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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case Nos. 1260/3/3/16  
1261/3/3/16

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

Monday, 4<sup>th</sup> December 2017

Before:

**THE HON. MR. JUSTICE SNOWDEN**  
(Chairman)  
**DR CLIVE ELPHICK**  
**PROFESSOR JOHN CUBBIN**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**  
**CITYFIBRE INFRASTRUCTURE HOLDINGS PLC**

Applicants

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- with -

**VIRGIN MEDIA**  
**GAMMA TELECOM**  
**CP GROUP**

Intervenors

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**PROCEEDINGS**

## **A P P E A R A N C E S**

Mr Robert Palmer (instructed by Openreach) appeared on behalf of the Applicant British Telecom.

Mr Aiden Robertson QC and Ms Julianne Kerr Morrison (instructed by Preiskel & Co LLP) appeared on behalf of the Applicant CityFibre.

Mr Josh Holmes QC, Mr Mark Vinall and Mr Daniel Cashman (instructed by Ofcom) appeared on behalf of the Respondent.

The Intervenors did not attend and were not represented

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THE CHAIRMAN: Good morning, Mr Palmer.

MR PALMER: Sir, members of the Tribunal, good morning. I appear for BT this morning; Mr Aidan Robertson QC, supported by Julianne Morrison, appears for CityFibre today; and the Tribunal knows Mr Holmes, Mr Vinall and Mr Cashman, who appear again for Ofcom.

THE CHAIRMAN: Yes.

MR PALMER: Sir, on your agenda today the main issue, as the Tribunal will have seen, relates to costs. There is also one unexpected issue from our point of view raised by Ofcom at para.3 onwards of their skeleton argument relating to disposal of the appeals.

THE CHAIRMAN: Right, now, before we get into this, there's also one topic which we ought to deal with probably to get it out of the way, and that's the question of redaction to the judgment. I don't know whether anybody's here from the CP who's raised a point in relation to the redaction from the judgment?

MR FORD: May I address the Tribunal? Sir, I believe we made submissions on the 29<sup>th</sup>, I think, that there were no issues with those two remaining redactions. I'll just check that and confirm.

THE CHAIRMAN: Okay, right. I'm -- well, to have a discussion about this we probably need to go into private, to do with the redacted part of the judgment. So is there anybody who -- sorry, I don't know----

MR FORD: Sorry, Lucas Ford from the solicitors for the CP Group, Towerhouse.

THE CHAIRMAN: Right. Yes, strangely enough this shows that the confidentiality is working well, because it's not actually you, I think, I was interested in. I thought -- sorry, that came out wrong.

MR FORD: It happens.

THE CHAIRMAN: Can we just check, we just need to check whether we can go into private just to have a discussion. So I'm just wanting to know whether anybody who is currently in court -- okay, we'll just go into private for a short while and then we'll come back into the loop.

(For proceedings in private, see separate transcript)

THE CHAIRMAN: Right, so you were about to -- sorry, I interrupted you in order just to deal with that.

MR PALMER: No, I'm grateful. I was about to deal with the issue of disposal of the appeals, which is raised at s.B from para.3 of Mr Holmes's skeleton argument.

MR HOLMES: Sir, I hesitate to interrupt, but simply to save time: in relation to disposal, I think at para.3B we were perhaps slightly carried away. We would accept that the correct order

1 as regards disposal of the BT appeal is that BT's appeal should be allowed. They succeeded  
2 in relation to market definition and their appeal was therefore successful.

3 As between Ofcom and CityFibre, there is a live issue. Ofcom says in relation to the  
4 CityFibre appeal that the appropriate order is that the appeal should be dismissed, CityFibre  
5 not having succeeded in relation to any of its grounds of appeal as against Ofcom; and, as  
6 I understand the position of CityFibre, they take the contrary view. So there is one issue  
7 live between the parties in relation to disposal, but none as between myself and Mr Palmer.  
8 I apologise for the interruption, but I didn't want him to feel obliged to deal with a point  
9 which has fallen away.

10 MR PALMER: That's very helpful. My short submission was going to be -- in agreement with  
11 what has just been said -- is that BT's appeal has been allowed and that the order that the  
12 Tribunal has already made, which is at tab 11, quashes the remedies as well as the market  
13 definition to which BT's appeal was directed. So there is no appeal left to be dismissed and  
14 it's not right to speak of dismissing outstanding grounds of appeal.

15 THE CHAIRMAN: Sorry, I'm slightly puzzled. I mean, is the order that I made on, whenever it  
16 was actually finally made, drawn on the 22<sup>nd</sup> and made on the 20<sup>th</sup>, does that not do the job  
17 for BT----

18 MR PALMER: It does the job.

19 MR HOLMES: I think it does, so if BT wants a declaration to the effect that their appeal is  
20 allowed, so be it, but it's not something that we seek----

21 THE CHAIRMAN: I must admit, I hadn't envisaged I would need to do anything more in  
22 relation to BT, I confess. CityFibre is different, obviously, I think, because we didn't really  
23 discuss the CityFibre position or make an order. I don't think I made a specific order in  
24 relation to CityFibre's appeal, did I, on the 20<sup>th</sup>? So that is, that's live as to what's to be  
25 done.

26 MR HOLMES: Yes.

27 MR PALMER: Sir, that is right. Just to be clear from our point of view that the order that you  
28 made is all that BT needs. The fact that the appeal is allowed is implicit because it refers  
29 back to the ruling which explicitly stated as such. So that is all done and there's no part of  
30 the appeal which has not yet been disposed of.

31 THE CHAIRMAN: Right.

32 MR PALMER: So that's all I have on that issue. It may be you wish to hear from CityFibre on  
33 this now.

1 THE CHAIRMAN: Well, I was going to say, I'm in a sense relying on you to -- because  
2 I appreciate there are a sort of multitude of little backwaters into which we could disappear  
3 if we're not careful. What the logical next step? Is it to deal with -- I mean, could we deal,  
4 if there's going to be a significant argument over this, should we deal with it at the same  
5 time as we deal with CityFibre's costs, which is what it, I suspect, really boils down to?

6 MR ROBERTSON: Yes. It is what it boils down to, yes.

7 THE CHAIRMAN: So are you happy for us to press on and deal with the other issues first----

8 MR ROBERTSON: Yes.

9 THE CHAIRMAN: -- and then we'll deal with all the CityFibre points together?

10 MR ROBERTSON: That's what we anticipated happening.

11 THE CHAIRMAN: Yes, okay. Let's do that.

12 Right.

13 MR PALMER: I'm very grateful for that.

14 Sir, then the next issue is that of costs, and the Tribunal have seen behind tab 1 of the  
15 hearing bundle is BT's application for costs.

16 Ofcom have launched a root-and-branch attempt to re-argue the *Pay TV* case, which  
17 established that the starting point in determining costs following this form of appeal to the  
18 Tribunal is that costs should follow the event. It has launched that root-and-branch  
19 re-arguing of *Pay TV* by reference to precisely the same authorities that were the subject of  
20 full consideration by the Tribunal in *Pay TV*. There's nothing new, and it proceeds,  
21 Ofcom's argument proceeds, from the starting point that the CAT is not bound by its own  
22 previous decisions, a proposition for which it cites *Deutsche Bahn*, which is at tab 12 of the  
23 authorities bundle, and specifically para.17. So that's authorities tab 12, para.17.

24 THE CHAIRMAN: Yes.

25 MR PALMER: And it's the second sentence, para.17:

26 "Nevertheless, prior decisions of the Tribunal are not binding on the Tribunal, and  
27 whilst entitled to great respect ... it is necessary to consider the substance of the  
28 question anew."

29 THE CHAIRMAN: Just pausing, as the footnote suggests, strictly speaking one High Court judge  
30 is not bound by another High Court judge, but that's not the full story.

31 MR PALMER: No.

32 THE CHAIRMAN: The full story is one High Court is not bound by the decision of another High  
33 Court judge, but as a matter of practice----

34 MR PALMER: Judicial comity, yes.

1 THE CHAIRMAN: -- you generally will follow the decision of another High Court judge unless  
2 it's distinguishable on the facts or you're satisfied that the first judge was not referred to all  
3 the relevant material, ie the decision was reached *per incuriam*; or if, having heard full  
4 argument, you are satisfied that it is plainly and obviously wrong, the latter being a very  
5 unusual circumstance, but not unheard of.

6 Now, I paraphrase. That's always been my understanding----

7 MR PALMER: Sir, you've anticipated exactly what I was about to say.

8 THE CHAIRMAN: If you think I've got that, sort of, loose summary wrong, then by all means  
9 I'm happy to be corrected, but broadly speaking that's the way it goes.

10 MR PALMER: That summary is accurate and reflects the authorities which are then referred to in  
11 that footnote which continues over the page, and in particular *ex parte Tal*, and of course its  
12 many -- often stated, but, Sir, that is exactly the approach on which I invite the Tribunal to  
13 approach this issue now. I say at once that there's no distinction on the facts for any  
14 relevant purpose for dealing with a matter of general principle. There's no new authority  
15 which was overlooked. The point is being argued by reference to precisely the same  
16 authorities, and, for the reasons to which I'll come, this is not a case where the Tribunal was  
17 plainly wrong. Its analysis of those authorities is plainly sustainable and the criticisms  
18 made by Ofcom of the Tribunal's decision are, in my submission, misplaced and certainly  
19 don't reach the high threshold of establishing plain error.

20 THE CHAIRMAN: Right. Is the actual test, just so that we can see it, the *Tal* test? Have you got  
21 *Tal* in the bundle, just out of interest?

22 MR PALMER: I'm not sure *Tal* has been brought. That -- I think there's probably agreement at  
23 the Bar, that that is -- I'm getting nods from Mr Holmes -- that that is the ordinary approach.

24 THE CHAIRMAN: Yes. It's just that the formulation -- I mean, my formulation I'm quite  
25 willing to believe is not strictly the one -- my paraphrase may not be entirely accurate,  
26 I don't know whether anybody's got a more accurate paraphrase in the bundles, just so we  
27 can see what it was (inaudible). If it's going to become controversial----

28 MR PALMER: I think *Tal* refers to it being wrong; *Amin*, which is the next authority, refers to it  
29 being plainly wrong. My experience is the same as my Lord's: generally High Court judges  
30 direct themselves on the basis of a plainly wrong test.

