look at one or two more facets of that case. It is in the first volume of the authorities bundle at Tab 7. It starts at p.183. If I can take you first to para.69 of the judgment which occurs on p.96 of the bundle reference, p.33 of the judgment. As you will probably recall, the case concerned obviously H3G's powers of SMP. One of the key issues was as set out in para. 69(c):

> "The dispute resolution mechanism which exists under the agreement between BT and H3G in relation to the access agreement between them. That agreement has a price alteration mechanism, with the Director-General (and probably now Ofcom) having some apparent role in resolving disputes. H3G says that this means that it does not have power over price".

So, that was the context in which the observations were being made, and it was particularly in the context of the very price alteration mechanism we are actually now looking at. Can I now move on to para. 119, which is on p.123? You raised a question earlier about the previous regime. We do get a little bit of guidance from para. 119 on p.123.

Miss Rose is helpfully pointing out to me that if one goes back to p.103 one in fact sees in terms that these are the SIA terms they were specifically considering, including specifically, obviously, Clause 30, as in fact occurs in our bundle because, of course, it has still got the reference in 13.7 to Director-General rather than, as it has now been changed, to Ofcom. But, for completeness, it is right to show that that is what the Tribunal on that particular occasion had firmly in mind when they were discussing the issues about pricing and their importance.

If I can return to para. 119, that is dealing with the previous regime that was in place under the European framework, including the interconnection directive of 1997 which was transmuted into English law by the Telecommunications Interconnection Regulations in 1997. As one can see from that, starting on the second sentence in that paragraph,

> "Under Article 9, national regulatory authorities were to encourage and secure interconnection, taking into account the need to ensure satisfactory end-to-end communications for users, and were to intervene as necessary to specify conditions, terms, and other things necessary to achieve that. The NRA was also to determine interconnection disputes".

If one casts one's eye down to the end of that page which is dealing with Regulation 5 of the Telecommunications Interconnection Regulations,

> "In pursuit of the aims stated in paragraph (1) above the Director may intervene at any time, and shall do so on the request of either party, in order to make a direction specifying issues which must be covered in an interconnection agreement, or to make a direction that specific conditions be observed by one or more parties to such an agreement".

So, although there is some difference between the wordings, the basic framework was not that dissimilar to what one has now in place.

If I can now go on to para. 123, just to illustrate the point, it shows that the appeal was specifically looking at, and had in mind, s.185 under the Communications Act.

THE CHAIRMAN: So, looking at Regulation 6(3), are you saying that that goes wider than what is currently covered by s.185?

MR. READ: I think the starting point is that the wording is obviously not entirely identical to what we have under the ---- (After a pause): I cannot pretend that the wording is identical to what we have in the various statutory and directives which you have already been taken to. But, the wording is, on the face of it, quite similar. For example, s.190(ii)(2)(c) of the Communications Act which is in Tab 11 of the bundle at p.261, (c) there is,

> "To give a direction imposing an obligation enforceable by the parties to the dispute to enter into a transaction between themselves on the terms and conditions fixed by Ofcom".

There is Regulation 6 of the 1997 regulations which are similar to the dispute resolution as contained within s.185. So, I think the short answer to this is that there has been a change, but the precise consequences of that change are not clear. It seems to be that they basically have the same framework as was present under the previous regime as is now present under the present regime, and that therefore ---- The point I am trying to draw from this is to say, well, in the *H3G* case they were having to consider in quite great detail the provisions of para. 13.7 of the agreement under the SIA, and they were doing it in a regulatory context which was very similar to the regulatory context we have to look at now, and that as a result the comments and the observations that are being made - although they may obviously not have been made in a dispute between similar parties because, as we know from what Mr. Roth said earlier on, Orange were not present - it is a particularly easy function just to say that the comments that the Tribunal made at para. 128 through to the end of para. 131 can be dismissed as having no relevance to the issue of what exactly are Ofcom's dispute resolution powers. It is quite plain, we say, from the decision in the *H3G* case that they were considering variations of price under Clause 13 of the SIA agreement, and that in that context they have made clear that the power to resolve interconnection disputes was considered to plainly arise under Article 5 of the access directive, and that pricing could, in the context of a variation, be at the heart of that type of dispute. So, we say it is, contrary to what was submitted earlier on this morning, a compelling decision for saying that pricing variations are capable of being a dispute under s.185. I may have taken a bit of a long time to go through and explain it, but that is the point that we derive from the *H3G* case - that

you cannot simply brush it aside and say at the end of the day that it has not got relevance. It plainly has.

