IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1047/3/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

26th May 2005

Before:
THE HON. MR. JUSTICE MANN
(Chairman)

MR. ADAM SCOTT TD
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Applicant

Mr. Peter Roth QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

Transcribed from tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

HEARING DAY FOUR

THE CHAIRMAN: Mr. Barling?

MR. BARLING: First, one matter of housekeeping, in response to Mr. Scott's questions yesterday we have produced a piece of paper which I hope will be helpful, showing the rate that BT pays for call termination over various mobile companies and the carrier price list [CPL] on May 25th. It looks, I understand as though this is a straight average rather than with any weighting. You will also perhaps note that we have corrected what was a typographical error in the H3Grate as set out in Mr. Locker's witness statement. I think that said 8.63 whereas it is 9.63, and that has been corrected in this table. I understand that Mr. Green's instructing solicitors have carried out a similar exercise to explain the weighting, how they get to the figure that is in the papers.

MR. SCOTT: Yes, indeed.

MR. BARLING: I do not know whether Mr. Green wants to put that in now, or whether it is already with you.

THE CHAIRMAN: We have already got it. I think we asked a question, I am not sure we are much better informed, but we are slightly better informed. I confess that we are puzzled as to how a competitor can extrapolate any useful information from the double digit number which has been given, but we need not get into that, but we have it and thank you very much.

MR. SCOTT: Our concern, Mr. Barling, as you appreciated yesterday, was to know which figures were in the public domain which we could therefore quote in an unredacted judgment.

MR. BARLING: I quite understand – these figures are quite quotable.

THE CHAIRMAN: Thank you. Mr. Barling, before you move on to your table, we have all done our homework ----

MR. BARLING: Thank you very much.

THE CHAIRMAN: And like recalcitrant schoolboys we are slightly puzzled as to why we have done our homework, because we are not sure why we are still going into the then, as opposed to subsequently for these purposes, bearing in mind where we think the case is and where the state of the evidence is. The position is that we read the witness statements, and then we read the documents which are summarised in the witness statements, and now we have read your document summarising the documents that are referred to in the witness statements. We know the story and we can see there is a dispute between the parties as to whether "interim" means "interim", which is all very interesting, but we are not sure that it is really going to take us very much further. I am not stopping you from dealing with the point, but I think we would like this to be short and snappy unless we are missing the point and there is some point that we need to

get hold of in relation to this bearing in mind where the history is in relation to this appeal, which is history.

MR. BARLING: Can I just try and deal with that?

THE CHAIRMAN: Of course.

MR. BARLING: I think you may well be right about the level of importance of this, other than as a pure matter of *amour propre* for BT which is obviously not what the Tribunal is concerned with. There is perhaps this too, Mr. Green's clients allege that Ofcom were wrong in a sense to treat the 2001 negotiations in that period as irrelevant and any countervailing buyer power as irrelevant in that period, and that was one of the allegations that they made and persisted in as far as I can see throughout the Notice of Appeal, replies and skeleton arguments. Mr. Green has said, certainly, that he does not think that you need to make any findings about that, but it may just be that perhaps whilst not needing to make any findings about it, you may need to have it in mind as important background, not least because on one possible eventuality, namely if you were to accede to Mr. Green's arguments it may go to the question of remedies. For example, if the issue of remission came up it may be important to know if there is any point in remitting anything to Ofcom to investigate about the 2001 negotiations, and you may have formed the view that there is not, and it therefore affects what you would do about remedies. That is just one example. If you took the view that there was no point because the facts were pretty plain from the documents then that may be one way of cutting through what would otherwise be a pointless remedy.

It is very hard, in a sense, at this stage for us, given the range of arguments and the criticisms made by H3G of Ofcom's decision quite how you will ultimately conclude on these matters, and so there has been a lot of evidence about the negotiations. If you ultimately conclude that they are relevant and accept Ofcom's submissions on that then perhaps the least said soonest mended type of approach; but if you feel that they are not then you might be glad that you have explored it rather than then having to say we should have perhaps looked at it a bit more. That is the only caveat I would make, and I take on board in any event, given your level of reading in and what has been said already, that I should be extremely brisk, and I do not propose to take more than, I hope 10 or 15 minutes, just going very quickly and making some comments on the note and on the way things panned out. It does lead to some extent into other issues, countervailing buying power at a later stage – one cannot completely divorce the 2001 negotiations, you may think, from what the position was later, if only by way of contrast.

THE CHAIRMAN: The only trouble with that is that that does not seem to have been part of Ofcom's reasoning. The reasoning in the Decision on one reading is that there may or may not

have been countervailing buyer power up until the date of the BT Agreement, which is all very interesting, but it does not matter because we are looking forward and we think that looking forward countervailing buyer power is less … for these reasons, and these reasons do not include the facts that emerge from the negotiation. If that is Ofcom's case and how they put it (and how they do not put it) then for my part I am not sure why BT is making more of a meal of it, and I use that as a shorthand, that is not a criticism, Mr. Barling, why they are making more of a meal of it than Ofcom is minded to and I think ultimately than '3' is minded to. '3' is happy to say they did not do enough for the later period.

MR. BARLING: We are entirely in your hands. The last thing we want to do is make a meal of anything, particularly if the two major parties have not done. There has been, however, it has to be said, in the Notice of Appeal and left in the amended Notice of Appeal, very significant slanted complaints about BT which ought, in a sense, at least to be given the opportunity to comment publicly on them, not just in the documents.

THE CHAIRMAN: That is the *amour proper* point.

MR. BARLING: It is the *amour propre*, but it is important because it is in the formal pleadings and if it is wrong or misleading then it may be that it is proper that the Tribunal should be aware of that as part of the general background to the case.

THE CHAIRMAN: Well, Mr. Barling, just give me one moment.

(The Tribunal confer)

THE CHAIRMAN: Mr. Barling, I am not going to stop you but I do think that briskness is ----

MR. BARLING: Briskness is the order of the day.

THE CHAIRMAN: -- the order of the day.

MR. BARLING: On this point.

THE CHAIRMAN: On this point – well, on everything would be helpful.

MR. BARLING: I cannot be too brisk.

THE CHAIRMAN: But certainly on this point and do what you think you have to do on *amour propre*, but please, no more than that otherwise we will be here for quite a long time.

MR. BARLING: I am certainly not going to detain you on this point for very long. I can do a lot of it by references, just by giving you the references.

THE CHAIRMAN: Yes, well if you would like to do that then they will be read into the transcript, and you can be confident that we will follow them up.

MR. BARLING: Yes, to the extent that you feel it is necessary.

THE CHAIRMAN: Well I think if you point us to something you can be confident that we will look at it ---

MR. BARLING: Can I start by saying that really the only bit I need to draw your attention to so far as the remarks about BT are concerned, are in the summary of the negotiations with BT and they can best be seen in one main paragraph and certain subparagraphs. The main paragraph is para.6.10 of the Notice of Appeal, which is C1,tab 1, p.35. It is these criticisms, and inferred criticisms that one would ask you to bear in mind when you have looked, and look at the documents dating from the time of the negotiations. You will see that it is split up into subparagraphs (a) to (k) and includes, for example, in (d) remarks – I do not see how this is a business secret so I am going to mention it:

> "(d) [negotiating a new charge band would have met with delaying tactics from BT including a possible reference to Oftel].
>
> (e) [the Appellant's only course (was) to agree rates quickly."

Then (g):

> "(g) [BT initially acceded to that approach but later backtracked and rejected the Appellant's proposal requiring it to agree a single contractual rate].

(h) – the word "insisted".

> "(i) "BT threatened to delay the process (including a reference to Oftel) and (threatened) to require sensitive information to be put before its Pricing Board if the Appellant did not propose an existing 2G … rate]

(j) the Appellant had no choice but to concede; and "(k) [the delays in the negotiation put back the Effective Date." That is clearly an inference there that those delays were caused by BT's behaviour we submit.

We would say that those are mainly the allegations to which BT has taken exception. One can see, when one looks at the actual documents, which you now have and many times now by the sounds of it either directly or indirectly, and you have our note summarising them, I hope fairly, and I will just whisk through that, if I may, because we submit that the actual facts present a very different picture from what is in para.6.10 of the Notice of Appeal. One bears in mind, on the first page going over to the second page of our note that there was not just the ordinary confidentiality agreement, but there was a side letter – H3G wanted extra specific protection and they got it, for any information, and information always has to be revealed on both sides in an interconnection negotiation. BT has to give information to all interconnecting parties, so there is nothing surprising about that.

We would say then, if you run down the second page of our note, that all the initiative was coming from BT, it was all in one direction, trying to get the negotiations up and running, not just for the agreements (the technical side of the agreement) but also for the price

negotiations. That started in February through to April, and in April Mr. Locker was suggesting that there would be a workshop to discuss pricing – "do let BT know when you are ready, perhaps when you have an Interconnect Manager on-board", so there was no one there at that stage in April with whom he could discuss pricing. Then three months passed – three months – to the next significant event. This is all in action on H3G's part. Then at the next meeting in August 2001, you see the note, there is an action statement:

> "H3G and BT to agree 'interim' pricing for testing phase – No progress made, awaiting input (pricing proposal) from Richard Rumbelow, H3G/commercial."

Still BT are offering a workshop to try and initiate the process, and BT at that meeting, as it says there, expressed concern at the level of interaction and support that they were getting from H3G and without more of that the matter would be delayed, and H3G were promising to escalate the matter within their organisation. Then we have the agreement made in August – next meeting in September. If one goes down to the very bottom of the page there is another promise from H3G that they will escalate the issue within them to ensure that progress is initiated. As you see a little bit lower down:

> "Although this has not been possible because of the need to include pricing, BT have made available the International contract for preparation and inclusion."

There is some suggestion that it has been escalated to Director level, and again there is a Workshop offer on pricing.

Then if you go down to 3rd October, bottom of the page: "A pricing proposal has been agreed internally", so still that proposal has not been put to BT, we expected it to be ready at the end of October and it was not ready at the end of October as, sir, you will have noted. Mr. Locker, or BT, are still really trying to push this process forward.

Then if you go to the 23rd you will see that there was an initial confusion on Mr. Locker's part about whether they needed an OCCN at the beginning, or they needed just simply a pricing letter and he explains on 23rd October that the OCCN comes when there is a change in the originally agreed price, and H3G understand that because they say how could it be otherwise? You cannot change something that has not yet come into existence, but the timescale is the same, similar. Then interestingly on 29th October H3G are saying "our lawyers want to know what the hurry is. We are required to justify to our lawyers why there is a pressing need to settle the Interconnect Charge". This is extraordinary given the eventual complaint that BT was somehow delaying this. Still there has not been a proposal from H3G. Then there is some clarification about they can do it by a pricing letter they do not need an OCCN process, and Mr. Locker then explains exactly what the position is telling them what to

do and by when, in order to have the charge set up in time for H3G's self-imposed timetable.

Then 6th November there is more discussion about the timing, and launch pricing and Mr. Locker then apologises for any confusion he caused about OCCN's as opposed to an initial charge, but he had already cleared that up, as you saw, two weeks before on 23rd October in the phone call.

Then there is the internal document, and I just make one or two points later about that. I know you have read that several times. I will not trouble you at this moment with that, so we can pass over the internal document and come on to the document at B1 tab. 25, which is the first proposal made, although as you have seen from this we have been asking them for a proposal really from April, and you know the history after this point. It is not an outright rejection, contrary to the way it was put by Mr. Green the other day. It was, as becomes quite clear, saying if you are going to have that price – which is actually a one off price to a special non-public mobile operator – you are going to have to provide us with some reasons. It was not an outright rejection. There was an express offer to continue to negotiate about it. Then there is suddenly a change of attitude by H3G. Their opening offer has not been immediately accepted, and they suddenly start talking about timing, if you look at the bottom, the last entry, of document B1 30.

> "I am also disturbed that you believe that we have weeks to conclude a rate with BT. Interconnect testing is a crucial milestone on our launch roadmap. By rejecting H3G's proposal, BT has already jeopardised the agreed testing dates. In order to minimise risk of further delay, we will need to reach an agreement in a very short period of time."

Then you have the most extraordinary behaviour by H3G at this point. Having said how urgent it is, BT then tells them that if they want to get an agreement by 17th December, which is probably when they need to get it by, can they have a pricing proposal (bottom of the page)? Then you have the most extraordinary behaviour by H3G at this point. Having said how urgent it is, BT then tells them that if they want to get an agreement by 17th December, which is probably when they need to get it by, can they have a pricing proposal at the bottom of next page, under the heading "Process", but that is just ignored, no pricing proposal comes, no further proposal comes by that date, or attempt to negotiate. Mr. Locker reminds them again, in B1, tab 32, on 10th December that he really needs it by that day if he is going to keep to that schedule. Still therefore BT trying to keep them up to their own timetable. There is nothing at all from them, they ignore that completely until, extraordinarily, Christmas Eve, they post a letter (24th December) on Christmas Eve. It is postmarked actually 28th December, so it does

not actually get dealt with until 28th December in the post. It arrives on 4th January, for all we know with probably second class post as well, and they have the cheek to put in it, as you see at the top of the next page:

> "Due to the delays that have already been placed on this process, I expect that BT will give this proposal its immediate attention."

So it really is quite the most extraordinary approach to someone who is saying that they are in a hurry and need to get this done urgently.

Mr. Locker's reply on the 4th confirms receipt, and then again on the 10th, is remarkably restrained I would have thought. He says that he is doing everything that he can within BT for a "speedy decision." In fact, as we know there was then an agreement reached within three weeks or so of that belated offer. So that is really all I need to say about the process, but if I may contrast that with the picture that is painted in para.6.10 of the Notice of Appeal, and in a great deal of Mr. Westby's evidence, we would invite the Tribunal, if it ever needs to come to a conclusion about this or to comment on it, that the picture painted in the Notice of Appeal is not an accurate picture, or a fair one, and that BT were in fact bending over backwards to help the new entrant. In fact, there were good commercial reasons for BT to do so, they had pressures of their own, they had their obligations under the Interconnect arrangements, but also as Mr. Locker says, BT regarded H3G as an important and a big new potential client.

Sir, Miss Laurent's evidence has already been commented on by Mr. Roth, and if I can just give you the references to our skeleton argument, where we deal with her evidence.

MR. SCOTT: Just one small point. You took us to the agreement being made on 29th January 2002. In Mr. Green's subparagraph K ----

MR. BARLING: That is in his Notice of Appeal?

MR. SCOTT: Yes, 6.10(k), a different date ----

MR. BARLING: Well that date there is probably the date on which they were able to commence operations, because remember there was a time lag. If you put yourself on an existing price point it was 40 days. I am not quite sure when the 40 days started running, whether from the pricing proposal, or from the agreement.

MR. SCOTT: I see, so it is the effective date in the relevant agreement in (k) as distinct from the effective date of the relevant agreement.

MR. BARLING: Effective date in the relevant agreement, yes. I think effective date is probably a term of art. The proposal was accepted so in that sense there was an agreement on 29th January. That resulted in, I suspect, the effective date being 25th March for operations.

I suppose that is an operational date – someone is nodding to me. If I could give you first of all the references to our skeleton argument where we deal with Miss Laurent's evidence. I feel perfectly well able to do very much as one would in a judicial review by way of comment – no one is suggesting that she is not a witness in good faith – paras. 46 to 47, 55 and 63 to 67 in our skeleton argument. Also, Mr. Locker's third witness statement at bundle D1, tab 17. With respect we very much endorse what the Tribunal Chairman said about being able to decide what weight to give to the matter as opposed to any question of any truthfulness, which is not called into question.

Our brief submissions are that Miss Laurent's evidence does not support the view of a small network driven to various decisions by a bullying bigger network. On the contrary, it shows H3G taking pragmatic decisions based on ordinary commercial considerations, and to this extent it tacitly confirms the internal H3G pricing paper, from which we would invite the Tribunal to note that there is not one iota of criticism of BT's approach.

PROFESSOR STONEMAN: Mr. Barling, can I just raise one issue? One thing that fascinated me in reading these documents about negotiations between BT and H3G was that at one stage BT says to H3G "Tell us your costs to justify your prices". Why is it BT's function to act as the regulator?

MR. BARLING: It is not acting as a regulator. All it is doing, as I read it, is saying "We ultimately have to justify what we pay you to our retail customers" and on the face of it there seem very good reasons why you should not get that rate that you have asked for, the Dolphin rate." It is the highest one, it is a one-off rate given to a small closed circuit tetra, a different technology operator. It is way out of line with the rates given to the 2G operators, and "therefore it is open to you to tell us why". With respect, sir, they were not seeking to impose anything, they were simply saying "We cannot really, in fairness, just give you that as a present and then pass it on to our retail customers". We have to have some justification for doing that. I think it is more of a pragmatic commercial matter. BT could say "We pay them a different rate because they have very different and higher costs."

PROFESSOR STONEMAN: It is, in fact, in terms of informing your customers so you could have passed on this cost information to your customers: "We cannot have it but the customers could have had".

MR. BARLING: I do not think that is in the evidence, but what is in the evidence is that one of the BT reasons have been very careful about this was because of the knowledge that it has the power simply to impose this on its retail customers, and ultimately would have to justify it to them, or in a sense to the proxy of the regulator, for example, or someone, or the consumer

bodies who would say why on earth is BT giving this special rate? And given as well the transparency of the rates that has to be made available to the public through the carrier price list, so we are in a rather tricky position in that way.

Miss Stevens has just pointed out to me at A1 p.247 you can see that agreement, the 29th January agreement. There was actually an agreement called "The First Supplemental Agreement". I expect if one delves into it one finds something called "The Effective Date", but I will leave that for a moment, I do not want to take too much time up on that.

Finally on Miss Laurent, we draw attention, as I have said, to Mr. Locker's third statement D1 at tab 17 where he states that Miss Laurent's fears about the uncertainty caused by serving an OCCN were really unwarranted and also her fears about upsetting BT if they served an OCCN.

Sir, the internal paper (the H3G paper) demonstrates that BT was actually advising H3G how to go about serving an OCCN. We would submit there was nothing really there that would give cause for H3G ever to think that they would, as it were, affect their relationship if they were doing that, and we would say that the evidence of Miss Laurent really does nothing to promote H3G's argument about countervailing buyer power.

What I would like to do now, having really finished with the evidence as such, I would like if I may to hand up what is an index of the evidence on various topics.

THE CHAIRMAN: We have been given an index.