31 THE CHAIRMAN: Fine.

32 MR PALMER: And I'm getting a nod from Mr Holmes that that's not in issue.

33 THE CHAIRMAN: All right.

1 MR PALMER: Now, *Pay TV* was the first complete review of all the authorities on the subject of  
2 costs in relation to appeals under s.192 of the Communications Act 2003. It was an attempt  
3 to identify a common approach in non-disputes cases; in other words, as we'll see as we go  
4 through the authorities, that the Tribunal has distinguished between cases where Ofcom is  
5 acting in a quasi-judicial capacity -- that's a phrase of Ofcom's own devising -- when two  
6 private parties who are unable to reconcile the dispute as between themselves bring that  
7 dispute to Ofcom and Ofcom determines that dispute as between the two private parties,  
8 makes a ruling. That ruling may well be informed by Ofcom's regulatory objectives, but it  
9 is there as a -- in a quasi-judicial capacity, and the Tribunal has consistently held that on  
10 appeal it shouldn't be assumed that costs follow the event, although there is a case when  
11 costs did follow the event because Ofcom had made plain errors in determining that dispute.  
12 But in general the court has refrained from making an order for costs in that context. A bit  
13 like when one appeals a decision of the High Court, no one seeks to recover costs from the  
14 High Court.

15 THE CHAIRMAN: Yes.

16 MR PALMER: But it distinguishes those cases from other cases brought under s.192, and *Pay TV*  
17 reaches the conclusion that those cases are more analogous, and should be dealt with in the  
18 same way as other cases before this Tribunal, including cases against other regulators and  
19 public authorities, whether that be a Secretary of State, the Competition Commission, as it  
20 was, or the CMA as it now is, where costs follow the event.

21 And indeed ironically it's one of the authorities which is heavily relied upon by my learned  
22 friend, which is a disputes case. It's called *The Number* and it appears at tab 8, which  
23 makes clear in tab 8----

24 THE CHAIRMAN: Sorry, are you going to take us to----

25 MR PALMER: Please, Sir. Yes.

26 THE CHAIRMAN: -- *The Number* before you take us to *Pay TV*?

27 MR PALMER: Before I take you to *Pay TV*, if I may.

28 THE CHAIRMAN: Okay, yes. Fine.

29 MR PALMER: Just to finish off the point about----

30 THE CHAIRMAN: Set the scene.

31 MR PALMER: -- judicial comity.

32 THE CHAIRMAN: Okay.

33 MR PALMER: Tab 8, para.5, where the Tribunal observes:

1        “It is, we think, important that differently constituted Tribunals adopt a consistent and  
2        principled approach if the discretion is to be exercised judicially, as it must be. It  
3        would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed  
4        radically different weight (or perhaps no weight at all) on OFCOM’s unique position  
5        as regulator.”

6        Or indeed any other matter, I would add:

7        “It seems to us that if any significant weight is to be given to this factor, it must follow  
8        that the starting point will, in effect, be that OFCOM should not in an ordinary case be  
9        met with an adverse costs order if it has acted reasonably and in good faith.”

10       Now, those words were given in the context of a disputes case, and in *Pay TV* the Tribunal  
11       construes those words as very much being given in the context of a disputes case. The  
12       reason why I take you to it at this point is that the first couple of sentences about the need  
13       for differently constituted Tribunals to adopt a consistent and principled approach, the task  
14       which the Tribunal took on itself in *Pay TV* was to identify that consistent and principled  
15       approach. And in my submission, subject to the Tribunal being satisfied that it’s not plainly  
16       wrong, it is appropriate to follow that principled approach which has now been  
17       authoritatively set out by the Tribunal in *Pay TV* and provides the backdrop and basis upon  
18       which parties have brought this appeal to this Tribunal.

19       THE CHAIRMAN: Right.

20       MR PALMER: So I go now to why *Pay TV* is not plainly wrong. We find the *Pay TV* case at  
21       tab 21, and if I may ask you to have open in the hearing bundle at the same time Ofcom’s  
22       skeleton argument at para.14.

23       THE CHAIRMAN: Yes.

24       MR PALMER: Paragraph 14 proceeds under the heading “The case law before *Pay TV*”, and it  
25       may well be that this section which follows may be said to be the submissions before  
26       *Pay TV* as well, because the submissions track the very issues which the Tribunal resolved  
27       in *Pay TV*, as I said by reference to the same case law, and if you read the first sentence of  
28       para.14:

29       “Until 2013, the Tribunal had repeatedly declined to make costs orders against Ofcom  
30       when s.192 appeals against its decisions succeeded: notably in [...] *RBS Backhaul*,  
31       *Hutchinson, Vodafone and The Number*. When awarding costs in Ofcom’s favour, the  
32       Tribunal had made clear that it was only addressing ‘the approach that should be  
33       adopted when considering whether to make a costs order in favour of OFCOM or  
34       against a party other than OFCOM’.”

1 Now, reading that, one might form the impression that there had been a principled approach  
2 before 2013 to the opposite effect: that costs should follow the event, and that there was  
3 some basis of principle on which it had been decided that an appeal such as this should not  
4 attract, normally attract, a costs order following the event.

5 For reasons in *Pay TV*, that's simply wrong. We can take them one at a time, starting at  
6 para.7 of *Pay TV*. Under the heading just before para.6: "Is Ofcom correct about the  
7 Tribunal's 'consistent practice'?" And you have first at para.7 an analysis of *British*  
8 *Telecommunications Plc v Director General of Telecommunications*, which is also known  
9 as *RBS Backhaul*, the first case on Ofcom's list in para.14. And this was a dispute case, you  
10 will see straight away, just reading para.7.

11 Then at para.11, which I pick up just for context at the top of p.4, the citation from *RBS*  
12 *Backhaul* you can see at the top of the page the self-directions that r.55, which is the general  
13 Tribunal discretion to make a costs order:

14 "Our judgment is that where OFCOM has determined a dispute in accordance with the  
15 procedure in the 1997 Regulations, and could have been appealed against by either  
16 side, it would not be right to order OFCOM to pay BT's costs in circumstances where  
17 it defended the appeal entirely reasonably and wider public interests were involved."

18 So it's in the context of that dispute resolution. And at para.11 Ms Rose for Ofcom  
19 submitted that although the present case was not such----

20 THE CHAIRMAN: Sorry, just to be clear, what they're talking about there is: parties bring  
21 a dispute to Ofcom; Ofcom determines it; and then one of the parties, or the dissatisfied  
22 party, appeals; and on the appeal the question arises about whether, if Ofcom defends its  
23 decision on appeal, Ofcom should be required to then pay the costs----

24 MR PALMER: Pay the costs.

25 THE CHAIRMAN: -- of losing the appeal.

26 MR PALMER: Exactly so.

27 THE CHAIRMAN: Is that it?

28 MR PALMER: That is right.

29 THE CHAIRMAN: That's the point.

30 MR PALMER: That's the context.

31 THE CHAIRMAN: So----

32 MR PALMER: And what the Tribunal are saying that context, in the *RBS Backhaul* case in that  
33 context it:

1       “... could have been appealed against by either side, it would not be right to order  
2       OFCOM to pay BT’s costs in circumstances where it defended the appeal entirely  
3       reasonably and wider public interests were involved.”

4       That is connected with that quasi-judicial role that it has. So unless it’s gone badly off the  
5       rails in terms of executing that quasi-judicial role, adjudicating a private dispute, then the  
6       Tribunal in *RBS Backhaul* is saying it wouldn’t be right to pay, order a costs order, if the  
7       defence of the appeal was entirely reasonable.

8       THE CHAIRMAN: Okay.

9       MR PALMER: It may be right, it may be wrong, it doesn’t matter, but you can see the context in  
10      which that observation is being made.

11      So at para.11, referring to that passage:

12       “Ms Rose submitted that although the present one was not such a case [ie not a dispute  
13       resolution] it was closely analogous because in addition to Sky’s and FAPL’s appeals  
14       against the Statement, appeals were also brought by BT and Virgin Media; Ofcom was  
15       therefore effectively stuck in the middle, with various commercial interests at  
16       loggerheads and an inevitable appeal no matter which way Ofcom decided.”

17       And Ofcom was under a statutory duty in the public interest. So Ms Rose, on behalf of  
18       Ofcom, attempting to carry over the dispute determination rationale to an ordinary  
19       regulatory rationale such as the Tribunal has in the present case -- regulatory context such  
20       as it has in the present case. And those points are dealt with from para.12 of *Pay TV*:

21       “It is true that a sectoral regulator has an ongoing relationship with those it regulates,  
22       and that the latter incur significant irrecoverable costs in meeting regulatory  
23       requirements, as the Tribunal stated in *RBS Backhaul*. However, whilst this may be a  
24       relevant factor depending on the circumstances, we doubt that it is likely to be a  
25       powerful factor in many cases when one comes to consider whether an award of costs  
26       to a successful section 192 appellant is appropriate. As the Tribunal said in that same  
27       passage, the situation changes once appeal proceedings are on foot. The fact that  
28       regulation causes a company to incur costs which it cannot recover directly, and which  
29       are therefore simply another outgoing to be borne by its business and ultimately its  
30       customers, does not seem to be a compelling reason, of itself, to deprive the company  
31       of the costs of a successful legal challenge to regulatory action which, *ex hypothesi*,  
32       was wrong.”

33       And then at para.14, this point about para.62 and the parallel with dispute determination.

34       Four lines down:

1        “The key passage in the judgment in *RBS Backhaul* is paragraph 62” -- that’s the bit  
2        I took you to -- “where the Tribunal placed emphasis on the fact that the decision  
3        under appeal was the result of Ofcom’s obligation to resolve disputes between  
4        commercial entities, either of whom could appeal therefrom. Whereas in that case  
5        Ofcom had no real alternative but to resolve the dispute once this was requested by a  
6        party, the position under section 316 is much more nuanced, and in practice provides  
7        Ofcom with more scope for the exercise of judgment and discretion notwithstanding  
8        the presence of some mandatory language in the section. For example, the parties  
9        whose joint complaint led to Ofcom’s investigation had originally requested Ofcom to  
10      refer the whole of the Pay TV industry ... for a market investigation.”

11      And, had it done so, “it is at least open to doubt whether there would have been a legal  
12      challenge to that referral”.

13      So the only point I need to take from this is there is a distinction between a dispute  
14      resolution which is referred to Ofcom which it must then determine, and the context here  
15      where, following market investigation, Ofcom decides to -- responds to a complaint in this  
16      particular context of *Pay TV*, and in the context of the regular review of the business  
17      connectivity market in our present case. But in either event, what Ofcom then does is scope  
18      from the exercise and judgment and discretion is for it to determine, and it’s against that  
19      which a party may appeal if it has done so in error, exercised that judgment or discretion or  
20      made a decision in error. So that’s a distinction between that context of dispute  
21      determination and the present context.