Can I then turn to the question of what the effect of constraining the word "dispute" in s.185 by a direct linkage to the nature of the contract between the parties. What actually happens as a result of this? It would mean the question of whether there was a dispute or not would be determined by the form of the contractual relations between the parties rather than the nature and the substance of the disagreement. We say that cannot be right because it produces all sorts of problems, depending upon the precise contractual relations between the parties, and that has been explored in Ofcom's defence, and we have also explored it in para.18 of our skeleton argument, and I will not go through those in details, but we say that it is a real consequence that you end up with a rather formulaic situation which is looking at the form of the arrangement between the parties and not the substance of the dispute itself. Then, as you have already heard Ofcom agreeing with what we say in para.13 of our skeleton argument the admin hell that it would create for Ofcom.

We say that those are very important points to bear in mind when you are addressing the question of the definition of dispute, because this is the obverse of what Lord Reid was saying in the *Pinner v Everett* case. If the result of the construction is one that cannot be reasonable then one has to conclude that in fact there must be a different meaning and we say that that is a very strong pointer towards the fact that when you are defining dispute in s.185, if you are going to end up with the unreasonable results that flow from the way that Orange put their case on this then one does have to come to the conclusion that that cannot be the meaning that was intended by Parliament when they drafted this legislation.

Can I at this point take you to three matters which Orange rely upon which we say illustrate the error in their approach to this whole question of interpretation.

First, if I can ask you to look at para.7 of Orange's skeleton argument, which is at tab 3, p.46. That really is the starting point for the argument that the SIA involved is that one that has been identified on 23rd March 2001 – that simply is not correct, and one has to go to it to see in terms that that cannot be correct, by going to a page which you were not referred to earlier on, but which I would ask you to look at now, which is in tab 15, p.429. It may be best to start at 427 first, which is the first main page of the agreement. You can see in terms, and this has been highlighted in our skeleton argument, that BT and the operator have entered into an interconnection agreement as amended by supplemental agreements, and (b) – I am reading from the recitals – "The parties have agreed to vary the original

agreement in accordance with this term in "the agreement" being a variation pursuant to para.30 of the original agreement."

The whole scheme under which the standard interconnect agreement works is that once you have it, it is then in place and it forms almost a continuing umbrella agreement which is then changed from time to time, after extensive industry consultation I might add, and that is done through a variation process which is the variation mechanism that you identified earlier on this morning - clause 19 of the main body of the agreement. It is a huge agreement because in addition to the bits that you have in this document, you have five separate annexes, each of which is very extensive, and certain of them, for example, annex C, which deals with the particular provisions of services be it call termination services, be it premium rate numbers or whatever, they are in themselves fairly lengthy documents which are all appended within this schedule C.

Schedule E, for example, has a specific provision relating to artificial inflation of traffic and Schedule A in fact has quite an extensive provision on the specifications to be applied to interconnecting. So this is a vast document, and the way the document works is that bits of it are varied from time to time, but there is one contract that has been going virtually from the day that the party involved first interconnects with BT. In Orange's case we know that that was 1996. Whatever may have been said about this agreement, if one just goes over the page to p.429 one sees the supplemental agreement technique, and one sees from para.1 that there has been a fairly wholesale variation namely the deletion of paras. 1 to 35 of the main body of the agreement, and substitution of a new set of paragraphs but it is still, at the end of the day, a variation. There is still an existing agreement in place, albeit that there may have been a more substantive variation than there have been on other occasions.

THE CHAIRMAN: But that page is headed "April 2000 Review Supplemental Agreement".

MR. READ: Yes.

THE CHAIRMAN: So that does not seem to be the variation which is agreed on 23rd March 2005.

MR. READ: I do not want to trespass into giving evidence about this, but I can tell you ----

THE CHAIRMAN: But I think we have your point as to the nature of the agreement.

MR. READ: I think what actually happens is that it is negotiated within the industry, and then once it is negotiated the parties actually have to then sign up to it and there may be delays between the review that has been agreed and the party finally signing up to it, and that is why I suspect one might have to investigate this a bit further; there is that time lapse between the date of this actual document and the heading of the April review supplement.