MR. BARLING: I am not proposing to take you through it, it is just if you say what was the evidence on that issue, I hope that that will provide you with some guidance to it.

THE CHAIRMAN: This is "Index to evidence concerning negotiation between H3G and BT leading to the Agreement"?

MR. BARLING: Indeed.

THE CHAIRMAN: We have that.

MR. BARLING: Thank you very much. May I now just summarise what we submit would be the main factors that would have to be considered in relation to any consideration of countervailing buyer power on the part of BT? I am not suggesting that you need to make findings and that is very much, I think, depending as we said on the way that the Tribunal decides to approach the case. We are not urging you to make any findings.

THE CHAIRMAN: Is this CBP in the period leading up to the negotiation or subsequently?

MR. BARLING: It is really covering everything, before and after. Specifically at the time of the original BT Agreement we obviously draw attention to the BT's regulatory obligations under the old regime. It is accepted by everyone now that that meant that there was every

conceivable power that was necessary in order to enforce interconnection, end-to-end connectivity and so on. Everyone seems to accept that they are helpful extracts from the relevant legislation, our licence conditions, and in particular the Interconnect Regulations 1997 implementing the former Interconnect Directive; and the licence conditions that were imposed on BT in order to implement those obligations, legislative obligations. Those are all set out in the annex to our skeleton argument. I will just check, I have a feeling there may be two annexes. It is actually annex 1 to our skeleton argument.

THE CHAIRMAN: It is annex "only" according to what I have – is there an annex 2?

MR. BARLING: Annex 2, there should be a diagram of the revenue path of voice calls from fixed to mobile?

THE CHAIRMAN: Yes, I have got that.

MR. BARLING: That is annex 2. Annex 1 is the extract from the various pieces of legislation and importantly the BT licence conditions translating those into specific obligations on BT, and in particular licence condition number 45 is the crucial one. You can see that there is really no wriggle room under that regime for BT in relation to agreeing and I would just highlight – going to p.2 of the annex – Article 9(3) of the Interconnect Directive:

> "In pursuit of the aims national regulatory authorities may intervene on their own initiative at any time, and shall do so if requested by either party in order to … lay down specific conditions…" etc.

Then the next paragraph:

> "Conditions set by the national regulatory authority may include conditions designed to ensure effective competition, technical conditions, tariffs, supply and usage conditions…"

Then in subparagraph 5 of that Article:

> "In the event of an interconnection dispute between organisations … the regulatory authority of that Member State shall, at the request of either party, take steps to resolve the dispute within six months of this request. The resolution of this dispute shall represent a fair balance between the legitimate interests of both parties."

You will see they have set out the criteria as well. This is nothing to do with SMP or anything of that kind.

THE CHAIRMAN: That was then.

MR. BARLING: That was then.

THE CHAIRMAN: And if Mr. Roth is right, this is now and it is all different.

MR. BARLING: It is not all different.

THE CHAIRMAN: I mean tariffs do not come into it unless there is an SMP finding.

MR. BARLING: Yes, well I will come to that, that is an issue I have to deal with, if I may.

THE CHAIRMAN: Yes. Regulation 6, the UK legislation, we see that translated into Regulation 6 more or less verbatim, I think, and again over the page, under the heading "BT's Licence Conditions". Really the whole of Condition 45, up to the end of 45.5 is relevant, and it might also be worth glancing at 45, or side-lining 45.8.

> "Any questions whether any term or condition including a charge is reasonable shall be decided by the Director having regard to any guidelines on the application of this condition from time to time issued".

THE CHAIRMAN: This licence is no longer in force, not the governing factor any more?

MR. BARLING: No, it is no longer in existence as a licence, but many of these conditions were effectively translated to the new regime by continuation notices, under the Communications Act they simply transferred them on to the new regime pending market analysis, and as and when the market analysis which changed the position, then they would be removed, or withdrawn. So now what they have been effectively replaced with are a series of SMP conditions, access conditions and so on, imposed on BT and others in respect of specific markets.

THE CHAIRMAN: Where will we find those? We will not, will we?

MR. BARLING: You will not find those, and I do not think we need t o go into them, they are all dealt within specific markets. I think everyone is happy to rest with the way it has been put by Ofcom in the May 2003 Notice, where they deal with the effect of end-to-end connectivity and basically make it quite plain that they are happy to impose it but it is not complied with.

57 was just that BT also had a licence obligation not to give undue preference or undue discrimination in relation to interconnection. That would be a factor if one was looking at this at the time of the 2001 BT negotiations. Also H3G rely upon the time pressure they were under to get their system up and running at that time, to get an agreement with BT and others as being a very important factor, but as against that you will bear in mind that the documents at the time show a slightly more lackadaisical and relaxed approach to timing on H3G's part. Once they had their agreement that factor changes completely, because then all that factor of urgency goes. In terms of any new negotiation with BT to uplift the price, if that is what they wanted to do, that factor is out of the picture entirely, they have their agreement, and as Mr. Rutnam for Ofcom explains (D1. paras 40-47, 69-72) why there would be no real pressure on an operator in trying to negotiate a change once it has got its agreement, because it is safe, as it were, it has its interconnection, and BT, if that is the other negotiator, can do

nothing to jeopardise that. If negotiations were extended because, for example, BT was being difficult, the thing can be backdated ultimately to the time when it was raised by the Regulator if he is involved on a reference. So that factor is not a factor once the initial agreement is in place.

THE CHAIRMAN: Sorry, if he is involved on a reference to do what?

MR. BARLING: On a reference to cut the Gordian knot, if negotiations have broken down.

THE CHAIRMAN: Provided there is an SMP termination in place, if Mr. Roth is right.

MR. BARLING: That would only apply under the new regime, but yes. Under the new regime, if Mr. Roth is right on that – well I will come to that.

THE CHAIRMAN: I am sorry, you said that before, and I will let you do that.

MR. BARLING: But yes, I agree, yes, if he is right on that that is the position.

THE CHAIRMAN: Just one moment, Mr. Barling.

(TheTribunal confer)

THE CHAIRMAN: Thank you, Mr. Barling. Another that would have to be considered is the commercial pressures on BT, that is entirely left out of the count by anything in Mr. Westby's evidence, but if I can give you the reference to that – Mr. Locker's second witness statement – (D1. tab 16, p.318) where, in effect, he refers to H3G as being an important customer for BT Wholesale - the first 3G operator to get up and running – so there are revenue streams obviously coming the other way from that new operator to be anticipated and it is extremely important that BT is co-operative, but that is the factor in countervailing buyer power, and of course there would be the threat hanging over BT if it was doing anything to delay the introduction of 3G technology, and this new entrant who was given the special licence for a new entrant in the big option and everything, this would be obviously something that would be unacceptable to the regulator and indeed commercially would look very poor. So that is the pressure that has to be borne in mind and we would submit that that pressure is reflected in the fact that BT behaved as it did behave in those negotiations and reacted very quickly and helpfully.

The actual price negotiated, as you know, was the highest rate negotiated with a public mobile network operator and has since become higher than any other – the rates are currently higher than any other – for voice calls, and there has been no negotiation down of that rate, although, as you know, the other operators have all been price capped and had to reduce their prices under the regulation. Nor, and I do not think that this is secret, did BT try and insist on any contractual mechanism to put in the contract to force it down.

PROFESSOR STONEMAN: Mr. Barling, given you response to my last question about how concerned BT were for their customers, why have BT ----

MR. BARLING: Not done more?

PROFESSOR STONEMAN: Yes.

MR. BARLING: Sir, I will have to take instructions on that.

PROFESSOR STONEMAN: All right.

MR. BARLING: I suspect there were commercial risks for both sides, but I do not know, if I may I will take instructions on that.

PROFESSOR STONEMAN: BT version of Miss Laurent?

MR. BARLING: Could be.

MR. SCOTT: To be fair to BT, BT has been very aware that this market review has been taking place and that in due course Ofcom would have to address the question of H3G's wholesale voice termination market situation so that this was going to come up any way in the regulatory process, although I entirely accept Professor Stoneman's point that neither party has addressed the issue. We have neither had H3G suggesting that this iniquitous below rate be increased on the grounds that it was unreasonable, nor has BT ----

MR. BARLING: Both sides have certainly sat where they were but, of course, sir, as you rightly say in the background, it was no doubt well known the costs would have been all over the place at the outset, but it is obviously known now that the costs are being investigated by the regulator. Whether BT can do a better job on that, as it were, than the regulator, in terms of obliging or seeking a reduction, probably they have taken a pragmatic view that they will not succeed. They cannot impose a price reduction, because ultimately it will go to the regulator.

MR. SCOTT: The other difference that now arises is that at the start of this process H3G were the only 3G operator, they are no longer the only 3G operator and so we have moved into a situation where there are now other tariffs for 3G with which the Hutchison 3G rate can be compared.

MR. BARLING: That is perfectly true. The position has moved on, and one suspects that the real answer to Professor Stoneman's question is that BT took the pragmatic view that they would not succeed in achieving anything which has to be done by agreement and that ultimately we go to the regulator who would be going through the process anyway.

THE CHAIRMAN: No countervailing buyer power.

MR. BARLING: Absolutely no countervailing buyer power, so you have the point. Obviously one the agreement is in place the negotiating stance, highlighted by Professor Stoneman's question, changes, they have a price, it has to be changed by agreement really, or the regulator and there

is no time pressure on H3G, they are secure. The May 2003 statement of regulatory intent has been made by the regulator, so they know jolly well that under the new regime too the regulator will enforce, make sure that these two networks stay connected for their respective customers, and commercially therefore BT has to continue to buy, as its customers require that.

Can I make another point and also not correct but clarify something which is in the Notice of Appeal of H3G. I wonder whether the best place to start on this would be A1? What you were taken to yesterday and indeed on Monday by Mr. Green, the May consultation, tab 2 of that bundle, p.521 on the stamp numbering, para.423, and then there is a table at 4.2, and you see from that table that this is "share of minutes terminated on mobile networks by originating operators". BT's share is 26.4 per cent. If you are able to keep a thumb in that and, at the same time glance at the Notice of Appeal at C1, tab 1, para.3.2 of the Notice of Appeal on p.28 of the stamp numbering.

> "According to the May Consultation, BT provided approximately 44% of the total number of "off-net calls" terminating on mobile networks. BT's strong presence on this market may be accounted for by several factors."

The reference to that statement is, as you see, this para.4.23 in the May Consultation. You do not find 44 per cent. when you look at that paragraph, what you find is "originating operator, BT, 26.4 per cent." That struck us as rather odd, but I think where H3G have got their figure of 44 per cent. may be this, you see the total on-net calls are roughly 40 per cent, that may mean that therefore they have said off-net calls amount to 60 per cent. of the total. BT's share of that 60 per cent. is 26.4 per cent. 26.4 per cent. of 60 per cent. is 44 per cent., but one has to bear in mind it is 44 per cent. of the 60 per cent. It is treating the 60 per cent. as 100. So it is giving a slightly misleading impression. The real figure revealed there is the 26 per cent.

MR. SCOTT: It is beginning to look as though you are trying to signal to Ofcom that you are about to go under the old 25 per cent threshold, which would have had consequences in the old days but may not now.

MR. BARLING: No, I do not think that is right. I was not really doing anything as subtle as that, but really in case you read para.3.2 – and it is also in the Amended Notice of Appeal – and were puzzled as to how on earth that occurs, that seems to be the explanation. Mr. Green may be able to assist further, but we emphasise, because there has been a lot of talk of, as it were, how important BT is. Putting it in perspective, yes, it is the major one, it is bigger than any other, and ----

MR. SCOTT: Mr. Barling, while you are considering that, table 4.2 points out that the other fixed operators have a 14.8 per cent. share, and presumably there is at least a theoretical possibility

that had H3G been really upset by BT, it would have been possible for them to reach an agreement with another fixed network operator for the transit to go the other way?

MR. BARLING: Yes, I suppose that is theoretically possible.

THE CHAIRMAN: There is evidence that they spoke to Cable and Wireless, is there not?

MR. BARLING: Yes.

THE CHAIRMAN: And that is presumably another fixed operator for these purposes.

MR. BARLING: Yes.

THE CHAIRMAN: So they did try.

MR. BARLING: Yes, they had a look at it and presumably they could not get a better price that way, or financially obviously took the view – I do remember that was mentioned, I cannot quite remember what they gave as a reason for ----

THE CHAIRMAN: I think the reason was for technical or capacity reasons they were not going to be able to do it and they had to go back to BT. I think it is something like that, we can look it up.

MR. BARLING: We are not saying that we are not an important outlet for them, I do not think there is any issue about that.

Generally, of course, in terms of the orthodox criteria for countervailing buyer power, we have none of those – we cannot switch, we cannot self-provide, and we cannot walk away, so those three alternatives which are normally the very basic pre-requisites for there to be any countervailing buyer power have no application whatsoever.

Also, a very important factor in this, as one can see from the German veto decision that our own call termination rate is regulated, so there is no bargaining tool, no leverage that BT could in any negotiation use in order to seek to reduce the price by reference to the price that it would charge itself. That was very important, because you see in the Commission's reasoning in that case - I will give you the reference to the German decision paras. 36, 37 and 45 – where it was almost decisive in a sense the fact that Deutsche Telecom has its own call termination regulated and that was said to significantly weaken their countervailing buyer power

I think I have already dealt sufficiently with the points relating to the so-called demand that we are said to have made for cost justifications. In fact, we did not make any such demand for cost justification, we simply suggested that as a way forward they could, if they wanted to try and maintain a case for the Dolphin price they could seek to justify it by reference to cost. We just say three things about that. First, it means we did not simply reject it as was said, we left the door open. Secondly, they were protected in providing any

information by a confidentiality agreement and a side letter. The side letter is at B1, tabs 8 and 9 – it may be pages 8 and 9, forgive me, my note does not tell me. Thirdly, as the document shows at B1, p.593, BT explained that only very limited costs' information was required if they wished to justify Dolphin, they did not want the full range of it, they just wanted the limited cost information that they set out at p.593 of B1, and I think we have noted it also in that note on the documents.

So for those reasons, we submit that the existence, let alone the exercise, of any countervailing buyer power by BT was not really on the cards at any stage whether before or after the agreement was entered into in August 2001, or whether before or after the new regulatory regime came in. We also submitting, sir, that the Harbord evidence, which has not really been relied upon or referred to by Mr. Green in his opening submissions takes the matter no further, provides no real assistance. I do not know whether you even have it in mind, but Mr. Harbord, who is an economist, gave two statements, one related to the costs' issue, which everyone steered well clear of, and one relating to countervailing buyer power. It may be that Mr. Green did not mention it because his point is really that you do not need to decide anything on that, and I do not particularly want to open it up. If, however, the Tribunal were going to pay any attention to Mr. Harbord, or indeed to the Binmore Harbord paper that came in very late in the day in response to what Ofcom put in on the serious doubts correspondence with the Commission. If the Tribunal were minded to do that I just want to take five minutes, as it were, to make some points about what we say about Mr. Mickel.

THE CHAIRMAN: Subject to any submission that anybody may make we take the view it is not actually in evidence as evidence in the case. What has happened is, I think, we have been copied in on some correspondence.

MR. BARLING: You have Binmore 1 there, Binmore 1 is in evidence, which touches on some theory of bargaining.

MR. GREEN: Something arose yesterday concerning Harbord, but it is of very limited relevance, but I can explain if it assists, so that you can see the way the evidence may relate to something. Professor Stoneman yesterday referred to the notion of bilateral monopoly. Mr. Harbord, in his first witness statement explained that, so far as he was concerned, there was an analysis of the negotiations between BT and Hutchison which could be analysed in terms of bilateral monopoly. When the Commission decision came out Hutchison put in submissions to the Commission and they were put in we believe as evidence. Ofcom did not object, BT objected, but we put them in as evidence and a month ago BT said they would want to put something else in, but we have always understood them to be evidence. We are not asking you to decide

anything upon the back of it, we are simply saying that it identifies an issue which required investigation. It was not investigated, it is clear that it was not investigated, but it simply highlights an area which warranted discussion and I think Professor Stoneman raised the issue yesterday about bilateral monopoly. We simply say that it has been in evidence. Mr. Harbord referred to it in his first witness statement, points were reiterated and elaborated upon to the Commission, but that is the full extent of it, it simply identifies an issue in relation to CBP which we would submit is a relevant issue, which is not in the Decision which required investigation and it really does not go to anything more than that.

THE CHAIRMAN: Well we must be quite clear about this, in case our decision goes further, I do not want any doubt about what is and is not treated as evidence of something or other before us. Can we just look at the documents in question so it is quite clear what we are looking at?

MR. GREEN: Yes, they are in bundle F.

MR. BARLING: I think before you get to that you will have to see bundle D.

THE CHAIRMAN: Exactly, yes.

MR. BARLING: It is D1, tab 3. That is his witness statement – the other material came in later. Mr. Harbord's statement here is dependent on Mr. Westby's account of the way that the negotiations with BT went, and that is clear from the footnotes. The first point we would make about this is that there are substantial factual inaccuracies derived, really from Mr. Westby's statement, because it talks about BT's bargaining tactic being able to insist on the 3 matching existing 2G termination rate. It talks about BT's demands and threats to refer the matter to Oftel. All that has come possibly from the Notice of Appeal, but I think also from Mr. Westby. So we would say that it starts out on that basis.

It is also based on a misconception of BT's regulatory position ----

THE CHAIRMAN: Mr. Barling, before we get into this, can we establish whether this is relied on as evidence in this appeal?

MR. GREEN: Insofar as I have just made the position clear, which is that it simply identifies an area of concern, an area of investigation which was not looked at by Ofcom, which they should have been. That only requires you to identify it as an issue not to resolve it. You will recollect at that earlier case management conference it was open to anybody to cross-examine the experts, and I think ours is the only experts' evidence which is in. So they had the opportunity, but I am not making a great deal of it, but it is plainly an issue in relation to CBP which arises as a serious issue. I am not saying we are right or we are wrong on it, but it is something which Ofcom should have examined, and it really does not go to much more than that, but this has

been in evidence for a very long period of time. The question of the cross-examination of experts arose and no one suggested they wished to cross-examine, either Mr. Harbord or Mr. Westby and we did put in as evidence in response to Ofcom putting in the serious doubts letter, our response to that. Now Ofcom have completed the documents sequence for the German case by putting in the Decision and the press release. We cannot, with respect, see how we cannot be entitled to rely upon it, but insofar as the modalities of this case are now evident it is for a fairly limited basis. We are not asking you really to do a great deal with it. Indeed, Harbord 1 was served with the Notice of Appeal, it has been in the case since the very earliest moment. If Mr. Barling wants to make comments about it, he can. If he wishes to challenge it he should have been seeking to cross-examine many months ago, but I doubt it really goes very far.