22      So that deals with the first point, case on the list in para.14. The next was *Hutchison*, which  
23      is dealt with at paras.16 to 18 in turn. Here this was not a dispute case, and the Tribunal  
24      here decided to make no order as to costs and it explained why, at para.44, and it was  
25      because the appeal had succeeded only in part:

26      “It would be a mischaracterisation of our judgment to suggest that the appellant has  
27      ‘substantially’ succeeded on its appeal. The appellant did not succeed on a very  
28      significant number of the issues that were advanced by way of argument, and those  
29      issues took significant time and effort. Furthermore, the extent to which it succeeded  
30      was reflected in the limited point which our order specifically sent back to OFCOM  
31      for reconsideration. The attack launched by the appellant was far more extensive than  
32      the level of its success. ... Doing the best we can to reflect the time and costs involved  
33      in the issues on which it fought and won, fought and lost, and the shifting ground, we  
34      consider that the right order for costs would be that there be no order for costs.”

1 So that's not a case where the Tribunal started from an assumption that the starting point  
2 is no order for costs. That's a case where in a standard and ordinary and unsurprising way  
3 there was an analysis of the extent to which----

4 THE CHAIRMAN: Well, I was about to ask you -- is *Hutchison* in the bundle as well?

5 MR PALMER: We've got all these in the bundle.

6 THE CHAIRMAN: That debate, or that little bit that's extracted, could only have been in the  
7 context of an assumption that there was indeed the power and/or the possibility of making  
8 an adverse costs order.

9 MR PALMER: There's no issue as to the power, the possibility; that's common ground. It's  
10 clearly open to the Tribunal to make an adverse----

11 THE CHAIRMAN: But if there was an established practice to the contrary, that sort of debate----

12 MR PALMER: Well, the rule. If I take you, I can show you the rule.

13 THE CHAIRMAN: Can you just show me the context?

14 MR PALMER: I'll show you the context. If you go to tab 3----

15 THE CHAIRMAN: Just show us the context in which that paragraph is extracted.

16 MR PALMER: Yes. If you go to tab 3 and turn to p.11. The jurisdiction which the Tribunal was  
17 exercising was set out in r.55 of the then Rules, the 2000 Rules, which you see set out at  
18 para.40 and materially in subpara.2, you see that open discretion.

19 THE CHAIRMAN: Yes, and then----

20 MR PALMER: That was the jurisdiction which was being exercised, and then if you go to  
21 para.44, it begins "We deal first with costs as between H3G and Ofcom," H3G being the  
22 appellant.

23 THE CHAIRMAN: Wait, wait. Before you go to para.44, in para.41 it says:

24 "In the *RBS Backhaul* costs judgment the Tribunal observed..."

25 And then there's a quote, and then it goes on:

26 "It has been noted that, unlike the position under the CPR, there is no *prima facie* rule  
27 that the unsuccessful party pays."

28 So they are there saying -- is that right? Are they there saying that there's no general rule as  
29 there is under the CPR?

30 MR PALMER: There's no general rule in the Rules as there is in the CPR. So what you have  
31 under r.55 is an open discretion for the Tribunal that differs from the CPR, which expressly  
32 provides that, in the ordinary event, costs follow the event. So that is a difference between  
33 the two regimes in terms of what is provided for in the Rules.

1      And the reason, as has been explained many times by the Tribunal, that the discretion is so  
2      broadly expressed is because there are a number of different types of appeal which come to  
3      the Tribunal and which are governed by that same open discretion. So that is why the  
4      Tribunal has developed its own rules of practice as to how it will ordinarily exercise that  
5      discretion judicially, which is why you end up with a distinction, for example, between  
6      dispute determination cases and other cases.

7      THE CHAIRMAN: And do you also accept the last sentence of that para.41 as a proposition  
8      supporting the absence of the general rule that “public interest has a larger part to play in  
9      litigation in this Tribunal than in most civil litigation governed by the CPR”?

10     MR PALMER: That's too broadly expressed, because the CPR apply in public law proceedings  
11     just as much as any other form of proceedings in judicial review, which is always against  
12     a public authority, where there is always a public interest involved; always concerns the  
13     proper, lawful, rational, fair exercise of public power; and costs follow the event in the  
14     ordinary way.

15     So I don't accept that that is a clear point of distinction. What I'll come on to submit is that  
16     the approach which I'm asking you to adopt in this case, and in this case in which the  
17     Tribunal did adopt in *Pay TV*, was to draw a clear analogy between this sort of case and the  
18     judicial review case, where in either event what you're looking for is you're examining the  
19     decision of a public authority acting in the public interest but which has been found to have  
20     erred in the exercise of its jurisdiction and gone wrong.

21     And the fact that it has gone wrong is a key point, because you will also be taken to some  
22     other authorities which concern a case where a Tribunal, the court, is conducting an appeal  
23     by way of rehearing where they can allow an appeal even if they're not saying that the first  
24     decision was wrong, it's simply that they're just exercising their own discretion anew.

25     THE CHAIRMAN: Right, okay.

26     MR PALMER: So in those cases there can be no order as to costs. But where there's an error,  
27     the fact that the public interest has a large part to play is not----

28     THE CHAIRMAN: Well, you're going to come back to this. I don't want to take you out of  
29     your -- sorry, I simply wanted to make sure I'd got para.44, which was what was extracted,  
30     in its context, and then so you've----

31     MR PALMER: So they announce their decision as to costs at the end of para.43 where they say  
32     that they've decided that the correct decision in relation to costs is that all parties should be  
33     left to bear their own costs, and no order, and then they give their reasons from para.44.

34     THE CHAIRMAN: Yes, okay.

1 MR PALMER: And you see para.44 is just the passage which is cited in *Pay TV*. You needn't  
2 read that again. It concludes with the words: "We consider that the right order for costs  
3 would be that there be no order for costs."

4 It then refers to some other wider matters:

5 "None of the other relevant factors detracts from that conclusion, in our view. Indeed,  
6 they probably reinforce it."

7 Now, all these points are considered by *Pay TV*, but we'll see them in context first. They  
8 say:

9 "We reiterate that this appeal took place in the context of a new European regulatory  
10 framework ..."

11 This was a 2006 case, so the common regulatory framework was brand new:

12 "... and was the first appeal..."

13 So they made some allowance for that. At para.46 they say:

14 "This was a case in which wider public interests were at stake, not just the private  
15 interests of H3G."

16 They make that point, and of course that's true in all public law cases. At para.47:

17 "The point relied on by OFCOM that an order for costs against OFCOM at this early  
18 stage under the 2003 Act may have a 'chilling effect' also supports the order that we  
19 propose to make, even if it would not, by itself, be sufficient to justify depriving H3G  
20 of costs to which it might otherwise be entitled."

21 And the Tribunal will see on that point where the Tribunal ended up in *Pay TV* was  
22 effectively to recognise that the so-called "chilling effect" is a material consideration, but  
23 again is not one that should lead the Tribunal to depart from the principle that costs should  
24 follow the event.

25 So that is what was decided in *Hutchison*. If you could turn back to 21, tab 21, the *Pay TV*  
26 case, and turn back to para.17 which we have reached.

27 THE CHAIRMAN: Yes.

28 MR PALMER: You see that the Tribunal considers all those points which I have just shown you,  
29 I won't read them out. At para.18 held that the result didn't justify an award for costs:

30 "The judgment reinforces the case by case approach and identifies possibly relevant  
31 factors in cases of that kind. The Tribunal also states ... the well-established position  
32 that under rule 55 there is no rule, such as applies in other litigation, that costs should  
33 follow the event."

34 It takes that into account:

1        “[It] does not in our view provide any support for the wide principle in relation to  
2        section 192 appeals for which Ms Rose contends.”

3        In other words, that costs should only be allowed if Ofcom has acted unreasonably and in  
4        bad faith.

5        “If anything, it takes as a starting point that costs follow the event.”

6        And that’s the observation, Sir, that you made a little bit earlier: that it hadn’t stated it  
7        explicitly, but the whole analysis at para.44 proceeds from that assumption. That’s what it’s  
8        doing: it’s assessing the level of success.

9        The next authority on the list at para.14 of those submissions was *Vodafone*, and the  
10      Tribunal in *Pay TV* considers that next. We have that at tab 4. It might be helpful to see  
11      that in context first.

12      You see what type of case that was from para.1. Again, this is not a dispute case; it was  
13      an appeal against the statement published by Ofcom entitled “Telephone number portability  
14      for consumers switching suppliers”. And what was in issue in that case was a new general  
15      condition that Ofcom was imposing on the market concerning number portability. That’s  
16      when you change your telecom provider but you want to keep the same phone number.  
17      And it was proposing a new system which would allow customers to switch over to their  
18      new provider in only two hours, rather than in two days as it took prior to this decision to  
19      make that shift and keep your number.

20      And there was an appeal against that decision by Vodafone supported by other interveners  
21      which succeeded, and the Tribunal’s analysis begins at para.14 on costs. Again, starting  
22      from r.55, the wide discretion. No specific rule that costs should follow the event. Notes  
23      that the Tribunal at that stage had yet to make an award of costs following an appeal under  
24      s.192. You’ve seen the context in which that was true, and emphasises, at the foot of 15  
25      quoting the *Hutchison* case:

26        “The correct approach ... is not to proceed by way of analogy with other cases, but to  
27        apply the clearly established principle that costs have to be determined on a case by  
28        case basis, relying on authorities for principles where appropriate.”

29        Then a citation from the case called *Booth*, to which we will come, but just to flag up now,  
30        this was a licensing case from which an appeal proceeded by way of rehearing -- so  
31        a complete *de novo* reconsideration -- and over the page a reference to a case called  
32        *Cambridge City Council v Nestling*. It’s a similar context where Mr Justice Toulson, as he  
33        then was, said:

1        “Although as a matter of strict law the power of the court in such circumstances to  
2 award costs is not confined to cases where the Local Authority acted unreasonably and  
3 in bad faith, the fact that the Local Authority has acted reasonably and in good faith in  
4 the discharge of its public function is plainly a most important factor.”

5 I’ll come back to that line of cases that concern, as I say, concern rehearing decisions:

6        “In each of those cases [that’s the rehearing cases], the following considerations  
7 emerge: the regulatory authority was under a statutory duty; while it acted honestly,  
8 reasonably and properly ... the court struck the balance reached by the authority  
9 differently ...”

10      That’s a very, very important point. Simply striking a balance differently rather than  
11 finding an error:

12     “... there existed the need to encourage public authorities to make and stand by sound  
13 administrative decisions in the public interest without fear of exposure to undue  
14 financial prejudice if the decision was successfully challenged; and it was necessary to  
15 consider the financial prejudice to the applicant if an order for costs is not made in  
16 their favour. In each case, ultimately costs were refused.”