But it demonstrates the point that this is an industry-wide agreement. BT does not have the option of being able to negotiate separate agreements with individual communications' providers, this is the agreement it is effectively stuck with when it negotiates interconnection.

Can I, while we have the SIA open, make one further point on this, because it is suggested in I think it was para.35A of the skeleton argument that Orange served, that BT was obliged to convey calls and terminate them on Orange's network under the standard interconnect agreement. That is not right and, indeed, it is quite interesting, that no provision has been pointed to demonstrating that BT actually has to terminate these calls, because there is a difference under the standard interconnect agreement between linking the two systems up and then obviously passing the calls along between the two systems. The obligation for the carriage of the calls of course comes under the end to end connectivity obligation and that is the obligation that forces BT to have to carry the calls and not the interconnect agreement itself. It goes back to the point Mr. Roth was making earlier on, that there plainly was an obligation imposed on the parties here because BT were subjected to the end to end connectivity obligation and that – and that alone – is the reason why it was having to convey the calls to be terminated on Orange's network.

Can I then briefly turn to the Directives, and say looking at this overview of the commonsense approach to it, is there anything in the Directives that suggests that you have to adopt this formulaic contractual analysis that Orange put forward for saying that this is the correct way to define "dispute" in s.185. The starting point we would respectfully submit, is the point that is made in para.11 of BT's skeleton argument, that you cannot circumscribe EU law by national law – I think that is a fairly basic proposition, that the law of the Member State cannot constrain a Directive or something like that by the way it incorporates international law. We say that if that is right then it must be even more forcefully wrong to allow the obligations and the responsibilities under European Directives to be constrained, not by the national law itself, but by the national law of obligations, because Orange's argument, because it comes down to this formulaic analysis of the contractual relations between the parties is going to be dependent upon the precise nature of the law of obligations in the particular Member States. Thus, for example, I think one can use perhaps an example from the UK, namely the way you seek to vary a lease that is for over three years. If you seek to vary that by reducing the time to less than three years, actually what you get is not a variation but a forfeit of the first lease and the incorporation of a new lease. So you do not end up with the variation you actually, because of the nature

of the legal obligation, end up with a separate new lease being generated. It cannot be right, BT says, that you should end up having for Ofcom to determine this on the basis of the peculiar quirks of the law in question, be it under English law, be it under some other national law. So we say as a starting point it would be an extraordinary situation if the effect of the access and the Framework Directive were to effectively constrain the definition of dispute by reference to a particular obligation under a Member State's laws of obligations and we say that cannot be right as a matter of construction.

I will deal very briefly with the Access Directive because I do not really want to take up a huge amount of time given the way that Mr. Roth has put it in his oral submissions. If I can just ask you to turn briefly to the Access Directive which is at tab 10 in the bundle starting at p.204. As I said, I will not go through all the provisions that have been discussed, but I would make reference to one or two of them just to make the point further.

> If I could ask you to look at Article 2, which is on p.208, this gives the definition of access. "'Access' means the making available of facilities and/or services to another undertaking under defined conditions on either an exclusive or a non-exclusive basis for the purposes of providing electronic communications' services."

We say using the words: "under defined conditions" indicates that you do not just look at whether there is an agreement to interconnect, but the conditions also under which that interconnection is to take place. We say that is further mirrored when you look at Article 4(1) which again makes reference to ----

THE CHAIRMAN: So you construe "conditions" there as meaning contractual conditions in effect, rather than physical or technical conditions?

MR. READ: I think that must be right, and it is certainly right when one comes to look at, for example, Article 4(1), where they talk about terms and conditions consistent with obligations. "… access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority."

So the point that I seek to draw from those two points is the fact of whether parties are interconnected or not is not the only thing that one has to look at when one is considering the Access Directive. The access directive is plainly contemplating that you have to consider the thing in the round, if you like, subject to the terms and conditions upon which it is being conveyed. So it is not simply enough to turn 'round and say:" Oh, well you've got your interconnection agreement, that is it, you do not have to look at the terms and conditions."

THE CHAIRMAN: The provision that Mr. Roth and you have referred to, s.185(viii)(a) ----

MR. READ: Were in the same year as that.