THE CHAIRMAN: Would you be in the same position to make submissions that a certain point was not dealt with by Ofcom even in the absence of this expert evidence?

MR. GREEN: Well I think that would be somewhat unfair. I can make the point that as a theory of bilateral monopoly that that actually is relevant to countervailing buyer power and one can explain it, that the expert has explained it in descriptive terms. You can see what his explanation is, you do not have to accept it; I only ask you to find there is an issue to be investigated.

THE CHAIRMAN: That issue being?

MR. GREEN: That on one analysis of the facts between BT and H3G there is a situation of bilateral monopoly. That is a relevant factor which affects whether or not the one side of the equation Hutchison can exert SMP because of the monopoly position of the buyer who has CBP, and the dynamics of the CBP issue are affected by an overall assessment of whether we are concerned with what Professor Stoneman described as a bilateral monopoly.

THE CHAIRMAN: This report, to which for my part I have not hitherto paid a lot of attention, does more than identify an issue which should have been taken into account, it goes on to express a view on various things.

MR. GREEN: Yes, insofar as it expresses a view you can see that the expert has expressed a view and you can take it into account in deciding – I will be putting to you in my closing submission to you that it is, as it were, a judicial review point. I am not asking you to say "He is right", I will simply say it is an issue that was not addressed and should have been.

THE CHAIRMAN: It should have been, and this report shows it is a plausible issue.

MR. GREEN: It is material, yes.

PROFESSOR STONEMAN: I seem to be in the middle of this! If we accept this as saying that there is such a situation as bilateral monopoly, that is not quite the same as countervailing buyer power, then fine, I do not think there is a problem. But if you want to rely on this or any other document to say what is the predicted outcome on the bilateral monopoly, then I think we have a problem.

MR. GREEN: I am not going to ask you to rule on a predicted outcome. I am simply saying it is an issue, as the Chairman points out, it is plausible issue, it crosses as we lawyers sometimes call the "red face threshold", no one is embarrassed about putting it forward as a serious issue, and I simply put it in a judicial review-type context, i.e. it is an issue which should have been addressed, was relevant to the debate and at some future point Ofcom no doubt would address it if it were remitted back to them with a direction or without.

THE CHAIRMAN: You are not saying that you put it forward and they ignored you, you are saying it is something they should have thought of for themselves and addressed it, are you. Is that in fact the nature of your point?

MR. GREEN: It goes to the dynamics of the countervailing buyer power issue.

THE CHAIRMAN: I understand what it goes to, I just want to see who you say, if anybody, should have thought of it. You say Ofcom should have thought of it. It is not something that you put forward at the time.

MR. GREEN: It is not something that we put forward at the time, but analysing it now it is a relevant point. Of course, coming back to the process that we are in, which obviously has its artificialities when you are looking at something after the event, the Notice of Appeal attaches this to it and it says "This is part of the dynamics which Ofcom should have looked at in relation to countervailing buyer power, they did not". I do not think we have said it was put to them at the time, during the course of the Decision, but Ofcom's position is it does not matter, it is for you to decide whether they are right.

THE CHAIRMAN: When you come to your submissions, but not now, perhaps you would help me at any rate as to the extent to which you can in this appeal complain that Ofcom did not take something into account which you have now thought of as being rather useful but which you did not put in at the time despite your opportunity to do so.

MR. GREEN: Yes, that ----

THE CHAIRMAN: No, no, do not rise now, Mr. Green, otherwise you will be hi-jacking ----

MR. ROTH: Without wishing to cause any delay I just want to say that I did not say anything about Mr. Harbord's statement because Mr. Green said nothing about it at all in opening.

Mr. Green's very full skeleton argument in this case makes no reference to it, the supplementary skeleton argument in answer to your questions makes no reference to it, and therefore I did not stress it.

THE CHAIRMAN: Well Mr. Roth, if you are disadvantaged by the way in which this is happening then you will have a chance to un-disadvantage yourself, but I am going to say you should do it after you have heard in more detail what Mr. Green is going to say about it.

MR. ROTH: Indeed, I am not seeking to do it now.

MR. SCOTT: Yes, I suppose the sort of thing with which I am concerned is that the Harbord witness statement suggests, for example, that there is evidence that BT's countervailing buyer power placed "severe limits on '3's ability to obtain a price which reflected any significant degree of market power as an example. Now, were that being argued we would expect to have quite an argument about that but, as I understand it, neither Mr. Barling nor Mr. Roth have sought to address that question of that being evidence.

MR. BARLING: Well I am grateful to Mr. Green because he says he does not rely upon it, as it were, to ask any findings, he just says there is an issue, to show there is an issue. That was in effect our understanding from the earliest case management conferences that he was not asking anybody to make a finding one way or the other about whether countervailing buyer power existed in this case. It was going to be more of a judicial review approach. So for that reason we have not bothered to cross-examine. All we would really wish to do is make some comments, and probably I should just take three or four minutes to make some brief comments about Mr. Harbord's statement – I will not take longer than that, I hope, and then we can see, as it were, how it develops in reply.

THE CHAIRMAN: We got side-tracked from my request, which was to identify the material. There is **this**?

MR. BARLING: Yes.

THE CHAIRMAN: And is there anything else?

MR. BARLING: Yes, there is a paper by Mr. Harbord and Mr. Binmore.

THE CHAIRMAN: That is the one that was sent in response to ----

MR. BARLING: It was. That came in and we said "Hang on, this is putting evidence in well after the time for evidence to be put in", and I think the Tribunal very kindly then took it out of their papers again, but we can sweep up the comments, as it were, that we make on the Harbord first statement, and deal with that as well.

THE CHAIRMAN: Yes, well you should understand at any rate for my part my view is that that is not actually formally in evidence, I have not understood it was given to us on that basis, I am not sure I have actually taken that on my papers but never mind ----

MR. BARLING: The way things have turned out it is probably not specifically relied upon because if all they want to do is identify an issue, and I think they feel that that issue is identified in Mr. Harbord's first statement.

MR. GREEN: I will save my comments for later but with respect it is in evidence, and Ofcom started the ball rolling by putting in the serious doubts letter in order to bolster their case. We, as one of the operators affected by this across Europe put submissions into the Commission, and now Ofcom have now put in the final Decision, and we are entitled to respond to the ball that Ofcom started rolling, and that is what we did. No one has said to Ofcom you cannot put in a letter from the Commission. This was our response. We were entitled to redress what we saw as the balance, but that is all it is there for. It may be that we are making mountains out of molehills because of the relevance I am going to attach to the document anyway.

MR. SCOTT: I think the difficulty that Professor Stoneman and I face is that at a time when it was sent to us we read the document, it was then removed from our bundles and we were asked to ignore it. Were we, as it were, to put it back into our minds I think both of us would have a substantial number of questions both as to the premises behind the argument and as to the argument. So we are faced with a particular difficulty in respect of the ambivalence with which this document is mentioned.

THE CHAIRMAN: What we will do is this, the Harbord paper is clearly part of the evidential background, and we know the reason for which it is it there which is flagging and justification exercise rather than a full evidential exercise. The other material, I think we will wait and see what Mr. Green is going to say about that, if anything, and I think we will have to rule on its status as evidence in case it matters in this case, but let us deal with that when Mr. Green is actually making his final speech, and if it is necessary to have a whole series of flow-on speeches then we will do that until we get to the bottom of it. I think we should make quite clear what the status of that document is, not least because of the difficulties faced by the Tribunal, but also so it is quite clear what we are deciding this case on.

MR. BARLING: I am very grateful, and in that context I will be very brief really in commenting on the first statement.

THE CHAIRMAN: I have already made the point that it depends for its factual account of negotiations on Mr. Westby's evidence that is cited in the footnotes in, I am going to call it, if I may, Harbord 1, the one that is actually in evidence, and I am going to quote from para.11:

> "BT's bargaining tactic was evidently to insist that '3' match an existing 2G termination rate and to suggest that '3's demand for a higher average termination rate would involve significant delays to an agreement being reached. '3's options were either to agree to BT's demands, or to refer the matter to Oftel for determination."

Then similar statements are made in the other material. The comment we make about that his first of all we did not insist that '3' accept an existing 2G termination, we offered continued negotiating about the Dolphin rate, but asked for some fairly limited cost material to justify doing so. Secondly, we did not deploy delaying tactics or refuse anything. Thirdly, '3's options were not confined to agreement or a reference to Oftel – as I have said BT would have been happy to consider alternative rates as well. So there is an element in which, as it were, Mr. Harbord was looking at a factual matrix that was not strictly reflecting the reality.

The second point that we have made is that it was also based on a misconception of BT's regulatory obligations and position. It strongly understates the effect of the end-to-end connectivity obligation on BT. If I just cite Harbord 1, para.16 and quote it:

> "Ofcom's arguments, however, merely establish the possibility that the threat not to interconnect may have been unavailable to BT in negotiations with '3' over its termination rates."

The possibility that the threat not to interconnect may have been unavailability, well, I think anyone who has read the documents at annex 1 to our skeleton argument will see that – what Mr. Harbord picked up is reflected in something that was in, I think, Mr. Westby's evidence, in his last statement, where he says there might have been a regulatory lifting of eyebrows if BT had refused to interconnect. That is a gross underestimate of the actual position. In fact the obligations at that time were particularly strong and expressly allowed Ofcom to limit the time for any negotiations. So Ofcom could actually step in and say "You have negotiated long enough, I am now going to impose a price on you". Also, Mr. Harbord does not appear to have been aware that BT's own termination rates regulated, he certainly does not mention that, which is a highly important factor as we see from the German veto decision.

The third point we make about that is that his central thesis of the economic theory of bargaining that all the factors that determine the relative bargaining power of the two parties favoured BT rather than H3G is simply not borne out by the outcome of these negotiations. Paragraph 18 is the reference to his first statement there. He says:

> "Alternative, if we modelled '3' as having a higher fixed cost of bargaining then the theory predicts that BT would obtain all of the gains from the trade. Finally, if we

> modelled H3G as having a fixed deadline to the negotiations then BT would again be predicted to obtain almost all the gains from the trade."

In fact, the position, as you know, was that H3G actually obtained the highest of the available 2G termination rates. So they got the highest rate and, as the internal document reveals, the real concern of H3G is that their rates would be seen as too high, and would be lowered if Ofcom intervened, H3G's rates are now considerably higher than anyone else's. So we would also ask you (for your note) to note Mr. Rutnam's evidence on this at para.33 onwards of his statement. So we submit for those reasons that Mr. Harbord's statement patently would not assist without considerable reworking and being provided with the real position both regulatory and factual.

PROFESSOR STONEMAN: Mr. Barling, given that this has now come into discussion, I am quoting from para.37 ----

MR. BARLING: Of Mr. Harbord?

PROFESSOR STONEMAN: Of Mr. Harbord's conclusion, and this is a witness asked by H3G to prepare the statement:

> "Ofcom has not provided any substantive economic evidence to support a finding that'3' is in a position to exercise significant market power."

Does that mean that they have significant market power but they are not able to exercise it? Is that how you read this?

MR. BARLING: Well, I suppose it might be said that that would be taking too fine a point, and he might be asserting there that they do not have it, and they cannot exercise it because he says they have not got it, or there is no evidence to support a finding that they either have it – I do not know, I do not want to be unfair to Mr. Harbord – I am not sure really which he is saying.

PROFESSOR STONEMAN: It is just that para.37 in my mind does not reflect the distinction between the existence of exercise of significant market power that is the main plank of the case of H3G.

MR. BARLING: With respect it does not seem to address that distinction.

PROFESSOR STONEMAN: Thank you.

MR. BARLING: So that is really all I need to say and I can turn to my final topic, which is the issues on clause 13. Three questions arise, Sir, in relation to clause 13 as far as we can see. First, on the hypothesis of SMP, is there a problem under the new regime in Ofcom resolving a call termination price dispute between BT and H3G? By "resolving it" I mean resolving it properly – forgive me for using that phrase, because that relates to ----

THE CHAIRMAN: You mean resolving it, not "ducking" it?

MR. BARLING: Yes, or even worse, as appears to be the argument, that if pushed to "resolve it" they would have no alternative, they say, but to approve any price increase suggested by H3G.

THE CHAIRMAN: Yes.

MR. BARLING: The second question then is if they are right in their legal obstacle point, what approach should Ofcom take to a reference to them of a dispute, again on the assumption that there is no SMP. Then thirdly, there is the somewhat orphan point of the issue of construction because of the changeover of Regulators which probably will detain me for more than a minute.

Our position on this is that in fact no problem arises under the new regime in relation to a legal obstacle to resolve a dispute properly, even if there is no SMP. We sympathise with the point made by Ofcom that the hypothesis of SMP is somewhat unreal in this situation and unlikely to arise in most call termination markets. So the question is, perhaps, artificial. Nevertheless, if Ofcom are right about the legal inhibition on them, then from our perspective this could affect other markets. BT, as you know, has a large number of agreements with many different operators, all of which contain clause 13 in some for or another.

THE CHAIRMAN: All of which were presumably intended operate whether or not there is SMP.

MR. BARLING: Indeed, and there are no doubt many of those with whom we have agreements who do not have SMP in respect of some markets and prices, so this is a matter of very considerable concern to BT.

We submit on the legal issue of whether there is a legal obstacle in the new regime, that Ofcom's fears are groundless and indeed, we would very much associate ourselves the way that you, Sir, put it to Mr. Roth yesterday. We say that the perceived legal barrier does not exist. If it does exist, they are right about it, then we would suggest that their approach to a price dispute referred to them in those circumstances would not be permissible as a matter of law – to that extent we share Mr. Green's view.

Finally, on the question of whether the change from Oftel to Ofcom affects the enforceability of clause 13 in its older form, because now it is amended in a lot of the new agreements, we make the appropriate submission but fundamentally we say that it does not cause a problem in law or in fact.

MR. SCOTT: Mr. Barling, while you are on that point, is there any particular enabling passage in the Communications Act to which you would want to draw our attention?

MR. BARLING: In relation to the last point?

MR. SCOTT: In other words, Ofcom are a statutory body.

MR. BARLING: Not on that point, no. I mean from a regulatory point of view, yes, there is a sort of smooth handover and metamorphosis, if you like.

MR. SCOTT: Yes, yes, but from the statutory point of view we have not found an obvious ----

MR. BARLING: I do not think there is one, and I think this is really a matter of contract and, maybe, a matter that ultimately will not cause too many practical problems given the regulatory overlay and the dispute resolution powers that exist. In a sense there is an element of belt and braces about clause 13. But the first two points we submit are important. I do not think I need to deal with the position of dispute resolution under the old regime. I have already shown you annex 1 to our skeleton argument and no one has suggested that there is a problem.

So far as then tackling the new regime, and I am on the first of the clause 13 points now, you have been shown the Directives.

THE CHAIRMAN: Well I have wondered why we have spent so much time in the Directives and as yet no time at all in the Act which technically confers powers on Ofcom, the Communications Act, which is actually differently worded ----

MR. BARLING: I know.

THE CHAIRMAN: I think at some stage we are going to have to look it.

MR. BARLING: I have it, and I was ----

THE CHAIRMAN: I was not accusing you of ignoring it! (laughter)

MR. BARLING: It is my next point.

THE CHAIRMAN: In that case carry on, Mr. Barling.

MR. BARLING: Unfortunately the way European law tends to approach these things is usually to go to the Directives first because ultimately that is what governs it and matters.

THE CHAIRMAN: That is by reference to which one construes English statutes if there are difficulties in construing it, but the logical starting point seems to me to be sections 185 and so on, based on the context of the earlier sections which – and I have forgotten their numbers, we can find them in a minute – which set out similar things that Ofcom can do when it is doing its serious regulation SMP finding stuff, and one has to look at the powers, there are two different sets of powers apparently.

MR. BARLING: Well, Sir, I have a heavily scored extract from the Communications Act to take you to, and obviously you are ahead of the game on it.

THE CHAIRMAN: It does not sound to me as though this is a five minute or two minute point and if it is not, then I think we should take our short break now. To make sure we finish this morning we will make it a little shorter, perhaps until a quarter to 12. How long do you think you are going to be?

MR. BARLING: No more than half an hour, perhaps less.

THE CHAIRMAN: Right, in that case we certainly will come back in at a quarter to. Mr. Roth, you two are not quite off the hook, leaving aside any other points that need to be dealt with. One point that we would like you to deal with when Mr. Barling has finished, and before Mr. Green rises is this: suppose that you are wrong on what you say about the limits on Ofcom's power to determine a price dispute in the absence of SMP? In other words, supposing that Ofcom does have power to decide a dispute between two bickering network providers as to how much one should charge the other without going to SMP? Supposing that applies to a dispute between '3' and Bt, what impact if any does that have on determination of SMP? Is that a factor that can be taken into account, or can it not? In other words, can it be said, as I think '3's case is, well ultimately if we cannot agree a price with BT then Ofcom will decide it and Ofcom, of course, will not decide an unreasonable price, it will decide a market price having regard to the interests of both parties (to take the wording from the old conditions) and therefore we cannot charge a super competitive price.

We want you to deal with how that argument works and whether it works at all and what it says about SMP. Do you understand my point?

MR. ROTH: I think so, yes, Sir.

THE CHAIRMAN: In that case, a quarter to 12.

(Short break)

MR. GREEN: May I, very gingerly, just raise the question of timing?

THE CHAIRMAN: Yes.

MR. GREEN: Mr. Barling tells me he could have 20 minutes more to say. Mr. Roth thinks he will only three minutes.

THE CHAIRMAN: Oh, does he? Right. (Laughter)

MR. GREEN: He is optimistic. As the Tribunal knows I have another hearing this afternoon starting at 1.30, and I am just concerned that we may be running against, rather than cutting, the deadline

THE CHAIRMAN: I am afraid I cannot move time, I cannot extend time, and I cannot do anything about your hearing this afternoon, we will just have to see how we go. You will have to be as quick as you can. If you want to prepare something in writing, which will make life quicker for everybody?