17 And then at para.19 an important point of context here:

18     “... often involve complex issues on which reasonable people might reach different  
19 conclusions to those adopted by the relevant respondent. In our judgement, the present  
20 case provided a useful opportunity to clarify the scope of OFCOM’s responsibilities  
21 when undertaking policy decisions of the kind set down in the Decision, to the benefit  
22 of all industry participants, and in the wider public interest.”

23 Now, the court may recall -- we haven’t got the *Vodafone* decision in the bundle, the actual  
24 substantive decision -- the court may recall that Ofcom was keen to distinguish this case  
25 when it made its submissions on the standard of review. A consistent theme of Ofcom, now  
26 consistently accepted by the Tribunal, is that the appeals to this Tribunal do not proceed  
27 simply by asking the Tribunal to substitute its own judgment for that of Ofcom as if it was  
28 a regulator waiting in the wings; but it’s not just a case of reasonable people reaching  
29 different conclusions to those adopted by the relevant respondent. Instead, there must be  
30 an error, and where that involves an exercise of discretion then there must be a -- it must be  
31 clearly wrong to have exercised the discretion in the way that it did.

32 Indeed, Mr Holmes was critical of the way that the Tribunal expressed the test which the  
33 Tribunal applied in *Vodafone* as not sharply making that clear. But the context in which the  
34 *Vodafone* Tribunal was proceeding here was that this was a policy decision, involved

1       a general condition for all market participants. At para.23 it recorded that they had clearly  
2       found errors in the decision-making procedure adopted by Ofcom. Those errors related  
3       specifically to the cost benefit analysis which Ofcom had undertaken:

4       “That they were wrong is clear from our judgment. However, we are of the view that  
5       they acted as reasonable regulators and in good faith. OFCOM believed they were  
6       pursuing the wider public interest in mandating the change to direct routing and  
7       recipient-led two hour porting. Indeed, the European Commission is currently  
8       considering proposals to reduce porting lead times below the two day standard that  
9       currently operates ... Whatever the means adopted by OFCOM in attempting to  
10      achieve the goals set down in the Decision, the end result sought cannot be described  
11      as illegitimate or beyond OFCOM’s powers. In fact, Vodafone have consistently stated  
12      that they are not opposed in principle to any of the changes mandated by OFCOM in  
13      its Decision.”

14      And that was a point picked up in *Pay TV*. And:

15      “Given the context of a regulatory body acting properly and in good faith, albeit  
16      reaching the wrong decision, we do not consider that in this case it was unreasonable  
17      for OFCOM to refuse to consent to the appeal or withdraw the Decision following  
18      receipt of Vodafone’s without prejudice letter.”

19      Which acted a bit like a part 36-type letter, and you see that referred to in para.22. So then  
20      it deals with the interveners. That is how *Vodafone* approached the costs decision in that  
21      case.

22      Going back to *Pay TV*, see what the Tribunal made of that case, which is dealt with from  
23      para.19, which I shan’t read, the Tribunal will see, it picks up on all those points, as I noted.  
24      Takes them all into account. Then at para.20 it says:

25      “... in the light of these specific factors the Tribunal did not consider it appropriate to  
26      make an award of costs against Ofcom. Nowhere in the judgment is there anything to  
27      suggest that the Tribunal was applying a principle applicable to section 192 appeals  
28      generally, or that it was engaged in anything other than the ‘case specific exercise’ to  
29      which the Tribunal had expressly referred at the outset of its ruling.”

30      And then the next case in the list in para.14 is *The Number*, which is at tab 8. I took you  
31      briefly to it earlier, and that, of course, is we’re back in the territory again of dispute  
32      resolution here. And at para.2 we see the same rule set out, familiar.

33      THE CHAIRMAN: Yes.

1 MR PALMER: Then at para.3, the Tribunal sets up a deliberate contrast with dispute resolution  
2 cases, and the contrast it makes here is with proceedings under the Competition Act 1998,  
3 damages claims, where it notes in the foot of the page, five lines up:

4 “In those cases the Tribunal suggested that, while there is no automatic rule, the  
5 starting point for the exercise of its discretion in such cases should be that costs follow  
6 the event.”

7 So that’s going back to the point I made, r.55 is generally open. That reflects that there’s  
8 different sorts of cases which come to the Tribunal, and in those sorts of cases, which  
9 include cases against Ofcom, *Independent Media Support*, the ordinary rule, starting point,  
10 was that the starting point should be costs follow the event.

11 Now, there’s a contrast between that kind of case and the present case. Paragraph 4:

12 “In the present case, the Appellants seek a costs order against OFCOM following the  
13 successful outcome of their appeal under section 192 of the 2003 Act against a  
14 decision of OFCOM in relation to the resolution of price disputes. OFCOM are, of  
15 course, in a unique position as regulator under the 2003 Act when dealing with the  
16 resolution of disputes under section 185.”

17 Section 185 is the section which gives them that role of settling disputes between two  
18 commercial entities:

19 “In addition, OFCOM have statutory duties to perform and fulfil a role as guardians of  
20 the public interest. They are called upon in the exercise of their functions to exercise  
21 judgments and to take positions on factual and legal issues. It is therefore strongly  
22 arguable that this puts OFCOM in a different position from other parties when it  
23 comes to making costs orders, whether against OFCOM or in their favour, in cases  
24 where the manner of the exercise of their functions is in issue.”

25 The function which it is talking about there is clearly its functions in relation to the  
26 resolution of price disputes:

27 “The Tribunal has taken this factor into account in other cases under the 2003 Act. For  
28 instance, in *Vodafone*, the Tribunal appears to have attached considerable weight, in  
29 declining to make any costs order adverse to OFCOM, to the fact that OFCOM had  
30 acted as a reasonable regulator and in good faith.”

31 But I add in that different policy context.

32 And then that passage which I cited to you earlier in para.5, and a conclusion that there  
33 shouldn’t be an adverse costs order in that dispute case, and some considerations relevant to

1       that in para.6 over the page: charged with duties in the public interest shouldn't be deterred  
2       and:

3       “... should ordinarily be entitled without fear of an adverse costs order, to bring or  
4       defend proceedings the purpose of which is to determine the proper meaning and effect  
5       of domestic or European legislation. We include the word ‘ordinarily’ because the  
6       Appellants submit that the present case is not an ordinary case, for reasons to which  
7       we now turn.”

8       And then it considers the particular factors of that case. So that case is considered in  
9       *Pay TV* as well from para.21. So tab 21, para.21, sets out all that reasoning in 4 to 6,  
10      paras.4 to 6. Paragraph 23:

11      “Ms Rose submits that the Tribunal was here setting out principles applicable to the  
12      generality of section 192 appeals and not just a dispute resolution decision such as the  
13      Tribunal was considering.”

14      So there's that point put directly in issue:

15      “In our view that is not a correct reading of the Tribunal’s ruling. First, it would be  
16      surprising for the Tribunal to purport to lay down principles for cases other than the  
17      one with which it was concerned; it had just emphasised that the exercise of the  
18      Tribunal’s discretion under rule 55 was ‘critically fact-dependent’. Secondly, at the  
19      very outset of the passage cited above the Tribunal makes clear that Ofcom’s ‘unique  
20      position as regulator’ for these purposes relates to its *dispute resolution* function - the  
21      Tribunal says so in terms ... Moreover the Tribunal uses the expression ... again later in  
22      the passage. It seems clear to us that it is using it to mean the same thing. Third, the  
23      fact that the Tribunal also referred to the existence of other statutory duties of Ofcom  
24      does not mean that the ruling is to be taken as governing also cases where Ofcom was  
25      not engaged in its dispute resolution function, i.e. to cases where the central factor  
26      identified by the Tribunal in its ruling is absent.”

27      And, indeed, I add there is no consideration of cases, regulatory appeals, such as the one  
28      which we are concerned with in the present case and such as was concerned with in *Pay TV*.  
29      So that was only concerned with the dispute resolution role under s.185, and that was  
30      commented on as well in *Eden Brown*, another Tribunal case which again emphasised it  
31      was dealing with resolving disputes under s.185.

32      The Tribunal then deals with the next case, which is *T-Mobile*. That doesn’t appear on  
33      Mr Holmes’s list at para.14. We don’t get to that until much later at para.16, and the reason  
34      why it doesn’t appear on Mr Holmes’s list at para.14 is it’s not correct to suggest that until

1       2013 the Tribunal had declined to make costs orders against Ofcom in a s.192 appeal,  
2 because here was a case where it did make such an order adverse to Ofcom.

3       And that decision is at tab 9, and this, though, was a dispute case again, where nonetheless  
4 costs were ordered against Ofcom. And I will deal with this one briefly because we're not  
5 in the dispute context now, but it shows that even in the dispute case there was  
6 the jurisdiction in an appropriate case to order costs. It's helpful to see why. The decision  
7 is at para.5:

8       “We consider that it is appropriate to exercise our discretion to make a costs order...”  
9 And then from para.6 they deal first with costs as between BT, the appellant, and Ofcom.  
10 BT's challenge had been entirely successful:

11       “The Tribunal found in most instances that the charges for which BT had contended  
12 throughout were reasonable charges and these reasonable charges were substantially  
13 lower than the charges that OFCOM had upheld ... The Tribunal held that OFCOM  
14 failed to have proper regard to its regulatory objectives in its approach to resolving  
15 these disputes ...”

16 And over the top of the next page:

17       “This is not a case where, in the course of an ‘on the merits’ appeal, the Tribunal came  
18 to a different conclusion from a conclusion reasonably arrived at by the regulator. We  
19 agree with BT that this is one of the cases where the interests of justice lie in favour of  
20 awarding costs against OFCOM. If an order for costs against OFCOM is not made in  
21 circumstances where its determinations were found to be so ‘seriously flawed’ ...”

22 As has been found in this case:

23       “It is difficult to see when such a costs order would be made, short of findings of bad  
24 faith and unreasonable behaviour.”

25 At para.10:

26       “We recognise the force of OFCOM’s argument that it is required by the 2003 Act to  
27 determine disputes referred to it and that it adopts, as OFCOM put it, a ‘unique  
28 quasi-judicial role’ in deciding these disputes.”

29 Refers to that. And then at para.11:

30       “... none of the factors ... detracts from our conclusion. The fact that there has been no  
31 award of costs against OFCOM to date does not establish a principle that no such  
32 award of costs should be made here; each case must be approached on its own  
33 particular facts.”

1 And a reference there to the “chilling effect”. Again, not sufficient to depart from that. So,  
2 even in a disputes determination case where the decision was seriously flawed and it was  
3 not a conclusion reasonably arrived at by the regulator, the Tribunal had simply come to  
4 a different conclusion but they’d found clear error, then costs followed the event on the  
5 facts of that case.