THE CHAIRMAN: You would say from the Directives that is where that comes from, or is there a more direct reference?

MR. READ: That is certainly no reason of where it must be being picked up from, because if you remember if one looks very briefly at s.185(viii) where it is talking about the provision of network access, disputes as to the terms or conditions on which it may be provided in a particular case. We would suggest that that is where the wording is being picked up from form the Directive.

If I could just briefly touch on Article 5(1), we say again if you pose the question: is there anything in there that suggests that any dispute resolution power should be constrained, we say there is not. There are particular points drawn out in Article 5(1) but there is nothing specific in there that constrains in any shape or form the issues between the parties in respect of a dispute then potentially arising under Article 5(4). So again we say that there is nothing in Article 5 that says in terms: "Yes, you have to look at the contractual relations between the parties." If that was the case, if the case was to be that in looking at a dispute you only had to look at whether or not there was a physical interconnection agreement going on and not necessarily the terms and conditions involved, then you say Article 5(1) in particular would be drafted in a different manner to reflect that and it is not.

THE CHAIRMAN: I do not think that is the case that orange are making, that all that matters is interconnection regardless of the terms and conditions. I think the point is rather the initial terms and conditions set when interconnection originally agreed one can assume are reasonable terms and conditions because they have either been settled by commercial agreement or they have been referred to Ofcom and settled through that. So as the background you have not just an interconnection facility but one which is on reasonable terms and conditions and as that continues through and may be varied, or may not be varied, nonetheless the parties always fall back on something which, at least when it was originally agreed, was reasonable in terms of not just the fact of interconnection but the terms and conditions as well.

MR. READ: But I would respectfully submit that the answer to that point is that, as the Director fully recognises, the telecommunications' market is a fast moving market and therefore it would be somewhat extraordinary if they were contemplating the idea that the terms and conditions once they have been initially agreed must continue throughout and, indeed, we say that that is what Article 4(1) is effectively saying in terms, offering access and

interconnection to other undertakers on terms and conditions consistent with the obligation imposed by the National Regulatory Authority, and it has to be obviously terms and conditions that take account of the market that is there rather than the market that was there in 1996 or whatever year one is looking at. That is why we say Article 5 is not explained in the way that is now being put forward.

Can I also make the point – I am grateful to Miss Demetriou for saying that we have correctly characterised the effect of the decision of *Telefónica 02* in our skeleton argument. Yes, we accept that it is not absolutely all fours on the point, but we do say that it gives a fairly good steer on how the ECJ has approached this question, and the fact that nobody else has come up with this suggestion that in fact a variation over terms of the agreement can be a reason for removing any dispute resolution is important. Of course we accept that it was relating to the provision of a different service, but that does not necessarily make it completely distinct from the situation we have here because there obviously was an ongoing interconnection contract, and I know Miss Demetriou tries to distinguish that by saying this was about interconnection on those services, but we say that is not quite far enough for her to say that that case has no bearing on the point that we are actually dealing with here.

I do not, as I say, want to go into any real greater depth on the Directives because Mr. Roth has dealt with them at some length.

Can I turn now to Ground 1(b) and really I am concerned about the way it was put. It was put in the space of 15 minutes, but it was still put, and cannot but be put on the basis that under the terms of the contract there was no longer a live dispute. However one dresses it up one comes back to the unfortunate fact that you have to reference to the contract itself to determine whether or not there is a dispute.

Now, we say that that is wrong for a whole series of reasons, because we say first, and most importantly, there is no need to get into an overview of the contractual relations of the parties because the statutory meaning of ‘dispute’ is so clear cut.

However, given that it is still raised against me I really feel that I am in a slight quandary about whether or not I declare the full force of my arguments on the fact that there plainly was a dispute still under the contract, it was still, to use Miss Demetriou’s word, a ‘live’ dispute.

Madam, I stand in your hands to this because it is, if you like, at the end of the arguments, and one only gets there if the Tribunal was to make a finding that the definition of the word “dispute” involved a consideration of whether there was a dispute contractually between the parties, and in effect that if there was not a dispute under the terms of the contract then there

could not be a dispute for the purposes of s.185. I am happy to develop those arguments, we have put them in an appendix, but they will take some time, if you want to do that.