MR. GREEN: I have got a note, which obviously I am going to use as an *aide-mémoire* for my reply. I obviously do not want to get into a debate about timing, but this hearing was only arranged once we had it clarified that time had been reduced from four to three days and that

was fixed after that. I understand now that the Tribunal has still reserved four days, but that is the predicament. It may be that it will not arise as a problem, but if Mr. Barling is going to have 20 minutes or half an hour I think I am going to be pretty finely squeezed.

THE CHAIRMAN: Therefore?

MR. GREEN: I may need to ask, if I have not finished, for time at some further point.

THE CHAIRMAN: Well let us see where we go, Mr. Green. My understanding was that it was a four day case. I do not think I had understood it had actually been agreed to be reduced to three days, but there is always a danger that cases overrun. It may be that this Tribunal is a unique exception, but in my experience cases often overrun and therefore other cases are fixed with that in mind and people stand by or arrangements are made, but we will have to see where we go. Let us not waste time debating it now, Mr. Green. We will see where we get to by 1 o'clock. You expire at 1 o'clock, is that what you are telling me?

MR. GREEN: The next hearing theoretically starts at 1.30. If it runs over they are not going start without me ----

THE CHAIRMAN: Well make sure not to have Mr. Roth's taxi driver then you might get there! (Laughter) Where is your next hearing?

MR. GREEN: It is at the ICC, so it is not far.

THE CHAIRMAN: Right, let us see where we go. I am sure your brethren will do what they can to assist without actually damaging the way they wish to represent their client's interests.

MR. BARLING: Sir, on point 1 then, on the legal issue of the perceived obstacle to a proper resolution under clause 13. Really what Mr. Roth's argument boiled down to was, he showed you recital 20 to the Access Directive and he said that price control is very broad. True, but we submit not broad enough to cover in effect what is the resolution of a private dispute on some connection with an Access Agreement, which would only ultimately bind the two parties and, depending how the regulator did it, it would effectively be a contractual arrangement that emerged.

THE CHAIRMAN: I am wondering about the characterisation of this, because of course it is a contractual arrangement, but in a sense depending on the construction of the legislation what is going on is a blend of a contractual arrangement which runs out and then on one reading of the legislation a statutory intervention. So let us assume for the purpose of illustration that the position is that Ofcom could resolve an initial dispute where the two parties simply cannot agree when they are starting their relationship what price should be charged, what plug should go into where and so forth; Ofcom decides that.

MR. BARLING: Yes.

THE CHAIRMAN: On one analysis, assuming that Ofcom decide that in the absence of SMP, what has happened is that the parties have agreed that the price will run for a certain period of time, and they hope they will be able to agree for the future, but in case they do not then they recognise that the person who is a regulator and price fixer will have a role, so at that point they are invoking the statutory role of Ofcom as being the person who resolves connection disputes, so it is a sort of hybrid.

MR. BARLING: It is a hybrid and I think often depends which end of the telescope you look down. If you look from the parties' point of view they may think they are operating clause 13, and invoking the regulator. The regulator himself says "Yes, I am willing to be invoked, but I am going to do it under my statutory powers.

THE CHAIRMAN: Well he cannot do anything else.

MR. BARLING: He has to act in accordance with his statutory powers, but I think it really narrows down, and I think this real difficulty narrows down to what Mr. Roth took you to, Article 8(3) in the Access Directive. I think it is right to start with the Directive because it is the Directive that he says is the source of his problem, and if one looks at Article 8(3) of that, which is at E1, tab 7, beginning at p.112. I need not trouble you until we get to (3), "Without prejudice to Article 5 .." which is very important, actually, Articles 5(1), 5(2) and 5(6), because there is a tweak to the argument in any event. This is the hard law that he says stops them doing it: "… the national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated …" with having significant market power.

THE CHAIRMAN: That is without prejudice to 5(1) and (2).

MR. BARLING: Well, even leaving that one side for a moment, you are absolutely right, Sir, but just leave that on one side, what they are forbidden to do is to impose the obligations, and then one looks through the price control and cost accounting obligations. The typical one is cost orientated prices, but there is obviously a huge scope they can tailor to the particular regulatory problem that they have identified in relation to this particular person with significant market power.

Our primary submission is that they are wrong in thinking that resolving a simple failure for two parties to agree on a price, they had already got perhaps a price, and someone wants a bit higher or a bit lower, resolving that dispute is not the imposition of a price control obligation within the meaning of Article 8(3) let alone a price control as set out in Article 13. That is our first point. An ex ante price control obligation is an obligation owed not to any particular party, but in law it becomes a statutory obligation to comply with it. It can only be

relieved by the regulator. So it has all the panoply of a statutory obligation, all the enforcement powers that go with it. What the regulator would be doing if he accepts, as it were, to cut the Gordian knot when two people cannot reach agreement on price is nothing of the kind, he is simply acting as an arbiter in effect, of course, bearing in mind that he must not do anything that is in breach of his statutory obligations, but he would not be doing in our submission, if he were simply acting as arbiter. He would have to determine in this case, because clause 13 is not very explicit. No doubt he would say well what is a reasonable arrangement between these two parties? And apply some sort of criteria of that kind, given that one has not got SMP.

We submit that there is no problem, even if you leave out of account Article 5, but, Sir, as you rightly say Article 5(1) in effect provides another route, and it is Article 5 that is reflected as well and implemented by the Communications Act. Article 5(1) and (2) are important because they do not require SMP. There is no limit on the measures that can be taken. All that is required is that the measures should comply with Article 5(1), which should be necessary to ensure, putting it in a shorthand way, that interconnection, access, and interoperability are in fact achieved between, in this case it would be two specific operators. Without turning to anything else in the Directives one then looks at the implementing legislation in the Act. We would submit that one needs to bear in mind not just the dispute resolution provisions that start at s.185 of the Act, but also bear in mind sections 1 to 4 of the Act, which deal with the functions and general powers Ofcom. Bundle E1, tab 14. Section 1(3):

> "OFCOM may do anything which appears to them to be incidental or conducive to the carrying out of their functions …"

So that is a general sweep up provision. If two interconnecting parties were really struggling to reach agreement on something basic that enabled the interoperability to continue seamlessly then, in our submission, that would be conducive to their general functions given to them by Article 5(1) of the Directive.

One sees in the general duties, and I will remind you of this when we come back to the alternative point, if they are right, how should they approach the problem? They cannot possibly approach it in the way Mr. Rutnam has suggested in para.63 onwards of his affidavit, which is to rubber stamp what could be an unreasonable price. Amongst these general duties, paraphrasing them, are very prominent the duty to act in the interests of the end consumer, and to further the aims of competition. We will see that repeated in various shapes and forms throughout section 3, without taking you to them specifically.

Then in s.4 one sees there are specific Community obligations here, of which there are six Community requirements reflecting what one has seen in Article 8 of the Framework Directive. Just looking at it at its most basic, subpara.5 of s.4:

> "The third Community requirement is a requirement to promote the interest of all persons who are citizens of the European Union."

It could not be more broad, but it is very hard to see how rubber stamping and unreasonable price could ever be consistent with that. So, as I say, one bears in mind sections 1 to 4. Then if one goes to the dispute resolution, I think, Sir, you are already very familiar with this and you have made comments about it.

MR. SCOTT: Just while we are in s.3, s.3 did envisage both in subsection 7 and subsection 8 that Ofcom could find itself in a position where they had a conflict in terms of what they needed to do and this could be such a circumstance?

MR. BARLING: Well, this is conflict.

> "…any of their general duties conflict with each other in a particular case, they must ensure that the conflict is resolved in the manner they think best …"

So that appears to give them a degree of discretion but we would agree with Mr. Roth to this extent that if there were to be a bar on them acting in the Directives in this way such as perceived then it would override this, and we accept that as a matter of law. But our point, as you see, see is that there is no bar. The section itself, and you are well alive to this, clearly would apply to this kind of dispute because this is network access – I am looking at s.185(1) now at p.461: "This section applies in the case of a dispute relating to the provision of network access." Network access is defined in s.151, and Mr. Roth helpfully says that he does accept that this would be a dispute about network access, but just for your note that is where the definition of network access is to be found.

THE CHAIRMAN: For the transcript it is p.432.

MR. BARLING: Thank you. Then if one looks at s.185(8):

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

So clearly that covers price. It is extraordinary what is in most contracts absolutely the fundamental term of a contract were not to be included, one would have expected to see that that was expressed somewhere in the statute.

Then of course the way it goes is that Ofcom have to make a decision as to whether it is appropriate. They have to decide it is appropriate for them to handle the dispute, and then these are cumulative requirements: there are alternative means, consistent with Community requirements and prompt and satisfactory resolution would be likely if those alternative were used. If those are not satisfied they have to treat it as appropriate for them to handle it.

MR. ROTH: Just if it helps my friend, given the pressure on time, we accept that this falls within s.185 to 186 of the Statute.

MR. BARLING: I am grateful.

THE CHAIRMAN: What does.

MR. BARLING: This dispute.

MR. ROTH: This hypothesised dispute about level of termination charge between H3G and BT.

THE CHAIRMAN: It is a matter of wording, but subject to your overriding SMP point?

MR. ROTH: As a matter of wording and substance, it comes within s.185 to s.186 and our point, which I will not develop now is in exercising that role, the s.186 role, we have to act in accordance with the Directive.

MR. BARLING: That is helpful.

THE CHAIRMAN: Well I am not sure it is, because I am not sure I fully – I am sorry, I was not ----

MR. BARLING: What he is saying, as I understand it, is there was nothing in the Statute which prevents them from handling this dispute, but the way in which they handle it would be determined by the bar they perceive in the Directive.

THE CHAIRMAN: I see, thank you very much, good. Perhaps we can take this swiftly?

MR. BARLING: I just want to draw to your attention, in case it has not been, I cannot remember, s.190(2).

THE CHAIRMAN: I have scored that for myself.

MR. BARLING: The proper amount of the charge.

THE CHAIRMAN: Right.

MR. BARLING: I am grateful. Good, well we can leave that. In that case it really boils down to whether there is a bar in Article 8(3) and the reasons I have already stated there is no bar, this would not be ex ante regulation or an imposition of an ex ante obligation, simple as that. Even if it were, it would be saved by Article 5(1) and they would be able to do it in implementation of Article 5(1).

That leads me on to the second point which I can also deal with very quickly, because I am really agreeing with the submissions that were made by Mr. Green in relation to this. If

there were to be a legal impediment to doing it this way it would be unlawful of Ofcom to take the course which is suggested by Mr. Rutnam, at para.60 to 64 of his affidavit, where he says that if this dispute came before them they would have to deal with it because of the Communications Act, it does not give them any leeway but to deal with it, it keeps coming back to them, they have to resolve it and, if there were no SMP they would have to resolve it by accepting whatever price was put forward by H3G; that would be, for a whole raft of reasons, unlawful. It would make a nonsense of clause 13, the parties certainly would never have envisaged that that clause would give one party the right, but not the other, to achieve whatever price they wanted, in fact, it would be turning on its head the very purpose of clause 13. It would remove all motivation to negotiate with, in this case, BT, and the non-SMP party would in fact want to get the thing off to Ofcom as quickly as possible rather than engaging in ordinary commercial negotiations, so it would entirely pervert the very purpose of clause 13. If that is the effect, then it would call into question the validity and the enforceability of clause 13 rather than allowing it in some way to metamorphose into an instrument whereby one party could extract whatever price it wanted from the other. That would not be a resolution of anything.

The second point about that is that no Community legislation would ever be construed as requiring such a perverse and disproportionate result. The general principles of Community law, which include proportionality, non-discrimination, effectively forms of reasonableness in another guise in many respects, do apply because what Ofcom are doing is being done as part of the European Community Framework and if one looks, for example, at Article 8 of the Framework Directive (E1, tab 9) one sees in Article 8(1) that that expressly incorporates a reference to the requirements of proportionality.

> "… the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3, and 4. Such measures shall be proportionate to those objectives."

Article 8(1). There does not need to be an express reference to those principles, because they infuse, if you like, the whole of this in any event. As a matter of law the general principles just apply to everything that the regulator does, and he must comply with them. As regards Mr. Rutnam's approach, although BT respectfully agrees with just about everything else Mr. Rutnam says in his statement, we do, with respect, disagree that those paragraphs could ever be a lawful approach.

In our submission, the solution – if this were the position they were in legally, which we say it is not, would be either that clause 13 would be regarded as frustrated because of

a supervening national law coming in, as can happen, there would either be a frustration in which case one would have to look at the severance clause (clause 34(1) of the Agreement. Bundle A1, p32), or may be a combination, but Ofcom would probably have to just walk away. They would not be able to do what Mr. Rutnam says they would do. They would have to not accept the reference. That equally would be Community law trumping the impulsion that Mr. Roth says they find in the Communications Act where they have to reach a decision on a reference. But that would be Community law trumping it to some effect to reach a proper result, not trumping it to the effect that Mr. Roth says it would trump it to make them reach a wholly absurd result. So it would be one or two of those approaches which would be the appropriate one were their fears to be well-founded about the legal point which we submit they are not. So those are the two main points.

So far as the clause refers to the contractual issue we deal with that at our written submissions in response to the Tribunal's questions at 14 onwards. For your note, Sir, there is also a helpful remark in Mr. Westby's first witness statement at para.52 showing how this intention within the industry that operates in relation to the change over between Oftel and Ofcom. I do not think it is going to be necessary for me to take you to the **Chitty** extracts, but what we say in a nutshell, as set out in our response to you, is that either through a mechanism of construction, ordinary construction where the courts would seek to infer the intention of the parties, or through an implied term to give business efficacy to the contract, if it came to a crunch – which it probably would not, and it has never caused any problems so far as far as we are aware – the courts would probably construe it as covering Oftel or the Director General or any successor in title, any successor as regulator fulfilling the corresponding roles. So in general terms therefore we associate ourselves with what Mr. Green said about that earlier.

THE CHAIRMAN: Mr. Barling, there is a line of cases – a short line of cases – starting with a case in the House of Lords at the beginning of the 1980s called *Sudbrook Trading Estate Limited v Eggleton* [1983] A.C. 444 which dealt with what happens when a mechanism that the parties intended to operate on a contract breaks down through no fault of their own, and allowing in certain circumstances the court to impose its own mechanism or to step in and apply the mechanism. It may be that you did not focus on that line of authorities – are you able to make any submissions about those? If you did not focus on them then do not worry.

MR. BARLING: I am sure that is mentioned in the substantial extracts from **Chitty** that I was hoping not to trouble you with.

THE CHAIRMAN: We will look at those, yes, I think we reserve the right to look at those for ourselves.

MR. BARLING: No one seems to think this is a problem, Sir, and I think therefore in those circumstances – it has not proved to be a problem in practice – so no doubt there will be a whole series of amendments by agreement to these, but I it would not be to helpful to over emphasise the nature of the problem, particularly as there is a regulatory overlay. So even if clause 13 did not work for some reason such as that, as you, Sir, have pointed out, and your colleagues, there is the regulatory overlay where you can achieve very much the same in any event. I hope that has been pretty quick.

MR. SCOTT: Mr. Barling, just say the Agreement does provide in 19.1(2) for what you do if there is a material change in the law or regulation, so that was also ----

MR. BARLING: You have reminded me, that was something I did intend to draw attention to and I am extremely grateful, but that is of course in place, as is the severance clause, as a last resort.

THE CHAIRMAN: Mr. Barling, the purpose of looking at clause 13 is not for academic interest only, but it is what does it tell us about SMP in terms of price ----

MR. BARLING: Yes.

THE CHAIRMAN: And whether '3' has power over price.

MR. BARLING: Yes.

THE CHAIRMAN: Do you want to make any submissions on that? Assuming you are right on mechanism?

MR. BARLING: Sir, I know Mr. Roth is going to deal with that. All we would say is in our submission one has to be very, very cautious before looking at regulatory constraints which apply to the person whose SMP is under consideration because there is a severe danger of circularity.

THE PRESIDENT: It is the Greenfield thing then – it is one of the regulatory constraints we are about to look at?

MR. BARLING: One has to be very cautious before looking at them and saying they are not free because of that regulatory constraint to act in that way, therefore they do not have SMP. In our submission the correct approach is normally to say well that goes to the question of their freedom to abuse any SMP they may have and therefore one should normally look at their market position in the absence of regulatory constraints.

THE CHAIRMAN: Thank you Mr. Barling.

MR. BARLING: I am very grateful.

THE CHAIRMAN: Mr. Roth?

MR ROTH: Sir, there is one important matter that has arisen from what has just been said in your questions on which we are seeking urgent instructions which those instructing me are now on the phone seeking to get, which may affect something I may need to say.

THE CHAIRMAN: So you are not in a position to make your submissions at the moment because you are seeking instructions?

MR. ROTH: On one particular point that I may need to ask. It will take five minutes, I think, to get those instructions.

THE CHAIRMAN: Well then let us go on with Mr. Green, we will come back to it.

MR. ROTH: If you can interpose me at some suitable point, thank you very much.

MR. GREEN: If I can start by handing up my *aide mémoire*? (Document handed to the Tribunal) This was a document obviously produced overnight. Can I just give you one or two corrections to it, I am not going to read it out but if you come to read it later there are just one or two bits of tidying for which I apologise. First, a very minor point on p.6, this is just really a typo just to correct, there is a black bold, underlined "fifthly" which, in fact should be "sixthly", if you could amend that.

THE CHAIRMAN: Yes.

MR. GREEN: On p.8 at the top, I think I may have cross-referred to an observation of Mr. Scott's slightly out of context, in the top paragraph, fourth line down, the market definition is "As Mr. Scott correctly observed …" it should in any event be "Monday", and then my recollection was slightly wrong as to the quotation, it should be "an artificial construction of regulation". So if you could just alter that quotation, please. Just so you have the context, it was day 1, p.38, and when I looked at it again this was in the context of the 3G licence auction. I might have taken it slightly out of context. I am alerting you to that, I am not going to make anything of it as I deal with it orally.

Then a final correction, I want to just accept something that Mr. Roth made a submission about in my document on standard of proof. In the final paragraph of that, where I had set out the quotes from *Tetra Laval*, para.17, he made an observation about the way in which I had framed the relevant question and, on reflection, I think I probably accept the way he puts it. I think it is probably more accurate than the way I had it in para.17 of the note. I do not know whether you have that here?

THE CHAIRMAN: Sorry, paragraph?

MR. GREEN: This was a note entitled "Standard of Proof".

THE CHAIRMAN: Oh yes.