6 We can see that, just going back to complete that case, being referred to and dealt with in  
7 *Pay TV* as well from para.24. Paragraph 24 recalls the matters again considered by the  
8 Tribunal in a very thorough way. In respect of the “chilling effect”, it referred to the  
9 “modest” order amounting to £160,000 in total:

10 “Ms Rose contrasted that amount with the indicative costs being claimed here, which  
11 are very much larger.”

12 That’s something of an understatement: indicative costs being claimed by Sky in *Pay TV*  
13 were £8.7m. We have that figure for your note, we needn’t turn it up, but it is at tab 37 of  
14 the authorities bundle, p.32 in the transcript at 1.31. So a considerably bigger figure being  
15 claimed in *Sky TV* than there was in the *T-Mobile* case and considerably bigger than is being  
16 claimed by BT in this case. But, as I trailed earlier, still the Tribunal found that:

17 “As already indicated, we do not believe that the possibility of an award of costs ...  
18 poses so substantial a risk of deterring Ofcom from taking appropriate regulatory  
19 action as to justify a general principle that such an award should not normally be  
20 made. However, the nature and extent of the risk that an award in a particular case  
21 could create a chilling effect is a relevant factor.”

22 That is how the Tribunal deals with that point. It’s not a reason to depart from the rule from  
23 the starting point that costs follow the event.

24 Then we’re back to the final case in Mr Holmes’s list at para.14, which is the *PPC* case, or  
25 *Partial Private Circuits* case. Again, the Tribunal see from para.26 of *Pay TV* again it was  
26 a dispute resolution appeal where the Tribunal made an award in favour of Ofcom, and the  
27 Tribunal expressly declined to express a view about whether that starting point -- sorry,  
28 having applied a starting point principle that costs normally follow the event, expressly  
29 declined to express a view about whether that starting point was an appropriate one where  
30 costs were being sought against Ofcom, whilst noting a familiar passage in *Bahta*, a judicial  
31 review case in the Court of Appeal, where Lord Justice Pill said at para.60, and this is  
32 referred to in our skeleton as well:

33 “Notwithstanding the heavy workload of [the public authority, in this case the UK  
34 Border Agency], and the constraints upon its resources, there can be no special rule for

1 government departments in this respect. Orders for costs, legitimately made, will of  
2 course add to the financial burden on the Agency. That cannot be a reason for  
3 depriving other parties, including publicly funded parties, of costs to which they are  
4 entitled..."

5 Indeed, the Tribunal went slightly further than that. If you turn to it, it's at tab 13. Picking  
6 up at para.9, which follows a long citation from *The Number*, which includes at para.5 the  
7 reference to the need for a consistent and principled approach, it says:

8 "We entirely agree that it is important that differently constituted Tribunals adopt a  
9 consistent and principled approach to the Tribunal's costs jurisdiction, if the discretion  
10 is to be exercised judicially. In this regard, we note the growing trend (in other,  
11 non-section 192 types of case coming before the Tribunal) towards a rule that costs  
12 should follow the event, even where this results in a costs order made against a  
13 regulator: see, for example ... *Merger Action Group v Secretary of State* ... *Eventim v*  
14 *Competition Commission* ... *Eden Brown v Office of Fair Trading* ... *Kier Group v*  
15 *Office of Fair Trading* ... and *T-Mobile v Ofcom* .. was a section 192 case, an order for  
16 costs was made against OFCOM in circumstances where it was expressly found that  
17 OFCOM did not conduct its defence unreasonably or in bad faith."

18 Then there's the reference to *Bahta* about public authorities, and then at para.11 in *The*  
19 *Number* the Tribunal was considering circumstances in which a costs order adverse to  
20 Ofcom should be made. That's not this case. And it considered the special role of Ofcom  
21 referred to in *The Number* at para.12. It says at para.13:

22 "In such a case, we can see no reason – unless constrained by authority – why the  
23 ordinary rule should not apply."

24 So that is considered as well in *Pay TV* at para.26.

25 THE CHAIRMAN: And you're in paragraph -- this is a case in which BT was contending for  
26 a different principle, see para.13.

27 MR PALMER: Paragraph 13 of -- yes. In that case, which was a dispute resolution case:

28 "BT contended differently. BT contended that there was a general principle that  
29 pertained in cases such as this; and that the general principle was that there should not  
30 be a costs order in favour of OFCOM or against a party other than OFCOM unless  
31 there was a 'good reason'."

32 So that that submission was advanced specifically in the context of a dispute resolution  
33 case.

34 THE CHAIRMAN: Right. Anyway.

1 MR PALMER: And again, that was all dealt with and taken into account in *Pay TV*.  
2 And then there is a final example given in *Pay TV* at para.27, which you needn't turn to,  
3 *Everything Everywhere*, a further s.192, which was a dispute resolution case in which costs  
4 were awarded in favour of Ofcom, who had been successful. And at para.28, therefore, they  
5 reject the principle which had been advanced by Ofcom that the consistent practice of that  
6 Tribunal was to take as a starting point the principle that:

7 "... in the absence of bad faith or unreasonable conduct, Ofcom should not have to pay  
8 any costs of the successful appellant in an appeal brought under section 192."

9 That's not been substantiated:

10 "In the section 192 appeals in which Ofcom was *successful* the Tribunal applied as a  
11 starting point that costs should follow the event ... also appears to have been adopted  
12 by the Tribunal in *H3G*."

13 That's no order for costs because it wasn't a clear victory:

14 "In *Vodafone* ... it emphasised the case by case approach ... and placed considerable  
15 reliance on specific factors ... in particular the narrow, somewhat technical nature of  
16 the victory given that the regulatory outcome (availability of number portability) had  
17 not been challenged in principle by the appellant."

18 And what this challenged was the cost benefit analysis relating to the means of achieving  
19 that:

20 "As to *RBS Backhaul* and *The Number*, these were both appeals against dispute  
21 resolution decisions ... In *T-Mobile*, another dispute resolution appeal, the Tribunal  
22 awarded costs in favour ... even though there was no suggestion that Ofcom had acted  
23 unreasonably."

24 So:

25 "In the light of these rulings Ofcom's proposed starting point ... cannot in our view be  
26 said to have been applied consistently in section 192 appeals, as submitted by Ofcom.  
27 We do not propose to add to what has been said in other Tribunal rulings about the  
28 appropriate approach to costs in appeals against dispute resolution decisions under  
29 section 185."

30 They refer to the performance of a unique quasi-judicial function:

31 "... and one can understand why the special nature of such decisions might be said to  
32 affect the appropriate starting point for the award of costs on an appeal therefrom.  
33 However, the present case does not fall into that category."

1 So there has been a contrast throughout that jurisprudence to be drawn between on the one  
2 hand s.192 appeals and other appeals to the Tribunal, such as damages actions, Competition  
3 Act 1998 cases; but then within the context of s.192 appeals there's a further distinction  
4 between appeals which have their genesis as dispute determinations under s.185 and come  
5 to the Tribunal under s.192, and other cases such as regulatory appeals which come to the  
6 Tribunal under s.192.

7 So there is that further bifurcation, and it's against that background that the Tribunal, having  
8 found no consistent practice as alleged by Ofcom, asked itself the question, "Well, what is  
9 the appropriate starting point in a case such as the present?" And that analysis begins from  
10 para.31. And the analysis begins with a reference to *Tesco v Competition Commission*,  
11 which is summarised at para.31. Involved a market investigation into the grocery sector and  
12 the CC lost. Submitted that it shouldn't be required to pay any of the successful applicant's  
13 costs. Relied upon strikingly similar arguments to those made by Ofcom in the present  
14 case. Referred to *Child Poverty Action Group*, which Mr Justice Dyson, as he then was,  
15 explained why it is normally as appropriate in public law cases as in private litigation that  
16 costs should follow the event. That's the point I made to you earlier, Sir:

17 "The Tribunal decided that the starting point in such a case should be that the  
18 successful applicant would obtain an award of costs in its favour. A costs order was  
19 ultimately made against the CC after all relevant factors were considered."

20 And:

21 "... noted that market investigation decisions were sufficiently similar to decisions  
22 made following a merger reference to require the same approach to the award of  
23 costs."

24 I will just ask the Tribunal to read that passage which is cited.

25 It's then helpful to go to *Tesco* to see it all in context, which is at tab 10. The analysis on  
26 costs begins at para.25. The familiar r.55, and then the grouping together of market  
27 investigation cases with merger cases is dealt with from para.27. At para.28, four lines  
28 down:

29 "Whilst noting that so far as the Tribunal's jurisdiction under rule 55 was concerned  
30 there was no "general rule" such as existed in CPR Rule 44.3(2)(a) [costs following  
31 the event], the Tribunal referred to the following passage from the judgment of Dyson  
32 J..."

33 Which you saw referred to. That's then cited. I ask the Tribunal to read those paras.36 and  
34 37 as to what lies behind that general rule.

1                   (After a pause). (Inaudible) the fact that that basic rule is:

2                   “Discipline within the litigation system, compelling parties to assess carefully for  
3                   themselves the strength of any claim ... is as desirable in public law cases as it is in  
4                   private law cases.”

5                   At para.29, noting that there are differences between market investigations and merger  
6                   references, but not necessarily so different that they call for a different approach to the  
7                   award of costs. It goes to the rest of para.29.

8 THE CHAIRMAN: Yes, well then we're into----

9 MR PALMER: Then we're into para.30 where we're into these s.192 cases. Now, Mr Holmes  
10 makes something of this, so I just need to deal with this with a bit of care. Paragraph 30:

11                   “Nor are the Tribunal's rulings in *The Number* and *Vodafone Limited* in point in the  
12                   present case.”

13 I just ask you to note that *Vodafone* is referred to there because Mr Holmes says that's very,  
14 very significant:

15                   “In those matters the Tribunal was considering what the starting point on an  
16                   application for costs against OFCOM should be where there was a successful appeal  
17                   under section 192...”

18 Then the rest of that paragraph is dealing with in *The Number*, where again the Tribunal in  
19 *Tesco* notes that the appeal was from Ofcom's resolution of a dispute, and goes through that  
20 familiar analysis distinguishing dispute cases, and then turns to *Vodafone*. It's clear what  
21 the Tribunal has in mind when it referred to *Vodafone*. It's the analysis which then follows  
22 which is not actually the substance of the *Vodafone* case itself, but the two authorities  
23 I showed you the citations in *Vodafone* earlier of *Booth* and *Cambridge City v Alex Nestling*  
24 *Limited* from which the Tribunal in *Vodafone* appeared to get some assistance.