THE CHAIRMAN: I cannot give you any indication, Mr. Read, as to whether you need to rely on this point or not, however the evidence, as I understand it, is not contested in that Orange have not sought to cross-examine your witnesses, so you must develop ----

MR. READ: There are a number of subdivisions to this because the first point we say is that the construction of clause 13.7 does not have the meaning that Orange contend it has. That obviously does not depend on, in effect, any real evidence at all, it is a question of straight contractual construction. The points on estoppel, as we say Orange must have been in breach of contract if their argument holds good that in effect time is of the essence in clause 13.7. We say that is more fact dependent, but it is something that obviously Orange have always been aware of and that, as a result, we are perfectly in a position, if they wanted to address the point, to have put evidence in in reply and prepared it long before they received our evidence. The evidence we have is primarily reference to the documents anyway, so it probably does not take the matter a huge amount further in any event.

Can I very briefly then run through these arguments – I will try not to take up too much of the Tribunal's time on it, but I do want to deal with the construction of clause 13.7. For the contractual dispute to be live – or put the other way, for the contractual dispute no longer to be live under the contract it requires the time under clause 13.7 to have been of the essence. So in effect BT have lost any contractual right it had to refer the dispute because the time limits set within 13.7 are of the essence. So that is the starting point. BT says: "No, it is not."

The problem with the approach that Orange take to clause 13.7 is that if you say "Time is of the essence for the one month referral period to Ofcom, which is the point they take against us, we have not referred in one month and therefore there was no longer a referable dispute under the terms of the contract, the problem with that is that if that time is of the essence it also means the period for negotiation must be of the essence as well, because you could not have a clause like 13.7 when you were making the month period for referral of the essence without also having made the immediate preceding time period of the essence as well.

So not only – if they are right – is the one month period of the essence, also the 14 day negotiating period, and that of course would have all sorts of horrendous problems. The starting point – there should be a second bundle of authorities, because we were not sure how far we needed to delve into this and so if I could take you to that second bundle, and the first document there at tab 1, is s.41 of the Law of Property Act 1925. One might think

that this is a slightly odd place to have a provision about contractual time provisions, but in fact it was to do with the differing approaches of law and equity at the time.

As you can see in s.41:

> "Stipulations in a contract as to time or otherwise which, according to the rules of equity, are not deemed to be or to have become of the essence of the contract, are also as construed and have effect at law in accordance with the same rules."

So the starting point is that unless equity considered time to be of the essence then time was not deemed to be of the essence regardless of what the position may have been under the common law prior to that.

The position is summarised quite helpfully in the House of Lords' case of *United Scientific Holdings v Burnley Borough Council* which is tab 4 in the bundle. This was a landlord and tenant rent review clause and it turned upon the issue of whether or not a particular provision for rent review was at the time of the essence, so that the opportunity to review the rent was effectively lost. In the course of the Judgment one of the issues that arose was what the position would have been in equity prior to the passing of s.41 of the Law of Property Act. If one turns to p.16, at the bottom of that page Lord Diplock discusses the rules of equity and at the bottom:

> "The Court of Chancery had reached this position in relation to contracts for the sale of land by extension of Lord Eldon of the earlier document and the stipulation of the time … mortgagor … was not of the essence of the contract."

Then, I am sorry I have got my references wrong, perhaps I can ask you, because it is cited at p.19, para.3 of the appendix to BT's skeleton argument, which is at tab 6. At the bottom of that page (p.98 in the bundle) the words of Lord Romilly were accepted in *United Scientific Holding* to the effect that:

> ".. time is to be the essence of the contract … only in cases of direct stipulation or necessary implication. The cases of direct stipulation are, where the parties to the contract introduce a Paragraph expressly stating that time is to be the essence of the contract. The implication, that time is to be the essence of the contract, is derived from the circumstances of the case …"

So that is the starting point, and the starting point, we say, with 13.7 is of course that there is no specific express clause making time of the essence as you would find. So the only issue then reverts to whether or not there is something to be implied from the terms of standard interconnect agreement that says that time should be of the essence.

Returning to the authorities' bundle, if one looks at page 14 ----

THE CHAIRMAN: If time is not of the essence in making the reference then what is the effect legally of having a deadline for making the reference?