MR. GREEN: We put in all the quotes from *Tetra Laval* just extracted.

THE CHAIRMAN: Yes, it is not in my ….

MR. GREEN: If you want I can read out the reformulated proposition for the purpose of the transcript, if that helps?

THE CHAIRMAN: Right, para.17 of your note on standard of proof

MR. GREEN: The very last paragraph. It formulated a relevant question. Mr. Roth criticised it and he said that in effect one would insert in the line which says: "In the absence of ex ante regulation will the undertaking concerned …" and he thought the proper question, at least so far as we put it, "… have the practical, rather than merely the theoretical ability to…" and I think that is probably a fair point to make, so we would insert therefore, between the words "concerned" and "raise", the additional words "have the practical rather than the merely theoretical ability to". That is not the exact wording he suggested but we are taking on board, I think, the point he made.

PROFESSOR STONEMAN: Do you accept "set" as opposed to "raise"?

MR. GREEN: Yes. I think that is right. I think I accepted that at the time, yes. Those are the corrections. If I can start with the note itself. We have started with the heading "What was the rationale of the Decision?" The purpose of this was simply to identify what I think is now clear and probably undisputed, what was the structure of Ofcom's approach to the question which they were addressing?

As you know, as far as this Appeal is concerned, it boils down to three main points.

(i) countervailing buyer power as a constraint,

(ii) regulatory intervention as a constraint in a particular dispute resolution; and

(iii) whether Ofcom correctly analysed prices.

Those are the three main pillars of our Appeal. The OFT accepted in its guidelines that in an appropriate case an undertaking's conduct in a market, or its financial performance may provide evidence that it possesses market power, and Mr. Roth took you to the quotation from the OFT's guidance document. In their Decision Ofcom (para.3.2) identifies four relevant factors as you know, two of which were excessive prices and profitability and the other was countervailing buyer power. Therefore, in broad terms one can look at Ofcom's position in this way, that they said market share and entry barriers are highly relevant, but throughout the May document, the December document and the Decision – certainly the May document and the December document – they say they are not sufficient in their own right and that tracks the European Commission's SMP Guidelines. It is correct to say that as from the earliest point indeed, May 2003, they had identified the presumption point and that is correct to say that they had said that where you have market share and high entry barriers, then you have got obviously automatically 100 per cent. market and that creates a presumption. One document says "presumption", the other says "strong presumption". But then Ofcom goes on to say, indeed from the earliest points back in the May document of 2003, that it is necessary and essential to look at the constraining factors, and the constraining factor identified in the earlier documents was countervailing

buyer power. That, I think, in Ofcom's mind at the time, and subsequently embraced what we have now separated into two issues, one countervailing buyer power, other dispute resolution or regulatory constraint. But it appears to have been in Ofcom's perception much of a muchness, and there may be some strength in that, we have isolated them as issues, but they are plainly interconnected, and closely interconnected issues. We have set out the references to that on p.1 of the note.

As far as prices are concerned, you have seen that although Ofcom had a different approach to the 2G MNOs to H3G, nonetheless in the case of all of the operators' price was a relevant factor in the relation to the 2G MNOs. They came to the conclusion after a cost price analysis that the prices were above the competitive level notwithstanding regulation, but because of the constraints of lack of cost data they adopted a different approach to H3G and they simply concluded it was an ability, but there was no sufficient evidence of incentive. So that is the starting point. What I want to do now is to just identify, relatively briefly, the thrust of our argument in relation to the constraining factors.

MR. SCOTT: One point that we rushed by, before they get to the four factors they had calling party pays as an underlying factor, and I think it is just worth reminding ourselves that that was where they started.

MR. GREEN: Yes, that is absolutely fair. So of the three factors, I am going to take them in the order – dispute resolution, because that I think is part of the context, countervailing buyer power and then finally price. Then I will deal with one or two points which my learned friends have raised.

Dispute resolution. We submit that there really should not be any dispute about the relevance of regulatory constraints to the analysis of SMP. That is because in the Decision, which is the instrument being challenged, Ofcom recognised that regulation was relevant to all three of the main categories of player to BT, to the 2G MNOs and to ourselves; and in various paragraphs of the Decision it identified it as being the relevant factor and it took it into account. So we rely upon the fact that it is an integral part of the Decision generally wrapped up in the context of countervailing buyer power because the two are connected, albeit theoretically separate issues. So the Decision itself starts with the proposition that regulatory constraints are relevant as a constraint and have to be examined from each and every relevant perspective, from the perspective of each and every one of the players.

Ofcom's analysis of the law, however, in the course of this Appeal, assumes that it has no power to intervene in a dispute in relation to interconnection save in cases where the parties, or one of them, has SMP, and in the absence of SMP it cannot intervene. Even if that were correct, Ofcom then jumps to what we submit is an extremely illogical conclusion, that if it has no power to intervene that it should then intervene but in a particular way. If it is right that it has no power to intervene you simply wash your hands of the affair and you close the door. You do not say "We will intervene by allowing Hutchison's price increase and refusing BT's price reduction application." There is an illogicality in coming to the conclusion that "jurisdiction" you cannot do it and then doing it. However, we submit that under Article 5(4) of the Access Directive they plainly had power. Mr. Barling has helpfully taken you through the Communications Act and I shall not go back to that, but I would like to remind you of some of the salient features of the Access Directive, and I know that you are familiar with them.

There are some important words, and I do not think we have gone through it systematically, and I would like to make a number of short points about the structure of the Access Directive, which is bundle E1, tab 7. The first point is that the relevant provisions start at Article 2 in Chapter 2. Chapter 2 is entitled "General Provisions". It is clear from these provisions they create a general regime of interconnection which is not limited to companies or firms with SMP but embraces all companies generally. Under the regime set out in Chapter 2 of the Directive, firms have both a right and an obligation to interconnect with each other, and inevitably in such a regime there will be disputes and equally inevitably those disputes will concern price. That is particularly a case in a country such as the United Kingdom where the other terms and conditions are largely subject to regulatory approval. It means there is very little scope for dispute over those matters, and it leaves virtually nothing but price which is going to form the essence of a dispute.

Nothing in Articles 3 through to 5 excludes price, indeed, it talks broadly in terms of terms and conditions. If you look, for example, at Article 4(1) it says:

> "Operators of public communications networks shall have a right, and when required 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. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authorities pursuant to…"

and then one of the provisions is Article 5. So 4(1) cross refers to Article 5, but there is no limitation as to the relevant terms and conditions which may be imposed pursuant to the Article 5 procedure. Article 4(1) is open-ended. Operators will offer access and interconnection on terms consistent with the NRAs duties and powers under Article 5.

Article 5 then sets out a broad dispute resolution procedure. You will see that in Article 5(1) the duty on NRAs is "to encourage and, where appropriate, ensure." So it has two obligations, one – encourage, two – ensure. "Ensure"means resolve the dispute in a definitive manner, encourage may be a lesser power to cajole – act as a marriage guidance counsellor, and so on. There is nothing in our submission in Article 5 which requires the NRA in each and every case where it is including cases where it would otherwise be inappropriate to act. The words "encourage" and where appropriate "ensure", are broad and, indeed, when one goes to Article 5(4), which is the dispute resolution mechanism contemplated by Article 5(1) which says "In accordance with the provisions of this Directive", one of which of course is Article 5(4), all it says is:

> "With regard to access and interconnection Member States shall ensure that the NRA is empowered to intervene."

So the obligation is on the Member State to grant a power to the NRA. So there are the two levels of implementation contemplated there, and that is also reflected in recital 6 to the Directive, which of

course is a guide to construction, p.113 of the same bundle, tab 7. It reads, so far as relevant, as follows:

> "In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services 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 negotiations fail, adequate access and interconnection and interoperability of services in the interest of end users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end users."

I am relying upon the word "power", which confirms the impression – in fact, the express wording in Article 5(4) – and I note in passing that the end-to-end connectivity obligation only involves proportionate obligations and we will point out to you very shortly that the end-to-end connectivity obligation is subject to a reasonableness requirement which Ofcom does not apparently accept. But Article 5(4) is a dispute resolution procedure not linked to SMP. It provides a power for NRAs to intervene in appropriate cases. The fact that it is not limited to SMP is clear from Article 5(1) itself, if you go back to that on p.117 of the bundle. After setting out the general provision, the second subparagraph of Article 5(1) says; "In particular", and the note the words:

> "… without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8."

making it clear that there are some bodies within the scope of Article 5 who do, and others who do not have SMP. That is because Article 5 catches all undertakings whether with or without SMP.

I will deal briefly with the Article 8 point because Mr. Barling dealt with it. Article 8 is in a different Chapter of the Directive (Chapter 3) which is headed "Obligations on Operations and Market Review Procedures". Article 8(3) is without prejudice to the provisions of Article 5(1). Article 5(1) is the governing provision for Article 5(4) and is explicitly stated to be implemented in accordance with the provisions of this Directive. Now, it cannot be argued, I would respectfully submit, that article 5(1) does not incorporate the fourth subparagraph thereof, when you have the provisions in Article 5(1) which expressly cross-refer to it in accordance with the provisions of this Directive which plainly includes 5(4). As a matter of logic, of course, there are also two regimes for dispute resolution. There is the Article 20 regime in the Framework Directive, and there is Article 5 for everything else. So this plainly has its own scope. It is not to be imagined that if Article 5 was limited to non-SMP companies, it simply would not say so expressly, and would not make an express reservation creating clear blue water between itself and Article 20, it just does not do so. It is also important to read Article 5 in the light of Article 1 which, unusually for a Directive, sets out a scope and aim. You normally get the scope and aim from the recitals but here you have a broader governing purpose, and Article 1(1) says:

> "Within the framework set out in [the Framework Directive] this Directive harmonises the way in which Member States regulate access to and interconnection of electronic communications networks and associated facilities. The aim is to establish a regulatory framework in accordance with internal market principles …"

in other words the principles predominantly related to the free movement of goods and services.

> "… for the relationship between suppliers of networks and services that will result in sustainable competition interoperability of electronic communication services and consumer benefits."

This is not just to do with competition. It has a broader panoply of aims and objectives, interoperability being one, in other words, a pan-European market, and a pan-national market and consumer benefits. Article 1(2) 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 NRAs with regard to access and interconnection and lays down procedures to ensure that obligations imposed by NRAs are reviewed and, where appropriate, withdrawn once the desired objective has been achieved. "Access in this Directive does not refer to access by end users." If it was to be limited to SMP you would have expected to see some limitation in the guiding provision.

The final point which I think is relevant is to just observe this. This Directive does not just govern telecommunications. It governs, for example, television. It would govern an interconnection dispute whereby a channel supplier wanted to get access to a digital or satellite platform. In that context there can be SMP as well. We are not dealing with a *sui generis* telecoms' regime, it is communications which is governed. Again, if one was expecting a major part of this Directive to be limited to a certain type of operator then you would have had it explicitly stated. We draw the conclusion from this that, with the greatest of respect, Ofcom erred when it addressed its own power to invoke the dispute resolution procedure, and it came to the conclusion that it had to allow a Hutchison application and reject a BT application. So it erred in its analysis of a constraint, and we submit it was a relevant constraint.

THE CHAIRMAN: So where do you say that error in the Decision is recorded?

MR. GREEN: I think it is 4.14, and I think that tracks back from 3.30 and 3.31, but I think it is 4.14 of the actual Decision. The relevant paras. are 3.50 and 3.51 on p.1105 of A2, and that cross refers to para.4.14, which is on 1109, just so it is there on the transcript for ease of reference, 4.14 says:

> "In this context Ofcom notes it has the power to resolve the price increase dispute by determining that it will not prevent the increase until it has exercised its powers to set *inter alia* an SMP condition (see s.190(4) of the Act). Accordingly Ofcom does not accept that it has made a material error of fact in rejecting dispute resolution as a constraint on the MNOs ability to price excessively."

Is this a material error? We submit it is a material error for a number of reasons. First, Ofcom in the Decision assumes that in 2001 at least the BT Agreement constrained, or at least hypothetically constrained, Hutchison's price because BT did (or might have had) the countervailing buyer power. The question then arises mechanistically how could Hutchison set a price which became excessive at some point in the future and, in particular, not be constrained over the 18 to 24 month period of the Decision. There are only a limited number of ways Hutchison could do that, and we have been through them at great length. First, Hutchison could ask BT to vary the agreement. That has to be done by consent, and BT would not allow a consensual variation to a price which it thought was excessive. Secondly, Hutchison could serve notice to terminate, but this does not allow a change for two years and as of the date of the Decision, which is the relevant point of time we are measuring things, as of that date, Hutchison had not served notice. It is a fact, that was a relevant matter which is in the context of the Decision. As of that date, Hutchison had not and therefore it could not escape the contract within 24 months, which is the outer limit of the period of the Decision. The only other way in which the price could be varied was through the dispute resolution procedure. We say that acting in accordance with the Access Directive, Ofcom could not have imposed or allowed an excessive price.

MR. SCOTT: Mr. Green, clause 19 reflects the situation of what happens if something has become unreasonable and that is not subject to a 24 month notice period. It is not subject to the charge change notice procedure and if your clients had come to the view that the effect of the agreement was unreasonable in relation to your client could they not have acted under clause 19?

MR. GREEN: (After a pause) Can I come back to that in one moment?

MR. SCOTT: Yes, of course, by all means.

MR. GREEN: I will certainly deal with it. These mechanisms apply symmetrically. They apply if Hutchison wishes to raise a price and they apply if BT wishes to lower a price. Those are the mechanisms by which ultimately matters come into the dispute resolution arena. In those circumstances Ofcom would have to resolve the case, it does not say it would not have resolved the case, it says on the contrary, "We would have resolved it but we would have resolved it in a particular way." We say, having accepted jurisdiction, having become seized of the dispute, it should have accepted that it would have resolved it reasonably. How does that impact in the context of this case? First, Ofcom accepts that every angle of this case, dispute resolution, is relevant, and dispute resolution is a regulatory constraint. This is the regulatory constraint that we primarily rely upon. I made submissions to you in broad terms about the other sorts of regulatory constraints that might arise, Article 82, Chapter 1, Chapter 2, and so on and so forth, but for the purpose of this case, the constraint which was in my client's mind when it negotiated the BT Agreement, and which exists as the most direct curb is the dispute resolution procedure.

So we rely on three things to show that it is a constraint. First, Ofcom's own approach to the decision. We are entitled to say Ofcom itself viewed it as highly relevant and did take it into account. What we object to is that in taking it into account it made errors of law or assessment. We do not

believe it is open to Ofcom to say that in principle it is utterly irrelevant. That has not been their position to date. Their position is that it is relevant, we are focusing upon the finer detail of that.

Secondly, it is relevant because of the contractual nexus between the parties makes it relevant, and there is a bridge through clause 13 and possibly even clause 19 into the dispute resolution procedure. The two are connected by that bridge, and therefore the contract which is negotiated and part of the industry norm, involves an element of curb through its own internal mechanisms. Thirdly, if there were any doubt about it we rely upon the CFI and the ECJ's Ruling in *Tetra Laval* which says that in an ex ante case, not an ex post case, and we certainly do not say that we would necessarily be relevant ex post, but in the very peculiar circumstances of these ex ante cases, which are only just arising, curbs, from whatever source, are relevant, and the example that I would give you, which I think is most pertinent from *Tetra Laval* is the commitments. It does not rely upon whether the company is or is not dominant in any pre-existing way, because the commitments in the *Tetral Laval* case involve non-dominance. They involve non-dominance because *Tetra Laval* was not dominant in the machinery market that *Sidel* was in, yet they offered commitments to deal with the market they were dominant in and the market they would in the future become dominant in. The Court of Justice said that those were relevant, not decisive, but relevant as part of the factual matrix of constraints to be taken account of. So *Tetra Laval* takes you straight to commitments as an example.

So far as the broader Article 82 point was concerned, there was some debate as to what was left by the ECJ Judgment yesterday of the CFI's Ruling, but we do submit that a broad regulatory prohibition such as Article 82 or Chapter 2 is relevant, I do accept, however, that it is much more remote. It does not have the proximity that the dispute resolution procedure has which is intimately built into the fabric of these facts, but nonetheless it would be something to which Ofcom would be entitled, and indeed required to at least consider, although it is certainly much further away from the sun in this case.

THE CHAIRMAN: Mr. Green, the analysis that you put forward a few minutes ago, Ofcom taking into account the effect of its intervention and Decision powers you say correctly, but then actually misconstrued its powers effectively. Does that, as a factor which they got wrong in the Decision appear as such in your Notice of Appeal? I was having a look and I do not think it does, does it?

MR. GREEN: It does.

THE CHAIRMAN: There are bits around the edges, I think, but I do not think that appears in your Notice of Appeal.

MR. GREEN: It is being checked at the moment, but that is the essence of it. Mr. Roth, as I understand him, was saying that you do not even look at regulatory constraints when you are assessing SMP. That was his submission to you. Now, that is not something which we have understood to be their case in the past, but nonetheless that is the argument put to you to which we say by way of reply and riposte: "Look at their Decision". In their Decision they did accept in principle accept that regulatory constraints were relevant, but they them just misapplied the constraint.

THE CHAIRMAN: Yes, but if you are saying on a sort of *quasi* judicial review basis on which this Appeal has proceeded that amongst the catalogue of things which you say Ofcom failed to take into account in their Decision is that they misconstrued their own intervention powers, or their own determination powers, then it seems to me that ought to be in your Notice of Appeal. I am not necessarily taking a technical point except under the Statute you are confined to the grounds in your Notice of Appeal, but we can fix that. I just want to make sure whether it is there or not, and Mr. Roth has had a chance to deal with it.

MR. GREEN: These are references I give in my supplementary note in response to your letter, but it is C1, tab 5, p.216, para.3.2 – this is the "fair and reasonable manner" point. We say that:

> "The Director/Ofcom would be obliged to exercise its dispute resolution role in a fair and reasonable manner."

And that:

> "The Appellants' post-increase termination rate would continue to be justified by reference to the Appellants' costs."

This is in the heading "Section 3" which is:

> "The Decision failed to analyse properly or give due consideration to the terms of the BT Agreement and failed to assess properly their effect on the Appellants' ability to set its termination charges."

So it is under the heading "Are we constrained?" and our submission was that they had to exercise their power in a fair and reasonable manner, and that would constrain.

Then in relation to reduction of rates on p.219 of the same bundle, para.3.8, also this time in the context of clause 13: "If the respondent has to respond then it will do so in a fair and reasonable manner."