25 It refers to these being case stated appeals which were “relied upon by the Commission ...  
26 very far from the present case”:

27                   “Each involved an appeal to the magistrates from a licensing decision by the local  
28 authority where the justices in effect conducted a re-hearing. They were entitled to  
29 reach a different decision without finding that the local authority had erred in any way  
30 in the original decision, and had a wide statutory discretion to make ‘such order as to  
31 costs as it thinks fit’.”

32 And in *Booth*, the Divisional Court:

33                   “... held that the magistrates had misdirected themselves on costs by applying a  
34 principle that costs should follow the event without considering a number of relevant

1 factors. It is difficult to read much more into the case than that. As the Lord Chief  
2 Justice said:

3 ‘what the court will think just and reasonable will depend on all the relevant facts and  
4 circumstances of the case before the court...’.”

5 THE CHAIRMAN: Mr Justice Barling -- sorry, the Tribunal, chaired by Mr Justice Barling in  
6 both these cases, has -- it's an interesting comment in para.34 of *Pay TV*.

7 MR PALMER: Yes.

8 THE CHAIRMAN: Mr Justice Barling basically says, “I don't know why we referred to  
9 *Vodafone* in that previous paragraph”.

10 MR PALMER: He does say that. It's surprising, isn't it?

11 THE CHAIRMAN: Well, not necessarily. Occasionally -- I can't remember what the  
12 appropriate(?) expression is, “Even Homer nods,” or whatever. But anyway----

13 MR PALMER: If one may assist by reconstructing that logic, in my submission it's perfectly  
14 clear why they referred to it, and the reason why it's been referred to is it had been prayed  
15 in aid, and in particular the authorities which had been relied upon in *Vodafone* were being  
16 relied upon by the Commission in the context of this appeal to the Tribunal, and in  
17 particular *Booth* and *Cambridge City Council*, which were expressly relied upon in  
18 *Vodafone* as being the proper basis upon which it should (inaudible).

19 And of course that is wrong for the reasons which the Tribunal in *Tesco* now set out, was  
20 that that concerned statutory -- they both concerned statutory appeals from the licensing  
21 decisions of local authorities where you had a complete right of rehearing *de novo* on  
22 appeal. And of course the fact is that reasonable people can differ when you have  
23 an original jurisdiction like that. And so it doesn't follow that automatically the starting  
24 point that just because the court has differed from the original decision-maker you should  
25 have an adverse costs order.

26 And that's the point which is being made in both those cases, and they're being  
27 distinguished in *Tesco* from judicial review cases, because in *Tesco* the appeal from the  
28 Competition Commission was on judicial review grounds, which, as you see at the top of  
29 p.12 in para.32, concerns the lawfulness or validity of the decision being challenged “and  
30 which does not constitute a merits appeal by way of re-hearing.” And I emphasise the  
31 words “by way of re-hearing”, because contrary to the whole approach to you and the  
32 submission, which I do not disagree with and do not argue with, but the whole approach of  
33 Ofcom in making its submissions to this Tribunal as the standard of review is saying, “Yes,  
34 this is an appeal, s.192 says on the merits, but it's not a merits appeal by way of re-hearing.”

1 It's not the Tribunal is a regulator waiting in the wings, "See what you think of this. Never  
2 mind what Ofcom thought"; they're in the process of identifying error, and indeed in this  
3 case you did identify clear principled error where Ofcom had adopted the wrong approach.  
4 So that's the contrast which is being drawn. Cases where you're looking for error and cases  
5 where you're not necessarily doing so, you're exercising, the court is exercising an original  
6 jurisdiction by way of re-hearing.

7 So that is the link with *Vodafone* which Mr Justice Barling may have lost sight of that  
8 connection, but the introduction to para.30, "the Tribunal's rulings in *The Number* and  
9 *Vodafone* are not in point in the present case," is explained in the case. It's *The Number* the  
10 rest of para.30 and in the case of *Vodafone* the rest of paras.31 and 32, dealing with those  
11 two authorities upon which the Tribunal based itself.

12 And you will recall -- we can go back to it if necessary -- that in *Vodafone*, the costs ruling,  
13 the Tribunal did specifically talk about, you know, this is a case where reasonable people  
14 can differ and reach different conclusions. But it's not the right test.

15 THE CHAIRMAN: Yes, okay. So we're back to----

16 MR PALMER: So when you go back -- those paras.30 to 32 of *Tesco* in my submission make  
17 perfect sense on their own terms, and it is emphatically not, before we leave *Tesco*,  
18 a distinction as suggested by Ofcom in a footnote. This is p.9 of Ofcom's skeleton  
19 argument, footnote 2, which is the footnote to the proposition that "the Tribunal found itself  
20 unable to explain how part of the *Tesco* judgment could be reconciled with its  
21 interpretation." It's just the point I have just taken you to. At footnote 2:

22 "In *Tesco* at [30] the Tribunal had distinguished *The Number* and *Vodafone* on the  
23 basis of what looks very much like a distinction between merits appeal and judicial  
24 review..."

25 That merits appeal loses the key words "by way of re-hearing" in Ofcom's reference to it.  
26 Then about half to two-thirds of the way down that footnote, it says:

27 "Despite the Tribunal's professed puzzlement, the reference to *Vodafone* makes  
28 perfect sense if paragraph [30] is read as drawing a distinction between merits appeal  
29 and judicial review. This is also consistent with the following paragraphs [31] ...and  
30 [32]."

31 That totally ignores that distinction between merits appeal by way of re-hearing and the  
32 merits appeal, appeal on the merits which the Tribunal considered in the present case.

1 THE CHAIRMAN: Right. Can we just pause for one thing, because I'm sorry: in the sheer  
2 excitement of going through all these cases I'd rather forgotten we have a transcriber who  
3 has been carrying away, who probably would appreciate, I suspect, a break.  
4 (Aside to the shorthand writer).

5 I appreciate that may not be an entirely convenient moment----

6 MR PALMER: No, that's perfect.

7 THE CHAIRMAN: -- but I'm conscious that we ought to have a five-minute break for the  
8 transcript writer.

9 Good, all right; we will come back in a little over five minutes.

10 (A short break)

11 THE CHAIRMAN: So, where are we in *Pay TV*? We need to probably move on.

12 MR PALMER: We're going to *Pay TV* at tab 21 and we've got to para.35.

13 THE CHAIRMAN: Right. We do probably -- I mean, I think in a sense we've got the -- I'm sure  
14 we've got the gist of where we're headed on *Pay TV*, so we probably can speed up a little  
15 bit.

16 MR PALMER: I think I can speed up now that I've shown you the s.192 cases in particular, but  
17 I will cover, because at the end, the remaining points which are covered are still relied upon  
18 by Ofcom and resurrected in ways which are dealt with fully in *Pay TV*, but which I do need  
19 to cover, but I'll cover them as quickly as I can. The end is not far off on that point.

20 We got to para.35. Just a diversion before we come back to the *City of Bradford* cases,  
21 which is drawing:

22 “... close parallels between the nature of the investigation procedure, the making of  
23 detailed findings about [AECs] adverse effects on competition, and the framing of  
24 remedial action in a market investigation under the 2002 Act (as in *Tesco*), and the  
25 nature of the process and decisions of Ofcom in the present case.”

26 THE CHAIRMAN: When I say speed up as well, I think in fairness to the transcript writer,  
27 I don't just mean talk more quickly.

28 MR PALMER: Okay. That's a fair observation.

29 The point which I want to draw from para.35 comes halfway down where the Tribunal notes  
30 that the CC in *Tesco* has less discretion under the 2002 Act than Ofcom has under s.316,  
31 which was the *Pay TV* case, when it comes to deciding whether and how to proceed.  
32 That's an important point, because in this case, Sir, Ofcom emphasise the point that the  
33 BCMR is an exercise they're required to do every three years:

“Once the subject matter of the market investigation has been referred to it (usually by the OFT or one of the sectoral regulators), the CC is under a statutory obligation to carry out the investigation and make consequential findings and decisions in accordance with a strict statutory procedure and timetable.”

So in *Tesco*, the CC was under a statutory obligation to carry out the investigation that it did and reach such findings as it thought appropriate, but that wasn't the reason why it should be insulated against the normal principle that if it erred in doing so, costs should follow the event, at least as the starting point.

Then we get back to the analysis of *City of Bradford* and *Cambridge City Council*, which sets out the analysis I have already taken you to in *Tesco*. Paragraph 38, those comments were adopted, and the very point I pressed upon you:

“The present appeal, and indeed any appeal under section 192, is emphatically not an appeal by way of a re-hearing of the original decision, and the Tribunal does not allow an appeal under section 192 without finding that the decision was unlawful or otherwise in error in a material respect.”

“The licensing appeals,” which are the subject of these Divisional Court judgments, “are therefore wholly different from this case”.

Then there are two other authorities which are very much in the same line.

*Baxendale-Walker v Law Society* concerned the approach to costs in disciplinary proceedings brought by the Law Society, which was acting as a prosecutor, in effect, before the Solicitors Disciplinary Tribunal; and there was no assumption for costs in favour of a solicitor that the court held because the Law Society's obligation, at the top of that citation, was to advance the public interest and ensure that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the Tribunal.

And we have that authority at tab 5. If I may briefly show you the key point on that, which is at para.34, which is that the Tribunal starts -- this analysis begins with the Tribunal itself, rather than the Law Society, and:

“... this statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it ... undoubtedly vests it with a very wide costs discretion. An order ... is neither prohibited nor ... discouraged. That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the

1           Tribunal, the ambit of its responsibility is far greater than it would be for a litigant  
2           deciding whether to bring civil proceedings. Disciplinary proceedings supervise the  
3           proper discharge by solicitors of their professional obligations, and guard the public  
4           interest, as the judgment ... makes clear, by ensuring that high professional standards  
5           are maintained, and ... vindicated. Although ... it is true that the Law Society is not  
6           obliged to bring disciplinary proceedings, if it is to perform these functions and  
7           safeguard standards, the Tribunal is dependent on the Law Society to bring properly  
8           justified complaints of professional misconduct to its attention. Accordingly," -- key  
9           passage -- "the Law Society has an independent obligation of its own to ensure that the  
10          Tribunal is enabled to fulfil its statutory responsibilities."

11          The exercise of that function places them in a wholly different position and the normal  
12          approach doesn't apply.

13          So there's an independent obligation on the Law Society to bring complaints to the Tribunal  
14          so that the Tribunal can exercise its statutory duties. That is again a very different context  
15          from ours where these appeals are brought to the Tribunal not in the circumstances where  
16          the Tribunal has primary responsibility for the regulation of telecoms companies.