MR. READ: There could be a series of reasons why that is the case. One immediately thinks of the question of interest, because it could no doubt be said "You failed to make the reference within time, now you have your determination you cannot now turn round to me and say that I should pay interest for the entire period because you yourself have sat on this matter for so long before referring it on. If one had a price rise, for example, suppose it was the other way around, that Orange were asking BT for a higher price, BT delayed in referring the matter to Ofcom and the determination was therefore delayed by a set period, I have no doubt that Orange, if they were sensible, would turn round to BT and say "This does not impact on interest. Why should we be paying interest at what is a fairly high rate under the interconnect agreement when you have not followed through the prescribed time period within the contract. That is one reason why one obviously ----

THE CHAIRMAN: Does it mean that it is a breach of contract for BT to refer the matter to Ofcom?

MR. READ: It could potentially mean that it is a breach of contract, the consequences of it though would probably not be great.

THE CHAIRMAN: Because the difference between time being of the essence or not affects whether it is regarded as a repudiatory breach to make the reference.

MR. READ: Yes.

THE CHAIRMAN: So by saying time is not of the essence, you are saying it could not be treated as a repudiatory breach of the contract by Orange, but they are not trying to treat it as a repudiatory breach.

MR. READ: The short answer is that it could become a potentially repudiatory breach if someone makes time of the essence, but the way you make time of the essence is to serve a notice saying: "You are in breach of the time period under clause 13.7 if you do not do this within …" and then you specify a particular time period, "… we will treat this as BT being in breach of contract."

THE CHAIRMAN: But I am still struggling with why it matters, given that it is a term of the contract, putting aside all the points about has it actually been varied or estopped by convention or whatever, just looking at the terms of the contract it says that the reference must be made within a month. If the reference is not made within a month what is the effect of that if the effect is not, as you claim, to deprive Ofcom of jurisdiction. Then it seems that there is no legal effect of putting that deadline in?

MR. READ: The position would be no different to me telling someone that "I want my building finished by 20th March" and by 20th March they had not finished that building. There would be a breach, query whether or not it would give rise to a right to terminate it until you had served your notice making time of the essence.

THE CHAIRMAN: But even if it is "time of the essence" you can decide not to terminate, but nevertheless, if it is a breach of contract you have your cause of action in damages, and that is where I am trying to explore where this goes. If it is a breach of contract to refer the matter to Ofcom out of time, or beyond the deadline, what then is the remedy for that breach?

MR. READ: As I have already indicated there may be financial losses that could be attributed to it, interest would obviously be one area that you could say that you have effectively lost interest, that you suffered a differential between the interest you would have earned and the interest that you are now having to pay under the contract for effectively back payment. You may be able to point to other forms of loss that you suffered as a result of the particular failure to comply with this. Of course, there will be many contracts where you have time periods prescribed within them, but the consequences of failing to comply with those time contracts are negligible and therefore one might say what is the purpose of having those time periods in there. But the short answer, I think, is if you have a time period it does actually define at least an initial period by which the parties should try and do something and if they fail to do it it gives rise to the consequence of a breach should the party suffer loss, or if the party wishes to act upon it to make time of the essence, and thereby force the other party into doing it, which you would not of course have if you did not have the time limit in the first place. I think that is the answer we would say to that.

The key point about it, we would respectfully submit, is that is rather putting the cart before the horse, because it is Orange who have to make the case for saying time is of the essence under clause 13.7 because if it is not of the essence then the ability to refer the dispute to Ofcom is not extinguished by the contract.

THE CHAIRMAN: That is the point I do not understand, Mr. Read, because you are making a point that the deadline in 13.7 should not be taken at face value, if I can put it like that, because of the way the parties have behaved and the way the industry now works, nobody regards that deadline as still binding and I can see that point.

MR. READ: I do not put it quite that way, I put it first of all by saying that the contract itself when properly construed does not require and have the effect of extinguishing the right to refer to Ofcom, simply because the one month period has not been met. The secondary

point is that you have to look at what the parties in the industry are in reality doing, and that in turn may well give rise to an estoppel or something like that. I am certainly not going as far as saying that you can construe this contract by looking at what everybody is doing in the market place; I think that would be a proposition too far. I think there are distinct legal principles: (i) is time of the essence? (ii) if it is of the essence is there some other principle operating to prevent reliance at this stage on time being of the essence.