So in those two ways, in the section on "Are we constrained?" we have submitted that Ofcom has a duty, insofar as it is exercising its power and has a duty to act it must do so fair and reasonably.

THE CHAIRMAN: Yes, but you have not said there "… and in the Decision they seem to have misunderstood their own powers", which is a rather more significant point for the purpose of an Appeal. I just wanted to make sure it is not there – Mr. Roth will tell me whether he is disadvantaged, and we can no doubt fix that. I just want to establish what the position is at the moment in your Notice of Appeal.

MR. GREEN: Yes.

THE CHAIRMAN: I believe that what I am saying is correct, but your Notice of Appeal is a long document and I may have missed something.

MR. GREEN: (After a pause) I am going to ask those behind me to check.

THE CHAIRMAN: Of course.

MR. GREEN: You may be right, I will just ask for it to be checked. What I am doing is responding to Mr. Roth's argument, that frankly when you assess SMP regulatory constraints are utterly irrelevant.

THE CHAIRMAN: Well you are doing more than that if you are saying "Look at the Decision, they talk about the relevancy of these things, but they have actually got their own powers wrong, they took something irrelevant into account", so your point potentially goes farther than that – unless you are disclaiming that as an attack on the Decision, which I would guess you would not want to do.

MR. GREEN: You guess right! (Laughter) Well if I need to make an application for permission to amend I will do so.

THE CHAIRMAN: I am not getting unduly technical about this, I want to establish what is fair and what is not and give Mr. Roth in due course if he needs to, a chance to meet it, if it is a new point.

MR. GREEN: I would respectfully submit I am responding to his point, but anyway there we are. For these three reasons it is a relevant and material error:

(i) it is their own case that says it is relevant,

(ii) it is contractually intertwined with clause 13 and possibly clause 19; and

(iii) insofar as one needs it at all *Tetra Laval*.

We dispute that there is any circularity – let me just deal with that point made by Mr. Roth. Circularity – yes, if we were dealing with ex post cases, absolutely, I have no doubt about that. If you say in relation to an ex post case that here we have an undertaking and it has been engaged in predatory pricing, it is circular to say it does not have dominance because that might curb its conduct, because you know it brooked that curb, it ignored the curb, otherwise it would not have engaged in the predatory pricing. It is in the past, it did not *de facto* exert any effect. So if and insofar as it is even theoretically relevant you know that, as a matter of practicality it had no impact which is why, in an ex post case, this does not arise, and that is why the Court of Justice and the European Court emphasised, particularly in paras. 42 and 43, that this was an ex ante analysis. So we are in a new framework, and we submit that this alleged circularity does not arise.

MR. SCOTT: But there is a difference, it seems to me, between Article 82, which subsists in any event and regulation which can only occur if SMP has been found. You cannot find SMP for regulatory purposes ex post – can you?

MR. GREEN: Well you find dominance.

MR. SCOTT: You find dominance, but that takes you to competition law.

MR. GREEN: The point here would be SMP equals dominance, do you say there is no dominance simply because there is a regulatory constraint? In an ex post case when you are actually looking at I suppose one would say in theory it is relevant, but in practice it will never, ever have any bearing, simply because when the case officer in Brussels has it on his desk he has a file in which there is evidence which, if right, establishes predatory pricing and, by definition, the company was not curbed. So in a sense it is rather irrelevant to say do they not have dominance because they might have been curbed when the answer is "Well we know they did not", because here are the bodies littered around the dominant undertaking. So if there was a curb it just did not operate.

MR. SCOTT: Yes, that is all ex post in relation to Article 82.

MR. GREEN: But the ex ante it is a relevant consideration because you cannot assume that everybody will ignore the law. When the police have nabbed the criminal red-handed with a mask on and a bag which says "Swag", you know that the fear of prison or the fear of capture did not work. But a citizen who walks out of his/her door may or may not commit a crime and you do not assume they will commit a crime, and that is the difference between ex ante and ex post, and that is what the Court of Justice was engaged in analysing in *Tetral Laval*. It is simply as a matter of fact, is the regulatory constraint one which works? In 99 cases out of 100, no, but in the ex ante cases it is at least a relevant question to be asked. It is not a conclusive answer, but it is a question to be asked. That is what the court was saying, no more than that. In an SMP case you would have to ask what constraints are relevant. Which are the most directly proximate? Article 82 quite remote, but dispute resolution an integral part of the machinery. I am not making a submission that SMP would be negated simply because, in this case, Article 82 exists, or Chapter 2 exists.

Countervailing buyer power ----

THE CHAIRMAN: Mr. Green, before you embark on this, I think this would be a good opportunity to work out where we are going to go now, because you are obviously not going to get through all this by the time which you would say you need to leave this hearing. We have still to hear from Mr. Roth.

MR. GREEN: Yes. I would be anxious just to push on and budge up as close as I can, and possibly beyond, my crisis this afternoon, because they are aware that I am in court this morning. However, if I come to a point where it is impossible – but I hope that will not arise.

THE CHAIRMAN: Right. Well just give me a moment.

(The Tribunal confer)

THE CHAIRMAN: Mr. Green, we will carry on past our normal lunch break, but I think I will record the Tribunal's displeasure at the fact that we are put in this position. I think if your position had been canvassed with the Tribunal – that is the members of the Tribunal – at the outset and we had known what the position was, we would have made it quite clear that we would want to continue this case in the normal way until it finished, and then you might have had to make applications or adjust your commitments. We are not very happy about the position in which we have been put but we will co-operate and just carry on while we can.

MR. GREEN: I am very grateful for that.

THE CHAIRMAN: There may have been some negotiations behind the scenes, and I think that things may have been said, certainly between the three of you down there, and there may have been some negotiations with the Tribunal's officials as well, but I have to say, Mr. Green, I think it is appropriate to raise it with the Tribunal itself if you are going to be in these difficulties so it can be sorted out.

MR. GREEN: I have to check, but I think it was raised with the Registrar, because we were asked whether it was four days or three days, and we said three days without oral evidence. I do not want to get into debate, I understand the Tribunal's position, and I am grateful for any indulgence.

Countervailing buyer power. This obviously interrelates closely with dispute resolution, but it does stand as a separate issue. In the present case Ofcom was of the view that BT could not have countervailing buyer power because it was subject to an end-to-end connectivity obligation, at least from May 2003. Ofcom's position is that the May Guidelines weakened BT's CBP and that since Hutchison is no longer in a position of such urgency, BT has no countervailing buyer power. The first paragraph of 3.32 says explicitly:

> "With such a forward looking perspective and with delay not such a critical issue for '3' it would be difficult to argue that '3' could not set excessive charges to BT."

So we say what are the implications of this? Ofcom accepted that in 2001 BT did not have, or at least for the purpose of the Decision might have had countervailing buyer power and it is upon this basis that we submit that Hutchison cannot have had SMP, at least as of that date because if even hypothetically BT had CBP that negates the SMP. That was the working assumption as of 2001 and, as you know, Ofcom then takes the position that the end-to-end connectivity obligation negates all CBP for the future. Therefore, there is a crucial issue: Does end-to-end connectivity negate all CBP? I accept that we can no longer submit to you that there was not a connectivity obligation prior to 2003, we accepted that. But the issue then becomes is Ofcom correct to take the position that end-to-end connectivity negates all countervailing buyer power? We submit the logic is flawed. First, if you just examine Ofcom's logic in 2001, the end-to-end connectivity pre-dated May 2003 and therefore must have existed in 2001. Yet then, Ofcom accepts that CBP can exist, notwithstanding in 2001 (at least in principle) the end-to-end connectivity obligation.

Secondly, the guidance from the Commission on this point, cited in BT's skeleton at para.24, this is the 2003 recommendation, makes it clear that where there is disparity in size then CBP can still exist. So again in principle the Commission and Ofcom do not agree, there is daylight between the two.

Thirdly, as a result of this, Ofcom did not conduct any factual analysis of the situation in its Decision, and there are three relevant matters which it could have examined. One, there is the position in the 2001 negotiations. Secondly, there is the position subsequently, and then there is the position which in effect takes you back to the dispute resolution procedure, and let me briefly say a few words about each of these.

So far as the 2001 negotiations are concerned, we submit that there six short points which can be made, and the real relevance is simply to ask yourself are these considerations which have at least some durable relevance – or might have durable relevance. The first is that Hutchison was acutely conscious of the threat of regulatory intervention. Secondly, Hutchison was conscious of the fact that its rates had to be acceptable to BT. Thirdly, Hutchison was also very conscious of the fact the high rates (or the very high rates) would risk growth in consumer demand. Fourthly, that BT was able to reject prices offered and proposed by Hutchison – it really does not matter who proposed to whom and when, BT was able to say "no" to certain prices. Fifthly, that BT could and did demand cost justification, and Bt was not prepared to agree different rates to those it had set for 2G operators, even though from H's

perspective it had 3G costs; and sixthly, Hutchison could not impose its own terms and conditions upon BT because these were initiated by BT and subject to regulation in the sense they were an industry norm, but that means you cannot have supplier power over the terms and conditions.

Had Ofcom investigated that position, it would have discovered that the position was more complex than it imagined, that urgency was not the only factor and that there were, what we describe as "durable characteristics" which would have been relevant and current in later years. Post the negotiation you are aware of the evidence as to this, Hutchison had signed a contract that locked it into the embedded price, subject to such keys as it had to unlock the door out of the contract. The evidence of Miss Laurent has explained that, from Hutchison's perspective, there was no sensible commercial basis upon which it believed it could unravel the arrangement and her evidence was that it would send the wrong signals to the market, and so on.

The third way (and the third relevant factor) brings you back to the dispute resolution procedure. This would have been the other way in which the prices could have changed and BT was aware that the dispute resolution procedure operated. You have seen the documents showing that both parties were aware of it and it did *de facto* exert an impact upon the negotiations.

In short, the failure of Ofcom to examine the issue was, we submit, a material issue. It was based upon an error of law that end-to-end connectivity excluded every element of countervailing buyer power, and there are two additional points which need to be made in this regard. First, the notion of end-to-end connectivity and reasonable prices. You have seen Mr. Barling's skeleton, and I will just give you the references at this stage, annex 1 to Mr. Barling's skeleton where he gives references to the conditions in the BT licence, 45.1(b), 45.1(c), 45.3 and 45.4, all of which impose reasonableness caveats or requirements into their obligation to interconnect.

It is clear from the European Commission's own 2003 recommendation that it takes the view that a small network cannot impose a reasonable price on a large network. It can only be upon the basis the large network has the right to refuse something which is manifestly unreasonable. Indeed, the European Commission in its German Decision said the same thing. So there is no such thing as "never say no", and that is a fact to which Ofcom apparently, as is evident from Mr.Roth's submissions, believed was something which applied at the time, and we submit that that is clearly an error of law.

The second matter which we would raise, arises out of Professor Stoneman's question and discussion ----

PROFESSOR STONEMAN: Before we go on to that, can I go back a little bit? The paragraph: "In short, the failure of Ofcom …" you frame this in terms of there is no way that H3G could set excessive prices on a persistent basis. If you were to say there was no way that H3G could set higher prices I may have less problem with that. But excessive prices is a statement with respect to costs.

MR. GREEN: Yes.

PROFESSOR STONEMAN: And as we know, we have discussed, over time we expect costs to be changing. All right, they have not been gone into – costs have not been gone into – but most of the

telecommunications sector is one where costs are falling over time, and earlier you were talking once again about setting excessive prices. So really, just if H3G and BT sit on this contract and never change the prices again prices will become excessive – it may not be this week, it may be three years' time. So you have given us statement from Miss Laurent as to why H3G did not want to change the price. This morning, in response to my question, BT was giving a very much similar response, that they did not want to change the price, so that generally over time the price will become excessive.

MR. GREEN: Put it this way, you may be right, but in that was not Ofcom's reasoning. What I found quite startling was the proposition in Ofcom's skeleton that the reference in 3.32 to the absence of a contractual mechanism to push prices down, was something which was just a comment in passing, and it is simply not part of Ofcom's Decision. They viewed it as something which was effectively trivial. Now, our complaint – you may be right, you may be wrong – there is nothing in Ofcom's case, and they have acknowledged this in the course of pleadings to suggest that costs would collapse to such a degree over the short period of this Decision. What happens after that is not for this case. It is a matter which plainly required investigation, it is really the corollary of the points I have been making – it is the dark side as opposed to the white side – but it is plainly something which would need to be investigated by Ofcom and no doubt will be investigated in the course of its present review.

We are talking about a Decision 18 to 24 months from the 1st June, and we simply say when you are looking at countervailing buyer power Ofcom might have considered it relevant to examine whether there was, in fact, some cosy arrangement between BT and Hutchison whereby they were all very happy that one could pass on excess prices and the other could charge them, and there was a cosy pass-on relationship. That is a hypothesis, but it is not part of the Decision – no doubt Ofcom would consider it relevant for the future.

MR. SCOTT: Mr. Green, can we turn to the Decision? The Decision makes it very clear in 3.32 that Ofcom recognised that there is no arrangement in this contract for BT to ensure that charges fall over time from their current level in line with costs. Some evidence of this is BT's inability to enforce reduced termination payments to '3' at the time of the 15% charge reduction applied to the other MNOs in July 2003.

MR. GREEN: Yes.

MR. SCOTT: We have already established that although what was in mind at the time of the Decision was a timescale that was short in relation to the 24 month termination provision in the agreement, but we have also established that this is an on-going situation in which negotiations take time to occur, we have already seen that the period has been extended to 2007, and it seems to me that the theoretical presence or absence of SMP can become apparent in the course of negotiations that may take place subsequently if anybody seeks a reduction in these charges. So that to say that it was not taken into account by Ofcom is to ignore that which is on the face of the Decision.

MR. GREEN: Well what they say is there is no contractual mechanism – that is the only thing they say. They observe, in the penultimate sentence of 3.32:

> "It may be that existing contractual arrangements between 3 and BT make it difficult for 3 to raise charges from their current level, however, there is no arrangement in this contract for BT to ensure that charges fall over time from their current level in line with costs."

I read that as the co-relative to the point that they make in 4.14 that if BT applies to them for a decrease in price they cannot grant that application. I am not certain that it can mean anything else. There is no contractual mechanism – that is the point they are saying – no arrangement in this contract. We have analysed and said there are the mechanisms in the contract which take you to Ofcom.

THE CHAIRMAN: To "ensure" – that is the verb "to ensure".

MR. GREEN: "…to ensure that charges fall over time".

THE CHAIRMAN: Not "to provide an opportunity" but "to ensure".

MR. GREEN: If the reference was made by BT to Ofcom and BT had to fix a fair and reasonable price then it would do so by reference to cost. Mr. Rutnam, in his witness statement, makes the point that in such a situation you would flex the timing of the dispute resolution with a market review and you may, for example, put the dispute resolution procedure behind the market review, and they accept that they are two different procedures. So Ofcom's position is that they would set a reasonable price. That seems to be their position. But it is not unimportant in understanding where Ofcom has come from. Paragraph 67 of Ofcom's skeleton:

> "As is apparent from 3.30 to 3.33 of the Decision Ofcom's reasoning on CBP is based primarily on the facts that:
>
> (a) BT's bargaining position had been weakened by the 2003 guidance on end-to-end connectivity,
>
> (b) H3G's bargaining position was no longer affected by its urgency to launch its service as may have been the case in 2001.
>
> The reference to the absence of a provision for charges to fall in line with costs is little more than a passing comment, and is certainly not central to Ofcom's case as Hutchison seems to suggest."

Now, I am entitled to assume that that is an accurate statement of Ofcom's position in the Decision – I cannot take it as anything else. Ofcom therefore is saying that there is nothing in the contract and again I am entitled to say 4.14 is the reason for that because Ofcom itself takes the view that it has no power to push prices down.

So far as the last sentences go that there is some evidence, well that has been dealt with by Mr. Westby. Hutchison was not subject to the Competition Commission Report, and was not subject to regulation. Nobody forced it, or even asked that it should reduce its prices. It is not in a comparable position to the other 2G operators. After the investigation that is ongoing Ofcom might take the view that it is, because it may say 3G costs are exactly the same as 2G, but that really is not evidence which

stacks up. Anyway we have dealt with that, it is in the latter part of Mr. Westby's witness statement, and I gave you the references to that at the outset in my submission.

If I could move on to three other points which arose in the course of my friend's submissions in relation to this. First, it is evident from Mr. Barling's submissions this morning that BT sees itself as having a duty to protect its customers. That is plainly relevant to its perception of what it does in a negotiation. BT certainly does not view this as a cosy club.

Secondly, we submit simply that this was a matter which required serious investigation and one does not see the proper level of investigation in the Decision. Thirdly, can I give you this reference that Mr. Roth yesterday (Day 3, p.45, lines 12 to 17) in response to a question from the Chairman about Hutchison's ability to set price said:

> "H3G cannot set any price and BT still has to buy. BT has to buy the service, that is the starting point. They have to procure end-to-end connectivity, and the only way of doing that is through acquiring termination service through H3G. We say H3G could not set some artificially high price because they have SMP and they would then be subject to further control by Ofcom."

As I understood it, and I have given you the reference so that you can see it in context, Ofcom is not saying that Hutchison has the ability to set an unconstrained price.

Let me move to the point of bilateral monopoly, and you will see where the relevance of this issue arises. It is merely this, that we submit it is a serious issue. It is one Hutchison itself raised in relation to the proper characterisation of relations between itself and BT, that the issue was squarely raised with the Commission and the short point is it was an issue which required close examination. It is a hypothesis, it is an alternative scenario which might or might not be relevant, but if it has legs it goes to the heart of, and is at least relevant to, CBP.

Can I deal with just the technical point? We certainly did not make this point to Ofcom at the time, but as far as appeals are concerned, Harbord is raised in the Notice of Appeal – he is referred to in the Notice of Appeal – but just so far as it arises in the *Napp* Judgment of this Tribunal – I do not ask you to turn it up (H2, tab 12, p.30 para.117): "An Appellant is not confined to points made to the decision maker on the Appeal". On the Appeal you can raise anything about the Appeal. Many points arise during the course of an administrative procedure. The decision maker makes its decision and then that Decision becomes subject to Appeal. So you are not limited to points you made to the decision maker on a merits' Appeal and that was established by the Tribunal in *Napp*. We are simply responding to the matter raised by Professor Stoneman, but it has limited relevance. We simply say it is yet one more of the scenarios which was not considered, but which may be

a relevant one.