17          And then at para.41, going back to *Pay TV* at para.41, is *Perinpanathan*, which again,  
18          a wholly different context. It concerned the costs of an application by the Police  
19          Commissioner for forfeiture of an amount of cash under the Proceeds of Crime Act 2002 on  
20          the ground that there were reasonable grounds to suspect that the cash was intended for use  
21          in unlawful conduct, namely terrorism, and that the magistrates refused to grant costs:

22            "... as they accepted that when the seizure took place and when applying for forfeiture,  
23            the Commissioner had reasonable grounds for suspicion."

24          Just to be clear, we can go to it if necessary, it's in tab 11, but the key point there is, so far  
25          as the police's power to act was concerned, all they had to do is establish reasonable  
26          grounds for suspicion, and then it's then for the court to decide whether or not that  
27          suspicion is well founded. So it's a different power being exercised, and where they were  
28          right that there were reasonable grounds to suspect that cash was intended for use for  
29          an unlawful conduct, it couldn't be criticised for bringing it to court and saying there were  
30          reasonable grounds to suspect. That is their role, so of course they shouldn't be punished by  
31          an adverse costs order for fulfilling that duty.

32          So again, fully considered by the Tribunal; not plainly wrong by any stretch; recognises that  
33          in *Perinpanathan* Lord Justice Stanley Burnton referred to *RBS Backhaul* but then noted  
34          that the context of the proceedings before the Tribunal was very different from the present.

1 Doesn't take matters any further. Referred to *City of Bradford* in that *Perinpanathan* case  
2 and *Baxendale-Walker*. And para.45:

3 "We do not agree that [those] provide close analogies to the present case. For the  
4 reasons discussed earlier, we consider that this case has a much closer connection with,  
5 for example, cases involving challenges to market investigation decisions."

6 The "reasons discussed earlier" are those at paras.35 to 36:

7 "In other passages in *Perinpanathan* ... Lord Neuberger MR (as he then was) stated that  
8 in cases where there was no principle that costs should follow the event, as for  
9 example in CPR ... guidelines could nevertheless be laid down for the approach to an  
10 award of costs in favour of a successful party. However, such guidelines should not be  
11 too rigid, and a balance struck ... It was desirable for courts to maintain an approach  
12 where it had been consistently applied, unless it was wrong in principle or contrary to  
13 authority."

14 So then the Tribunal in *Pay TV* comes to its own conclusions as to what the consistent  
15 practice of the Tribunal should be on s.192 appeals other than dispute determinations, as  
16 we've seen. It starts that at para.47:

17 "Given that the Tribunal has not established a consistent practice that in successful  
18 section 192 appeals the starting point should be that no order for costs should be  
19 made," rejecting Ofcom's point, "... and given also that in respect of most categories of  
20 proceedings falling within the Tribunal's jurisdiction the Tribunal has established as  
21 a starting point that costs follow the event, Lord Neuberger's comments about  
22 consistency point to the approach that should be adopted in the present case."

23 THE CHAIRMAN: I mean, and then they go on to, as it were, wrap this analysis into their own  
24 views, which, I mean, conveniently are set out in sort of paras.50 through to 52.

25 MR PALMER: That's exactly it.

26 THE CHAIRMAN: And presumably, other than reading those to ourselves, that they pull  
27 together the approach which you're urging upon us.

28 MR PALMER: That is absolutely right, Sir.

29 THE CHAIRMAN: Yes. So if you just pause for a moment we can read to ourselves.

30 MR PALMER: I'm grateful.

31 THE CHAIRMAN: (After a pause). And presumably you also say, don't you -- is this  
32 right -- that to the extent that we were looking at some of these earlier cases which were  
33 under rule -- the old r.55, I think it was----

34 MR PALMER: Yes.

1 THE CHAIRMAN: -- the current rule, costs rule, is r.104.

2 MR PALMER: That's right.

3 THE CHAIRMAN: And that does, in addition to the sort of wording that was in place under r.55,

4 it does expressly set out a number of points that the Tribunal might take account of----

5 MR PALMER: Yes.

6 THE CHAIRMAN: -- which are not dissimilar from some of the points that the CPR----

7 MR PALMER: Indeed, including whether a party has succeeded on part of its case.

8 THE CHAIRMAN: Yes.

9 MR PALMER: Because it maintains, it's the one costs discretion for appeals to the Tribunal. So

10 of course I accept the Tribunal's approach will differ, for example, in dispute determination

11 cases than in regulatory appeals.

12 THE CHAIRMAN: Right.

13 MR PALMER: But the factors are there.

14 THE CHAIRMAN: Okay.

15 MR PALMER: And that rule is made, the 2015 Rules of course are made in the knowledge of all

16 this preceding jurisprudence, in the knowledge of *Pay TV*. It doesn't depart or correct or

17 respond to that to lay down a different rule, and so in the ordinary way one takes it as

18 confirming that approach.

19 THE CHAIRMAN: Right. So you say, if we pick up your skeleton again, in principle we should

20 start from the proposition that costs follow the event----

21 MR PALMER: Yes.

22 THE CHAIRMAN: -- but subject to the Tribunal having a discretion to take into account all other

23 relevant factors, of which some are set out in r.104(4).

24 MR PALMER: Yes. That's right.

25 THE CHAIRMAN: And you accept that we also should take into account, presumably, the

26 potential chilling effect on Ofcom's activities referred to in para.52 of----

27 MR PALMER: As a factor.

28 THE CHAIRMAN: As a factor----

29 MR PALMER: It is established to be a factor.

30 THE CHAIRMAN: -- both in terms of principle and amount.

31 MR PALMER: Yes.

32 THE CHAIRMAN: And to what extent do you accept that a relevant factor would include the

33 conduct of a litigating party in the BCMR itself?

1 MR PALMER: That's a broadly defined proposition. I don't necessarily accept that as a broad  
2 proposition. If, Sir, you have in mind specifically the error as to the 20 per cent point----

3 THE CHAIRMAN: Yes.

4 MR PALMER: Then of course that is a factor which you're entitled to take into account. I have  
5 submissions as to how that should be taken into account in the present case.

6 THE CHAIRMAN: Right. No, well, I'm just -- the reason I was asking was because r.104(4)(a)  
7 talks about specifically the conduct of all parties in relation to "the proceedings", and so  
8 I was just asking you, as it were, how the conduct of a party in the regulatory review that  
9 led up to "the proceedings", as to whether that is a factor that the Tribunal can take into  
10 account. And I think your answer is: it is potentially a relevant factor, but you would have  
11 submissions about the relevance of it in this particular case, but it's not something that  
12 falls outside our discretion.

13 MR PALMER: No, it doesn't, it's not part of the proceedings but the list of factors is not  
14 exhaustive.

15 THE CHAIRMAN: That's fine.

16 MR PALMER: I don't pretend that it is.

17 THE CHAIRMAN: Right, well, we're on the same page in that respect, subject obviously to your  
18 points about the application of the facts of this particular case.

19 MR PALMER: Yes.

20 THE CHAIRMAN: Okay.

21 MR PALMER: So may I just briefly, before we come on to the application of the facts, just to  
22 complete these submissions, may I just very briefly just point out why it is that Ofcom are  
23 wrong to suggest, to characterise *Pay TV* in the way they did, which presumably they are  
24 submitting is plainly wrong. And there are clear errors in its submissions, and  
25 misrepresentation of the effect of the decision as you've now seen it. I'll do this as quickly  
26 as I can, but at para.18 of Ofcom's skeleton, five lines down:

27        "*Tesco*, on a fair reading of the judgment, turned on the distinction between appeal and  
28 judicial review, placing the s.192 case law as falling into the 'appeal' category (at [30]  
29 to [33])."

30 That's dealing with there, you will recall, disputes and that appeals by way of re-hearing:

31        "In *Pay TV*, the Tribunal engaged in a wholesale reinterpretation of the reasoning in  
32              *Tesco* re-drawing the line so as to place s.192 appeals on the opposite side."

33 Couldn't explain how part of it could be reconciled, I've dealt with that:

1        “The Tribunal’s justification for assimilating an ‘on the merits’ s.192 appeal with  
2        judicial review is surprising given the case law discussed in the present Tribunal’s  
3        judgment at [71].”

4        Footnote 4:

5        “Especially ... Lord Sumption: ‘an appeal to the CAT is an appeal on the merits. It is a  
6        rehearing, and is not limited to judicial review or to points of law’.”

7        That simply misrepresents the very careful analysis in *Pay TV* which doesn’t treat s.192  
8        appeals as a whole as being on one side of the line or the other, but distinguishes down the  
9        middle between dispute determination cases and others; and in the case of “others”  
10      assimilates those with being on the judicial review side of the line, and distinguishes from  
11      other cases on the basis either of the determination principle on the quasi-judicial role or the  
12      point about re-hearing, in the true sense there of original jurisdiction, which is what’s being  
13      discussed; elides all those points and does so unfairly and incorrectly.

14      Then at para.21, their submissions on what the starting point should be, there’s a number of  
15      factors at paras.21 and 22, and I’ll do this quickly just for your note because we’ve dealt  
16      with all of these points in substance, but just to tick them off. Paragraph 21.1, the fact that  
17      telecoms is a regulated sector, and there’s an ongoing regulatory relationship with Ofcom.  
18      That’s dealt with at *Pay TV* at para.12, for your note. You’ve seen it.

19      Secondly, the point that the law requires Ofcom to undertake a market review. That’s dealt  
20      with, I’ve shown you, at *Pay TV* at para.35 by analogy with the CC, which is equally  
21      required to act on a reference by the OFT.

22      (3) That its purpose is to arrive at the right answer in the public interest and in accordance  
23      with its statutory duties. That’s true of all public authorities, and you’ve seen the point dealt  
24      with in *Tesco* as well as *Bahta*.

25      (4) A decision by Ofcom to adopt a different market definition would almost inevitably  
26      have been appealed by one or more market participants. That seems to have been  
27      an attempt to analyse the position with a dispute determination, but the answer to that is:  
28      only succeed if there is an error and it’s wrong, and indeed it’s rare for market definition to  
29      be appealed. There’s nothing inevitable about it at all. Here there was case of clear error  
30      which BT successfully appealed.

31      THE CHAIRMAN: Sorry, you’re saying it’s rare for market, for----

32      MR PALMER: Market definition to be the subject of a direct appeal. Here BT -- Ofcom they’re  
33      saying it’s almost inevitable that whatever we decide on market definition would have led to  
34      an appeal by one party or another, and that simply isn’t true. It’s not what routinely

1      happens by one party or another. Here BT appealed because it considered that there were  
2      clear errors in the market definition appeal. There's no inevitability about it at all: it stems  
3      from the errors.