THE CHAIRMAN: And by saying that the question is whether time is of the essence or not, what you mean is not whether it is in the old nomenclature of "warranty" or a "condition" or anything like that, it is to do with the effect of not complying with it is to extinguish the right or some other different effect.

MR. READ: Yes the "time of the essence" is, if you like, a principle of the contractual construction that you have to apply to clause 13.7 in determining whether it has the effect that Orange now contend of effectively extinguishing any dispute under the contract, because that is really where they are coming from, they are saying that the dispute is not live because it is being extinguished, the contract has killed it. Now, in order to be able to demonstrate that you have to demonstrate that that one month period has the draconian effect of completely extinguishing any right that BT would have had to refer the matter to Ofcom, and the starting point for doing that must necessarily be to say "Is that one month period of the essence?" to which BT says the answer is quite clearly, if you comply normal contractual principles "It is not of the essence" and what is more we go further and say that if you look, for example, on the situation of referrals to arbitration, if the result intended is to actually exclude any right to refer to arbitration then you have to have very clear words to that effect and if there is any doubt about the matter, any ambiguity then it must be construed in favour of the party wanting to refer, i.e. that the right is not extinguished. That is how we say, but obviously the starting point with it has to be whether or not time actually can be said to be of the essence when you are looking at clause 13.7.

THE CHAIRMAN: Yes, thank you, I understand the point now. Thank you.

MR. READ: Madam, I think I have set out in paras. 4 and 5 of the appendix the cases we rely upon. I would make this point though, when you look at those cases and in particular the decision of Mr. Justice Donaldson as he then was, in the *Bunge v Deutsche Conti* case, which was the arbitration case, you see the type of very clear words that are expected in a clause if the effect is going to be to remove and restrict the opportunity to take the matter further, and 13.7 does not have anything like that and it would be very easy, we say, to put

words in to the effect "and if BT does not pursue the claim within the one month period all rights to refer the matter to Ofcom are extinguished", or a clause to that effect.

There is nothing, we say, in clause 13.7 that suggests that the periods must be strict. Indeed, to the contrary, we would argue the fact that you have only set a 14 day period for negotiation demonstrates that when the time periods were being included they plainly were not being considered of the essence because 14 days for any form of commercial negotiation is an incredibly tight time period, and it would be in our respectful submission an extraordinary situation that the SIA should have contemplated the fact that unless you have completed the negotiation within 14 days that is effectively the end of the matter, and you are on to the next stage which is the referral of the matter to Ofcom. So we say that that is a very good reason for construing clause 13.7 as not having the effect that Orange now say, and we cited in para.7 of the appendix *Wickman Machine Tool Sales Ltd v L Schuler AG* which is the one that makes it clear and again it is a fairly standard contract construction case - that the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties cannot have intended it, and if they do intend it, the more necessary it is that they should make those intentions abundantly clear.

THE CHAIRMAN: If you are right asserting that Point 7 - failure to comply with a 13.7 deadline does not extinguish the right to refer the dispute to Ofcom - is the right ever extinguished? Or, does it remain open indefinitely?

MR. READ: One of the problems I have with this, of course, is that I say we are into an argument that I just do not agree with because, of course, we say that you do not construe s.185 by reference to it. But, we say that if you are in that argument, then the short answer by normal contractual principles is that, yes, you could get it extinguished, but the way you would have to do it is to have to give effectively an ultimatum to the other side in order to make time of the essence, and then only at that stage would you be in a position to say, "Well, you have lost your right to take this matter any further".

THE CHAIRMAN: Is there any indication in the contract about giving notice to make time of the essence, or is that a right that the parties automatically had?

MR. READ: It is a standard right under a contract that a party would have where you have a clause that time is not of the essence, to make time of the essence. So, to use my builder's analogy, if you said to your builder that the work had to be completed by 1st February and you did not impose anything further - like liquidated damages or something of that ilk, then your remedy would be to send him a letter on 2nd February, saying, "You haven't complied

with your time period. You must do this within a reasonable time, and if you do not, the contract is at an end", or whatever. So, that is how you would deal with Clause 13.7 in this situation.

I am afraid I am not going to complete all the arguments on this point tonight.

THE CHAIRMAN: We will break now and reconvene at 10.30 tomorrow morning.

(Adjourned until 10.30 a.m. on Wednesday, 12th November, 2007)