THE CHAIRMAN: I can see why the *Napp* Decision make sense if there was an evidential point or some point which was not fully developed, but does the *Napp* Decision entitle you to complain that Ofcom did not take something into account, when it was something that you could have drawn to their attention at the time but did not.

MR. GREEN: There are many points in *Napp* which we put new evidence on in respect of the Appeal, and then the Office of Fair Trading put counter-evidence in and we had a debate about whether the OFT's new evidence was admissible in that case, but there was a considerable amount of evidence put in in the course of the Appeal ----

THE CHAIRMAN: That is a different point.

MR. GREEN: -- and there have been in other Appeals, new evidence is put in by the Appellant to attack the Decision, irrespective of what happened before. That is because the Tribunal, the merits' tribunal, is not a judicial review tribunal, it is a merits tribunal and can take its own decision.

THE CHAIRMAN: I understand that and, obviously, if you are going to invite the Tribunal to do that you put in evidence and you have a debate about it, but where the essence of your complaint is a Judicial Review sort of complaint where you are saying "Look, these people did not take X, Y and Z into account", can you say that if you yourself had an opportunity to have X, Y and Z taken into account and did not avail yourself of the opportunity?

MR. GREEN: In this case, you have seen it is in our evidence. I was responding, and I put it in the note because it was a point which arose yesterday from the Tribunal. I was not aware at the time whether Professor Stoneman had read Mr. Harbord and it had generated itself out of that, or if it was a free-standing piece of inspiration – a very clever point, if I may say so. Our criticism is that in fact the issue is far more complicated than is reflected in the Decision. There may be any number of different permutations which would arise on a detailed analysis, and one simply identified one out of perhaps many different permutations, and it is really put as a hypothetical. You could analyse this case as bilateral monopoly. It is a plausible proposition in which case you might ask yourself is it a cosy bilateral monopoly? Is there a pass-through of excessive prices to customers, which are matters which have been raised throughout the course of this hearing. These are issues, they are just simply flagged as issues, which are not evident as having been addressed in the Decision. It really goes to no more than that, and one could no doubt identify all sorts of other counterfactuals.

PROFESSOR STONEMAN: Can I say I have no idea where the thought came from, but I know why it came up.

MR. GREEN: It was inspiration.

PROFESSOR STONEMAN: If we want to put it that way – that sounds better, does it not? The reason the thought came up was in the discussion of countervailing buyer power one of the pre-conditions for the existence of countervailing buyer power was that the buyer had an alternative source from which they could buy the product. So for BT to have countervailing buyer power it had to have an alternative source from which to access subscribers to the H3G network.

MR. GREEN: Yes.

PROFESSOR STONEMAN: And the point was that it had not, and therefore it was argued there is no countervailing buyer power. You may take that or not, but if you take that definition of countervailing buyer power it does not exist, and therefore H3G could set whatever price it wanted.

MR. GREEN: Yes, I understand that.

PROFESSOR STONEMAN: But then it raises this issue of well, if you have a monopoly facing a monopsonist where neither of them have alternatives to which they can turn, is that still countervailing buyer power? It looks as if it is not. It looks as if it is defined out of the definition of countervailing buyer power. So you then, for your arguments, you need to define bilateral monopoly as a situation of countervailing buyer power which seems to conflict with the case law and the definition.

MR. GREEN: With respect, that has never been Ofcom's position, otherwise Ofcom would never have examined this case and contemplated that, at least in theory, in 2001 there may have been countervailing buyer power. Countervailing buyer power is nothing more than there is sufficient power on the buyer's side to prevent the supplier from charging an excessive price. If you can bring the price down below the excessive price on the definition of SMP, you do not have it. So it is just simply a conduct matter. There is no legal definition of countervailing buyer power, it is simply a factual inquiry – one factor is whether or not the purchaser can leverage an alternative supplier into the equation. That is a relevant factor, but where you have bilateral monopoly – if one wanted to use that term – that does not mean to say you cannot have CBP if the end result is that the buyer can prevent the supplier from charging an excessive price, because we are talking about no more than is somebody or something a constraining. At base, that is all we are concerned with.

PROFESSOR STONEMAN: All right, but all the documents to which I have been referred consider that for countervailing buyer power you need an alternative source of supply? I am quite

happy if you were to give the Tribunal some examples where that is not the case. You do not have to do it now, if you want to put it in a bit of paper ----

MR. GREEN: We will have a look but I do not know off the top of my head whether there are or there are not, but with respect there is a legal point here, which is what is the relevance of CBP? CBP has no greater relevance than it is a factual aspect of "constraint". So therefore it is a factual inquiry, it is not a question of legal definition, and you are simply asking yourself whether the buyer can constrain the supplier. If you have a monopoly purchaser you may cancel out the monopoly supplier's price, and the monopoly purchaser may simply not be prepared to buy at an excessive price, and if that is *de facto* the case, then we submit that negates supplier power, it is as simple as that. It cannot be anything else. You are only asking yourself as a question of fact whether that big buyer there did or did not have the ability to prevent an excessive price being charged to it, and that is all it comes to, did it or did it not constrain, that there is no legal definition? With respect, if one tries to turn it into a legal definition that, we submit would be an error, and the attempt by Mr. Roth to try and put it into a strict legal straightjacket is simply wrong.

That is why the European Court, for example, was considering this question of regulatory intervention as just a constraint. That is the only question one is asking, is it, or is it not a constraint? One has to approach this from first principles, and first principles tell you it is no more than a question of fact. Many, many things may constrain and this is one of them. I fully accept that if there is an alternative supplier that may be a very relevant consideration but it is not the answer, not a total answer.

It is pointed out to me that if, Professor Stoneman, you were right on that, then 100 per cent. market share would mean there was no point in looking at CBP because you would always have someone who was a supplier and you may be looking at someone who is a monopsonist purchaser, but the Commission is quite emphatic, market share alone is not enough, one has to look at countervailing buyer power.

Just one or two conclusions on countervailing buyer power and dispute resolution. One needs to just stand back and say why are these relevant. In a market where you define the market as being narrowly defined, where you have a supplier with 100 per cent., then CBP and regulatory constraints are plainly the two main potential constraints, and you have to decide for the purpose of dominance whether or not they do constrain the ability to set an excessive price. In the present case there was a very marked disparity between the size of Hutchison as a new entrant, and that of BT, and that is plainly a relevant factor, as the Commission itself recognises in its 2003 recommendation.

Can I move then to the final matter, which is ----

MR. SCOTT: Sorry, the evidence, as I understand it, is H3G have been growing by leaps and bounds ---

MR. GREEN: As of the date of the Decision they had about 361,000, by the time the Decision ends, well they are going to be 3 or 4 million, but they are still going to be very, very much smaller. There will come a point in time ----

MR. SCOTT: But in a forward looking sense the situation that has been achieved, which is of 3 million and more customers, could easily have been conceived by Ofcom. It seems to me you are no longer a small operator.

MR. GREEN: No, it is relative, it is "smaller". BT is connected to approximately 250 operators, we are connected to one or two. The size of our network is vastly smaller than that of our main interconnection partner. We are dependent upon BT ----

MR. SCOTT: Less than one order of magnitude, in fact, now.

MR. GREEN: But we must confine the analysis to the 18 to 24 month period of the Decision. What happens in the future is for another day.

MR. SCOTT: It is a forward looking analysis?

MR. GREEN: No, with great respect, only for the purpose of the 18 to 24 month period of the Decision, because otherwise they know they were going to take another Decision. When Ofcom started this it was one review leading to another review, and this review and this Decision is without prejudice to the next review.

MR. SCOTT: Yes.

MR. GREEN: Finally prices. We make three points about prices. I will deal with them quite briefly, because we have gone into them in some considerable detail. We submit first that in the structure of the Decision Ofcom has made price an integral part of proof of SMP. I entirely accept a great deal of what Mr. Roth says, that in 99 per cent. of cases conduct and price are utterly irrelevant – they are. There are very few cases where conduct is said to be relevant to dominance. There are cases where the court has said evidence of a particular conduct buttresses conclusions about dominance, but in 99.9 per cent. of cases this is emphatically correct. But we are dealing here with a most unusual category of case – the ex ante case, and we have had virtually no jurisprudence, we have *Tetra Laval* and a couple of other merger cases. This is the first of no doubt a series of EC related cases about telecommunications and price; and given that you are looking at something prospectively in the future, the court has said that you have to look very carefully at the conduct which is said to form part of the SMP.

You only have to look at para.3.2 of the Decision to see that analytically, methodologically Ofcom makes price a condition which it examines before you get to the conclusion of SMP. I entirely accept that this is not the run-of-the-mill case. It is simply a stage before you get to SMP whereas in 99.9 per cent. of cases it is something you ignore. In that context we say first that there is an important distinction which has been drawn between ability and incentive, and as you know Ofcom found that in relation to the 2G MNOs they had both the ability and the incentive. But in relation to Hutchison they found an ability but having examined the facts they said there was no sufficient evidence of incentive.

So forensically when the decision maker says "I have no sufficient evidence" one says "it is not part of his reasoning". We are entitled to say "If you have examined it and you have not got sufficient evidence, you are not entitled to say 'we have the incentive'". Ofcom are therefore stopped short of saying "We have the incentive to raise prices to an excessive level" we simply have the ability. We submit that, as a matter of law, that just is not enough. They had to be able to establish more than a theoretical ability. Of course, we submit the dispute resolution and CBP negate that ability and this argument therefore is separate from that.

We submit it is an error of law which goes to the heart of the Decision, and as a matter of law, under Community law, under the Directive, an NRA cannot get home on SMP through a mere theoretical ability without an incentive.

The second criticism we make is the failure to examine the issue of price at all, and again I will not go back into what Ofcom did and did no do, and what it therefore accepts for the purpose of this Decision, of course without prejudice to what it finds in the future. Ofcom says that it can found its decision by reference to the presumption only and it does not have to conduct an examination of prices. The debate, you will recollect about business plans is, I think, on analysis not really on point because Ofcom's case is that cost price just is not relevant. It is only as a subsidiary matter that it says that if it was relevant it could not conduct a full cost price analysis, but its basic case is we did not have to conduct any analysis at all. Our point is that it is relevant, it is a matter which needs to be examined, and we accept there was no cost data. I will not go back into the evidence, except that there was no sufficient cost data to analyse the issue, but we simply say that there are alternatives. We gave BT Openworld, and the question of business plans as an illustration of alternatives. You have seen Mr. Rutnam's statement where he said that when a dispute resolution dispute and a market review coincide they will effectively delay the dispute resolution procedure until they have done the market review. There is no reason why Ofcom could not have done that in this case with a new entrant. After all, you have seen from the remedies that they did not believe there

was any material adverse impact of Hutchison's conduct on the market and that is why they imposed what they viewed as a light touch reporting obligation. There was no downside, there was no proportionality risk to simply delaying the Decision for a period of time. So we say, as a matter of law, they were required to consider the question of cost and price and they did not do so.

Thirdly, and finally, the temporal element. In *Tetra Laval* the CFI held that where dominance was due to emerge following conduct after a period of time the Commission had to factor that, the temporal consideration, into its detailed analysis for the obvious reason that the further you are away from the conduct you are speculating or hypothesising about, the more remote is its likelihood, and we submit Ofcom's case is confused here. In its skeleton and its submissions it suggests that the Decision is based upon a here and now and a present ability, but this does not appear to be consistent with the Decision. The Decision indicates that Ofcom accepts there is no present incentive to raise prices to an excessive level. I am looking at the date of the Decision. I am taking the point that as of the date of the Decision that does not appear to have been Ofcom's analysis. But Ofcom has accepted that it is not part of its case in defending the Decision that during the course of the Decision costs will decline to such a degree that the embedded price will become excessive. That is part of the logic which Ofcom accepts underlies the Decision – that is point 1.

Ofcom also accepts that its Decision is forward looking and it says that even if BT did exert CBP in 2001, which as you know it accepts at least as a hypothesis, that this does not provide an answer because its Decision is based upon an ex ante prospective assessment of H3G's position in the future. We know what their position is, it is all future. The question is when in the future. Given what they did not examine, given the short period of time is it sufficient for them to have a generalised view that it will arise in the future without being more precise as to at what point in time – how, why, when, what, who and where that will arise. Part of their problem, I think, is because they came to an error about their own powers as reflected in 4.14. But in the present case Ofcom has not carried out this analysis. There is no indication of when costs will collapse to such a level, and I think everybody agrees that that is probably the way in which an excessive price will arise, rather a price hike it is a failure to reduce price, that is more consistent with the way telecoms markets operate. When is that going to occur? There is no analysis in the Decision, and you have seen Ofcom in is skeleton says that is simply something they have addressed in passing. These are matters which we say are relevant. If you are going to find SMP you have to pin it down to a point in time. That is all I wish to say about pricing. Can I make some final short points?

First, harmonisation and the German Decision. So far as harmonisation is concerned, in terms of the way the issue arose yesterday, it is clear this Tribunal makes the law. You supervise the regulator. There are complex issues of law which arise in this case. You are an appellate court in this sense. You are not bound by the Decisions of an administrative nature of officials whether here or in Brussels or in Germany. Documents from the Commission show the Commission's view. You are of course entitled to take account of them, but you are not bound to pay them utmost regard. That is an instruction to NRAs, not to a court supervising an NRA. They do not necessarily tell you what the law is. If the Commission takes the view that Article 5 of the Access Directive is limited to non-SMP undertakings then with respect it is guilty of an error of law, just as we submit Ofcom is. The options open to you are to decide this case. If the matter went further the Court of Appeal could refer it to Luxembourg, or the House of Lords could. The German Government or the operators in Germany could appeal the Commission's Decision to the CFI, and it could go on there to the European Court of Justice.

If you decided this case on whatever grounds in my client's favour, it was remitted to Ofcom and Ofcom then went through its own verification procedure with the Commission and the Commission adopted a veto decision we could appeal that to the CFI and on to the ECJ. There are many ways in which these issues could be thrashed out but the most important point is that we are now at a judicial level, not an administrative level, and we simply invite you to rule on whatever legal points you believe are relevant. You are not bound by anything the Commission says, or the German regulator or Ofcom says. It is a question of law and assessment for you. This is how harmonisation is achieved, because when we get to the CFI and ECJ level, it takes decisions which apply, as it puts it *erga omnes,* for the whole of Europe, and then all the regulators simply fall into line, but they fall into line through the harmonised judicial procedure of which this Tribunal is obviously part.

That takes me finally to the German Decision and I can probably do this by simply a series of submissions, but we do believe actually it is quite supportive of our case for the following reasons. First, Germany disagreed with the Commission and it is perhaps a jury point to say well there is one regulator on our side. There is therefore no universal agreement on important issues.

Point two, Reg TP, the German regulator said that the interconnection obligation was irrelevant – para.14, you will remember their modified Greenfield. We actually disagree with the German regulator on that. It is relevant, it is a question of what weight you give the end-to-end connectivity obligation. It is just simply a factor to be taken into account. We have some sympathy with the Commission when it said that they did not quite follow the German

regulator's position that methodologically you should ignore the connectivity obligation on Deutsche Telecom.

The third point, which comes out of para.17 of the Decision, the Commission emphasises that NRAs must respond to their own facts in their own Member States. Again, that may limit the extent to which the German situation can be read across from, because we do not have the German Decision – or translations of it – or any of the documents that are referred to.

Point four, yes, the Commission said there was a strong presumption when you deal with 100 per cent. market shares – okay, well that is a fair point. That is the Commission's view, and it accords with Ofcom's view, but it does not, we say, constitute the end of the story.

Point five, which comes out of paragraphs 19 and 20 of the Decision, the Commission was concerned that the German regulator's position had not been sufficiently proven and, on a number of occasions they say that we do not accept your proposition without proof. Nowhere do they actually say the Germans got it wrong. They simply say if you are going to take the position you have, that there is CBP, then we need further proof. They criticise, for example, the notified market analysis in para.19 and in para.20 they said there is no convincing evidence.

The sixth point is this – it comes out of paras.21 and 24 – it concerns the strict Greenfield approach and I think it reflects a point I have already made, we do not say that Ofcom should assume no end-to-end connectivity. We say on the contrary it is a relevant factor and if Germany thought the opposite then we accept the Commission's criticism of them for that.

Point seven, there are peculiarities of the facts in that case, it comes out of para.30. It appears that in analysing Deutsche Telecom's position as a countervailing buyer with power, there were two salient facts. First, it was forced to agree prices it did not accept and, secondly, that they were so unacceptable that they actually challenged them in court. So there seems to have been a very strong opposition from DT as to the prices which were imposed upon it and that, one would have thought, was counter-intuitive to the conclusion that they had countervailing buyer power. They accepted prices which were so inimical to them they actually challenged them in court.

Paragraph 32 of the Decision, in a modified Greenfield scenario, where a buyer is subject to a connectivity obligation it is a question of fact that appears to be have accepted implicitly by the Commission.

Then paras.36, 37 and 44-46 demonstrate only this, that this was not a Decision on theology, it was a Decision on nuts and bolts. Then very finally in relation to that, para.33 of the Decision – it probably suffices to read this into the transcript – BT asked you to look at this last sentence, and it refers to the fact that a large network can raise prices, and when you look at it carefully you will see that the large network referred to in the last sentence of para.33 is the BT-type body not the Hutchison-type body. It is actually referring to cases where there is a large network, and the risk of a large network raising prices can be curbed by regulation. It is not referring to small network cases. The risk is of a large network. I do not ask you to come back to it now, it is a very small point but when you look at it I would ask you just to bear in mind it that it needs to be looked at quite carefully because the language is slightly obscure.

Final sweeping up points. A quick point on price discrimination. Mr. Roth said that Hutchison could engage in price discrimination. That is not in the Decision. There is no explanation anywhere of how Hutchison could engage in this price discrimination. Mr. Roth was bound to accept that we could not charge more to the 2G MNOs because they could simply transit via BT. He then resorted to the notion that Hutchison Whampoa would discriminate in favour of some subsidiary that it had acquired, probably a fixed line operator, as opposed to a mobile operator, this is not in the Decision, it is pure speculation and I do not think anything more needs to be said about it.

Finally, clause 19 of the BT Agreement. It does not allow for summary termination. If you have a clause 19 dispute you have to go through the determination procedure in clause 20. Therefore, you would have to serve two years' notice as usual. I think that is the mechanism which is set out. (After a pause) I am sorry, it is not two years. The mechanism for serving notice in a clause 19 dispute is in clause 20, it takes you to the "Director General" – I shall not go back to that – but then it takes you straight back to the point we discussed earlier, namely, that the Regulator would decide on a fair and reasonable manner, but I think therefore the point ----

MR. SCOTT: Yes, there were two sorts of review. One is the unreasonableness review, provided for by 19.1(7) and the other is the general review provided for in 19.4, and as we understand it neither party has sought to initiate the general review notwithstanding the passage of some of the dates provided for in 19.4.

MR. GREEN: That seems to be correct on the reading of the contract, yes. (After a pause) Sir, the point has been made to me, in relation to our challenge to the dispute resolution procedure, you have seen the provisions in the Notice of Appeal, Ofcom put in a detailed defence and we dealt

with it very fully in the Reply. The Reply deals with dispute resolution (C1, tab3, p.131-132. paras.216-27)

THE CHAIRMAN: What is your point on this?

MR. GREEN: It is whether or not we pleaded the attack on the dispute resolution procedure, but we have a fairly full analysis of dispute resolution – it is really in response to your question, Chairman. If we need to make an amendment to cover any particular point, or if Mr. Roth feels that in responding to his arguments we have raised something which he needs to address then he can do so.

THE CHAIRMAN: Right.

MR. GREEN: Can I just make sure that something we handed in earlier, we were asked to hand it in at the beginning, that you have a copy of the note that we prepared in response to Mr. Barling's note. We handed this in just before 10 o'clock, I do not know if it has got to you.

THE CHAIRMAN: What is it called?

MR. GREEN: "H3G's Response to BT Table Summary".

THE CHAIRMAN: "H3G's Response to the Tribunal's Question of 25th May 2005" – read what your heading is.

MR. GREEN: "H3G's Response to BT's Table summarising the negotiations between H3G and BT and the Tribunal's questions on this issue on 24th May 2005."

THE CHAIRMAN: Let me see, I do not think I have that.

MR. SCOTT: We have not read it.

MR. GREEN: I am not going to read it, it is our *amour propre* – I think it is counter-*amour propre* –but I really think that there is a limit to the extent to which it is relevant to go into.

THE CHAIRMAN: Yes.

MR. GREEN: Unless you would like me to read it at great length.

THE CHAIRMAN: I would not like you to read it at any length. (Laughter)

MR. GREEN: Good, I am very grateful for that.

MR. SCOTT: You would like a marriage guidance counsellor, I think.

MR. GREEN: I think I need one, yes. Thank you very much, unless I can assist you further.

THE CHAIRMAN: Thank you, Mr. Green. Mr. Roth?

MR ROTH: I am not concerned about *amour propre*. Sir, I have been able to gather my thoughts, I said "three minutes", I think realistically ten minutes.

THE CHAIRMAN: Yes.

MR ROTH: Just so Mr. Green knows where I am, and you know where I am. I shall resist the temptation to make any sort of reply to the various mis-characterisations of Ofcom's position

in Mr. Green's closing submissions. I only ask you, please, when using his note to, if I may say so, check carefully at the references for what is attributed to Ofcom there which, in a number of places, I have to say is quite seriously misleading – clearly as regards incentive, and matters of that kind – but I am not going to address them. I should also make clear I do not suggest that I am disadvantaged on this point in dealing with it, and I do not want to take any point on that basis. That is on the understanding that the relief that is sought here is a setting aside of the Decision and remission, that is how it is put in the Notice of Appeal, and not that the Tribunal would make any determination of "yes" or "no" regarding SMP, and I think that is the basis upon which one has been proceeding and, indeed, it is a very important basis because here, as you know, the Commission as

a distinct statutory role on an SMP decision because of Article 7 and the veto power. So it is not like the normal sort of competition case. If there were to be a new Decision we would have to notify first in draft to the Commission and they have statutory power to veto it. One then starts to think what would happen next given that we, Ofcom, are bound to follow the Judgment of the Tribunal, but that is for conceivably another day. So I shall confine myself to answering your question.

The starting point is the Act, and sections 185-186. They set out the power and the duty of Ofcom as to what it can and must do. (E1, p.461). The scope of dispute embraced by the power and duty on resolving disputes is very broad, as you saw, it is terms and conditions upon which network access can be provided. So it is price and its many other things in addition that can be covered. But Ofcom can act in exercise of that power and duty only in accordance with the EC Directives, that is expressly set out in s.4(2)of the Statute as you saw (E1, tab 14, p297) and that embraces the functions that are in s.185, as you see from s.4(1)(c). So the position then is this, if Ofcom's power as now hypothesised, to determine a price dispute by fixing a fair price was to be taken into account in determining whether or not the undertaking seeking to charge that price has SMP, and led therefore to the conclusion that the operator had no ability to charge a supra competitive price because of the dispute resolution power, no operator would have SMP. H3G would not have SMP in call termination, buy not only H3G, none of the 2G MNOs would have SMP. Mr. Green took you to the consideration of this at paragraph 4.14 of the Decision. That paragraph is not dealing with the position of H3G it is dealing with the position of all the MNOs. Indeed, none of the 52 fixed line operators, other than BT, who have been subject to an SMP designation on termination charges would have SMP, and indeed BT would not have SMP in fixed line termination charges because it is also always subject to the s.185 resolution. If it were to be taken into account and

would lead to that conclusion it would emasculate, with respect, the whole EC regime which is dependent upon the SMP designation.

THE CHAIRMAN: That is the Greenfield argument, or the rebuttal of a Greenfield argument, whichever way around it is, but place that in the context of clause 13 which says well we start with this price, and if we want to vary the price we will go through the mechanism, and put it then in the context of this Decision which is forward looking and is questioning whether prices will become excessive or whatever way you put it – that is the more important point, I think.

MR ROTH: But clause 13, if it were not for sections 185-186 Ofcom could simply say we are not going to take these references, we are not party to the contract.

THE CHAIRMAN: Yes, but that "but for" is not allowed you on this hypothesis.

MR ROTH: No, but we would act pursuant to not clause 13 but sections 185-186, and that is what controls what we do, and that in turn brings in, as I have said, the EC framework. So clause 13, with respect, cannot take it further than it would be in any event, and the power of parties to refer under statute disputes to Ofcom, and it cannot give Ofcom greater power than Ofcom would have under Statute. That is the source of our powers and duties. The question is whether that whole power, duty of Ofcom, assuming as we are now hypothesising that we could set a fair price, is to be taken into account in saying no significant market power, and we say "No, it is not", it is not to be taken into account and we invite you to follow the German veto Decision. I accept what Mr. Green says that it is not binding on you as a matter of law, that is clearly correct, but we invite you to follow it.

He made rather half-hearted attempts to distinguish it in his closing submissions, although his first point was "You do not have to follow it, you are a court of law, and they are the Commission in Brussels". But the reasoning of the Decision is quite clearly inconsistent with the approach of taking into account a dispute resolution power on the regulator.

THE CHAIRMAN: So in other words, we treat it in the same way as you say we should treat general regulatory powers?

MR ROTH: Yes.

THE CHAIRMAN: On the party in question – you do not take them into account whether they are regulatory or whether they are brought in as part of a contractual mechanism?

MR ROTH: Yes.

THE CHAIRMAN: That is your short point, is it?

MR ROTH: Absolutely. That was, I think, your question to me. Do we take into account the answer "no"?

THE CHAIRMAN: Well my question was "What effect does it have on SMP?" you have actually recast it but it is the same question.

MR ROTH: And I refer to the German Decision, which I would ask you – and that is why I say 10 minutes not 3 – just to look at it for a moment in bundle F1, you will recall it is in the very last tab of the bundle, tab 19. Just perhaps to understand what it says, if you turn back to tab 18 and p.723, you see at the top of 723:

> "Paradoxically the German regulator has, in practice, introduced price regulation for a number of ANOs through dispute resolution procedures since 2004 and intends to maintain this price regulation despite its finding that ANOs do not have significant market power."

So that is the position Germany. That is why Mr. Green says "We are not alone, we have the German regulator". So there was dispute resolution. It did apply in the absence of SMP. That was the situation in Germany. The Commission, agreeing with Ofcom, thinks as a matter of law that is wrong, but we are assuming on the hypothesis that it is right. That is then addressed in the Decision on p.735-6 in para.35. This is the modified Greenfields.

> "Presently under German law it seems the interconnection charges, i.e. also call termination rates of a non-SMP operator may be price regulated in cases of failure of private interconnection negotiations, and without the need for any prior SMP finding."

In the footnote it is to the German Telekommunikations Gesetzes (TKG) and the relevant sections.

> "Against this regulatory background, and following applications by at least 37 ANOs RegTP has, since September, ruled that each is allowed."

So there have been, as it were, disputes referred to them. They have set prices, imposing a ceiling and they deal with it this way:

> "This implies call termination rates of a large proportion of ANOs constrained by regulatory ceiling rather than Deutsche Telecom exercising countervailing buyer power."

So they are distinguishing between simply the countervailing buyer power in negotiation, of the kind that Professor Stoneman referred to, by switching or self-supply, or just saying "We will do without the product" from the intervention of a regulator through a dispute resolution procedure, and they are ruling that that dispute resolution procedure and role of the regulator does not mean that the various operators do not have SMP. So that clearly supports the position very analogous to the situation here on the hypothesis that you have put to me. We

say there is no problem then about the interests of the end consumer, because of course if an operator does have SMP, if we are right in saying Hutchison has SMP, then if a dispute is referred to Ofcom under s.186 we can set a fair price, and that was the answer I gave to your question at p.45 of the transcript, to which Mr. Green gave the reference. It is very clear when you read that answer I gave. It says "If H3G have SMP then we can stop them charging an excessive price". Our approach is that if they do not have SMP, there is true countervailing buyer power – true countervailing buyer power – in BT with ability to switch, or an ability to not take supplies, or ability to deny connection, as could arise down the line in the future, that they do not need to take that from Ofcom, then that would drive the price down, so that although H3G could ask for a very high price, BT would say "no, H3G needs to deal with BT" and the market negotiations would fix a price.

THE CHAIRMAN: How does that work under clause 13? One of them serves a notice, the other one says "no", and they bicker for a while, and they come to no conclusion, then what?

MR ROTH: Well if there was no obligation of end-to-end connectivity then BT would say "Well, all right, this is the price in the contract, we are just not going to take the service".

THE CHAIRMAN: So there is no agreement when the CCN is served?

MR ROTH: Yes.

THE CHAIRMAN: And then what?

MR ROTH: Well then the price will remain because that is the position under the contract. This is a price variation mechanism.

THE CHAIRMAN: Right, I see.

MR ROTH: There is that, because that is the price they have got, there is no purchasing obligation under the contract. As I say, our primary submission is that you leave it out of account, you do not get into the circularity, you do what the Commission in vetoing the German Regulator's Decision, and then there is no such problem and one does not even have to get to that point.

If you are against me on that, if you say that dispute resolution, which is not just clause 13, because first of all in this case it is a common contract for BT, as you have heard, it is their standard contract – there are 100s of such contracts, moreover, it is s.185 in general terms. It is so fundamental to Ofcom's whole operation of telecommunications' regulation in the United Kingdom – this is the point on which I needed instruction – that we would ask you not then to decide the matter, but to make a reference to the European Court of Justice.

THE CHAIRMAN: What matter?

MR ROTH: Whether dispute resolution should be taken into account in determining whether an operator has significant market power for the purpose of the EC Framework Directive and the Specific Directives.

MR. SCOTT: Mr. Roth, thank you for that, because if you had not mentioned that I was about to raise it as a question. Mr. Green, in his remarks, urged us to decide, and he urged us to recognise that we are a judicial body and the Commission is an administrative body. He then mentioned the Court of Appeal and the House of Lords, and there is a question for us as to whether the sensible course for the Competition Appeal Tribunal generally is itself to make a reference, which as I understand it we are empowered to do, or for us to take a decision and allow that to go to appeal and then for the Court of Appeal, or indeed the House of Lords whether to make a reference. What you are suggesting is that the reference should be made from our level and not from any higher level in the United Kingdom system?

MR ROTH: Absolutely, and the reason for that is, that if you were to take, and of course there are many other ways you can decide the case, but if you were to take this particular course of being minded to decide that the existence of, let us take both – either the contractual clause or the statutory power, or some combination of the two – is relevant to determining whether an operator has SMP, and may therefore lead to the conclusion that they do not have SMP, a whole raft of Ofcom's existing SMP designations are immediately called into question and SMP obligations, which currently apply to a whole range of operators, including the MNOs here in this Decision, are at once called into question and it would be very difficult to see whether they could be legally enforced, because we are, of course, bound by your Judgment. So it has very wide ranging consequences, and we are not just, with respect suggesting a reference, we are formally asking, expressly asking, that if that is the line taken that the Tribunal should make a reference, and the exact question, subject to your wishes, if that were to be the course taken, it is often helpful to spend time between the parties formulating the question rather than me doing it on my feet, exactly how the question for reference would be expressed.

THE CHAIRMAN: You are asking for a contingent reference. You are saying if we are minded to decide something, and then "please do not decide it", or "decide it in a certain way" then "do not decide it in that way, please send it to Europe".

MR ROTH: That is right.

THE CHAIRMAN: You are not actually asking us now to send the question to Europe?

MR ROTH: No.

THE CHAIRMAN: You want to know what we are thinking before you do that? (Laughter)

MR ROTH: With respect, not quite. I am saying you will know what you are thinking and will in due course come to a provisional view – you may have already – I am not asking for any further feedback, as it were, to be told that. I am saying if that is the line you will find yourself taking then I am asking you to refer.

THE CHAIRMAN: I have not focused on this, we do not have to accede to that request?

MR ROTH: You do not.

THE CHAIRMAN: Right. Just give me a moment.

(The Tribunal confer)

MR. ROTH: I should have referred you – perhaps you know – it is Article 234 of the Treaty, governing provision ----

THE CHAIRMAN: Indeed.

MR ROTH: -- and the reasons why we put it only if it goes that way because if it takes that route it is inconsistent with the view of the Commission, secondly, it can create serious problems for Ofcom who would then have to take a decision in line with your judgment, but the Commission is likely to follow its own decision one assumes, and would veto it and then one is left in the unhappy situation, presumably someone then has to appeal it.

THE CHAIRMAN: Can I be clear what the question is you think might need to go off if we decide in a certain way? It is not necessarily whether, as a matter of construction, the Directive rules out participation of regulators in a dispute resolution regime.

MR ROTH: No.

THE CHAIRMAN: It is whether that question is first of all in a sense, yes, they can, and secondly, you have to take that into account in SMP designations.

MR ROTH: Only the second part of that.

THE CHAIRMAN: The second part.

MR ROTH: So if you take Mr. Barling's view for BT against me saying if there were reference we would have to have fix a fair price, and we are wrong in saying we have to take H3G's, we are not asking for that to be referred.

THE CHAIRMAN: No, I understand that.

MR ROTH: It is the second part.

MR. BARLING: Can I just interject to say that if a reference is made, and there are three questions of Community law that arise in the case of a decision, and you are going to have an 18 month to two year gap, it is normally worth sending the other questions too. The one you have just adverted to, which Mr. Roth says is not the prime concern that they have, that is not their prime worry, but one of the points the Tribunal (and the parties) will have to consider is if you are

minded to make a reference on one point you should actually send the other points of interpretation as well, including the *vires* point, which is the point that I pressed you on. That is just a factor, and does not have to be determined now, and obviously you would ask the parties presumably to try and agree, as it were, draft questions and so on. I just flag that up because it would be odd to send it just on one.

MR ROTH: Just to clarify that point, we are asking only if that point is going to be decided. It may be that if you then refer you refer other questions as well. But if that point is not going to be decided in the way I have indicated about SMP, then we are not seeking the separate point from Mr. Barling to go on its own.

THE CHAIRMAN: I understand that. I think our view is that we are going to have to wait and see what impact, if anything, that point has on (a) whether it is relevant; and (b) if relevant to our decision whether we will refer or not. Did you want to say anything about this, Mr. Green?

MR. GREEN: I agree with Mr. Barling on this. If you came to the conclusion you needed to refer, I think we would welcome the opportunity to identify other issues. This case is obviously of great importance both to the various parties from different perspectives, but I think we would welcome an opportunity to make submissions about other questions.

THE CHAIRMAN: I think what we will have to do on this is wait and see and take our own view as to whether or not we need further submissions on the point when we can see where it might be going. It is rather unusual, I think, to make an application on a contingent basis like this where the contingency is if you are minded to go down that route then. We will have to wait and see, we cannot do anything else I think at the moment, and if you are called in to make further submissions then you will be called in to make further submissions.

MR ROTH: I hope you appreciate we did feel that it is right to raise this with you now, it would not have been right to take the course – get a judgment, feel we do not like it, go to the Court of Appeal and then ask them to refer it. It seemed to me entirely proper we should raise this with you separately.

THE CHAIRMAN: And there is no impropriety. You might have reserved your position to take that second course instead but nothing you have said in that respect seems to me to be improper.

MR. GREEN: It is not uncommon for parties to ask a Court of First Instance to set out reasoning and for that then to be subject to the Court of Appeal's analysis and a reference. It delays matters certainly, sometimes it is very sensible to get that degree of analysis going through the system first of all.

MR ROTH: Yes our problem here is what happens to all the SMP designations in the meantime, and all the controls that are in place.

THE CHAIRMAN: Quite. Well thank you all very much. Is there anything else from anybody? There is nothing from us.

MR ROTH: Only to say this, Mr. Green said something about new arguments and referred to *Napp* in that regard. I would just say that *Napp* was not a judicial review-type case at all, it was the imposition of a penalty. It was held by the Tribunal in that case that it was for the purposes of the Convention a criminal charge under Article 6 that for the protection of the rights of the undertaking subject to penalty the hearing in the Tribunal was the first proper hearing, protective rights, it is a wholly different situation from this case.

THE CHAIRMAN: Thank you. If there is nothing else, we will reserve our judgment and let you know whether we are going to decide anything – if that appears to be the appropriate ruling – otherwise, you will get a decision in the normal way.

I think it is right that I should express our collective gratitude to the shorthand writer who is no doubt sitting in a room in this building wondering whether this is ever going to finish, and the good news for her is that it is, now, and I think it is right that that should be on the record.

Thank you all very much.

_____