4      (5) The law made Ofcom's decision subject to an "on the merits" appeal. That carries  
5      substantial risks that the Tribunal will take a different view. Again, that's ignoring the basis  
6      of the Tribunal's standard of review. It's not a re-hearing.

7      And (6) as the Tribunal found in *The Number*, if any significant weight is to be given to  
8      Ofcom's role as regulator, "it must follow that the starting point ..." and so forth. You've  
9      seen that. Again, that's specifically in the context of dispute determination.

10     And finally at para.22, the size of the award, the risk of chilling effect "in accordance with  
11     its statutory obligations could not be entirely excluded, but it was reassured" that  
12     Ofcom -- it was the first time in 10 years or so that Ofcom had found it appropriate to use  
13     s.316. It was not a frequently trodden route of regulatory action. The answer to that lies in  
14     paras.56 to 58 of *Pay TV*, which I've shown you. In the context of the sum, headline sum  
15     being claimed, being £8.7m, liable to be cut down on assessment, of course.

16     What they say at para.23 is that "No such reassurance ..." as to the rareness of the s.316 "...  
17     is available here: Ofcom has to undertake market reviews in various markets every three  
18     years, often making difficult decisions on which there can be reasonable disagreement, and  
19     may have to choose between options ...". The Tribunal is well aware that reasonable  
20     disagreement and choice between options doesn't give rise to a ground of appeal.

21     Now, in this context, the Tribunal has been given a witness statement, Ms Weitzman, which  
22     appears at tab 3A of the bundle, which is behind the skeleton argument, the figures in which  
23     are confidential but which I needn't refer to.

24     THE CHAIRMAN: Hang on; 3A?

25     MR PALMER: That's where it should have been filed. Perhaps it hasn't reached you.

26     THE CHAIRMAN: Sorry. I'd heard about this but it hadn't actually made its way into certainly  
27     my bundle. I don't know whether anybody else has got it?

28     MR PALMER: I think Ofcom have suggested that it be filed behind their skeleton argument.

29     THE CHAIRMAN: No. So I've now got a copy of it.

30     MR PALMER: This is the witness statement----

31     THE CHAIRMAN: Sorry, just bear with me one second. (After a pause). Let me just see  
32     whether we've got it elsewhere. Ah, in fact it's gone into -- sorry. Yes, we did have it, but  
33     there were two inserts which certainly in my bundle went into the same place, which is due  
34     to the filer's error. So I now do have it, thank you.

1 MR PALMER: I'm grateful.

2 THE CHAIRMAN: Right. Sorry, I've got it. And where did you want us to go in the statement?

3 MR PALMER: This is a witness statement which is -- seems to be directed to the proposition in  
4 para.1 if an adverse costs award of the nature sought by BT were made, to consider the  
5 effect on Ofcom's ability to regulate effectively in the interests of consumers.

6 It then makes clear at (2) what the basis of Ofcom's work is: it's funded principally by  
7 industry participants via administrative charges and licence fees, and some limited  
8 circumstances, you see in the footnote, where Ofcom may receive grant-in-aid from  
9 Government. And then there's an explanation of how that's subject to a cap, which is set by  
10 Government, as to what it can raise by that means, that cap having fallen over the last  
11 10 years, and you see the figures set out: millions of pounds. It's required to set its budget  
12 at or below that cap, we're told at (6). And we're told the budget at (7) and how it relates to  
13 the cap, and it's driven by staff costs.

14 But within that is the legal team, which has its own budget, if you see that. Most of the  
15 legal budget represents the cost of Ofcom's in-house lawyers, the remainder of the budget  
16 used predominantly to meet costs of external counsel.

17 There is no separate contingency for litigation costs in the legal budget or the Ofcom  
18 budget. That's a choice that Ofcom has made, not to make any contingency within that  
19 budget. Can't carry over underspend. Correspondingly, if there is overspend, they would  
20 seek to save by cutting back on other matters.

21 And at (10) it's said:

22 "Any significant cost award would therefore mean Ofcom having to cut back  
23 materially on non-mandatory work such as Ofcom's consumer protection work."

24 So various indications are given as to the sort of things which might suffer:

25 "A high award of costs against Ofcom is likely to mean that, even if cuts to  
26 non-mandatory work were made, it would still be necessary to ask the Government to  
27 advance monies to enable it to meet its obligations, and to increase the spending cap  
28 for that year. When Ofcom was established, the possibility that the Government would  
29 need to provide additional funding to meet litigation costs was envisaged. However,  
30 to date, Ofcom has never had to approach Government on this basis. I therefore do not  
31 know what view Government would take in such a situation. Ofcom would be  
32 reluctant to take this step, in view of the significant reductions in the cap over the last  
33 10 years and the constraints on public spending generally."

1      But just pausing there, we've seen that against a background that, as you've seen, where on  
2      the facts of the cases which have been determined, there haven't been substantial costs  
3      awards being made against Ofcom in this Tribunal; that in *Pay TV*, subsequently overturned  
4      in the Court of Appeal on the merits, the costs award fell away. So that is why Ofcom has  
5      never had to approach Government on the basis which was envisaged. That is presumably  
6      why it's made no contingency, and we don't have an explanation as to why it hasn't made  
7      any contingency. And 12:

8      "The risk of future significant adverse costs awards would be liable to have the  
9      following adverse effects on Ofcom's future decision making ... likely to have to  
10     allow a significant contingency and ... have to place greater weight on the need to  
11     minimise the risk of litigation."

12     But I meant that point, the second point, is simply the same duty as on all public authorities  
13     to think carefully about public law challenges to them and to act responsibly. And what's  
14     missing from this analysis is any recognition that where Ofcom succeeds in defending  
15     an appeal, it claims its costs from the unsuccessful appellant, as indeed it claimed its costs  
16     from CityFibre in this case when it withdrew its appeal; and those costs don't just include  
17     the costs of external counsel which have been incurred in defending that appeal, but also, as  
18     is frequently done with other public authorities right across Government and right across the  
19     country, incurs -- it includes costs for the time of in-house solicitors such as Ms Weitzman,  
20     at standard -- at proper commercial rates.

21     So where Ofcom succeeds is they recoup from unsuccessful appeals some of those core  
22     staff costs, and that has to be -- that ability, of which I make no complaint whatsoever, has  
23     to be set against the fact that where they do not succeed, just as with any other public  
24     authority, there will be an effective movement going the other way.

25     Ofcom here is special pleading, seeking to distinguish its position from all other public  
26     authorities and public law jurisdictions, including judicial review. There is no basis for it to  
27     do so, particularly in circumstances where, as Ms Weitzman explains, its core source of  
28     funding is from the industry, albeit subject to a cap, but from the industry rather than the  
29     general taxpayer, whereas Government departments, local authorities who are taken to court  
30     and who lose, pay costs routinely, and those costs have to be met out of their constrained  
31     budgets.

32     This is no basis for special pleading, and in particular we can see as recently as November  
33     this year in the Court of Appeal, if you turn to tab 30 of the authorities bundle, EE Ltd, now  
34     wholly owned by BT----

1 THE CHAIRMAN: 33?

2 MR PALMER: 30 is the reference. Tab 30. I'm so sorry.

3 THE CHAIRMAN: 30. Sorry, yes.

4 MR PALMER: The Court of Appeal allowed an appeal by EE Ltd against a decision of the  
5 Administrative Court in which its application for judicial review had been dismissed. That  
6 was reversed and the judicial review claim was allowed. You can see the subject matter of  
7 the claim from para.1 of the judgment where Ofcom was fulfilling its regulatory public  
8 interest function of setting annual licence fees for the use of the radio spectrum for mobile  
9 communications, and the issue was whether it had correctly applied, interpreted and applied  
10 the 2010 direction issued by the Secretary of State.

11 So it just so happens that against that decision the route was judicial review rather than  
12 appeal to this Tribunal under the statutory scheme. They lost, and if you turn to tab 31 you  
13 see the order made by the court quashing the decisions. And over the page, para.3, as to  
14 costs, costs following the event not only in the Court of Appeal but also then in the Admin  
15 Court, so that if Ofcom was to repay to the claimant the costs which had been awarded in its  
16 favour below, and by way of interim payment £178,000 on account; and then the defendant  
17 shall pay the claimant's costs of the proceedings incurred in respect of ground 1 and the  
18 costs of its appeal been reversed, to be determined by detailed assessment unless agreed and  
19 shall pay £250,000 as an interim payment.

20 All standard in the context of CPR litigation, but Ofcom's position of having a constrained  
21 budget, in this case the appeal was a three-day appeal, not anything like the scale of the  
22 litigation before this Tribunal. There's no special pleading on the basis there that, "Oh, our  
23 financial position means you should depart from this rule" -- that's an order which  
24 I understand was agreed between the parties -- in a context where, where the roles were  
25 reversed in the court below, Ofcom had successfully recovered its costs, including in-house  
26 costs, one assumes -- I'll be told differently if that's not right -- in the normal way. And this  
27 is a case where sauce for the goose is sauce for the gander, swings and roundabouts, and  
28 Ofcom are perfectly capable of budgeting for that contingency as any other regulator, as any  
29 other public authority.

30 Sir, for those reasons, I say the starting point should be as found in *Pay TV*, that costs  
31 should follow the event. And, Sir, that's taken a very long time given the principled  
32 approach which Ofcom has taken, but I now intend to be as short as one would normally be  
33 in a costs application.

1 THE CHAIRMAN: Right. I mean, can I just check from -- going back to Ms Weitzman's  
2 witness statement.

3 MR PALMER: Yes.

4 THE CHAIRMAN: You said -- well, she says that Ofcom's work is funded principally by  
5 industry participants via administrative charges and licence fees, and, relevant to the current  
6 situation, she says that providers of electronic communications, networks and services pay  
7 the administrative charges.

8 MR PALMER: Yes.

9 THE CHAIRMAN: And then she refers to the cap which is the product of a framework  
10 agreement; correct?

11 MR PALMER: Yes. That's what she tells us.

12 THE CHAIRMAN: Ofcom -- is that right -- Ofcom is subject----

13 MR PALMER: "Subject to the terms of a Framework Agreement between Ofcom and  
14 Government, DCMS, which establishes..." That's what she says there.

15 THE CHAIRMAN: "Which establishes that Ofcom is subect to an overall expenditure cap"----

16 MR PALMER: "...set periodically by the Treasury". So it established that Ofcom is subject to  
17 an overall expenditure cap set -- that's the way she puts it.

18 THE CHAIRMAN: "Broadly speaking Ofcom ... overall cap". Right. What I'm not getting  
19 somewhere is, is it right that within the cap as set that the -- how much of Ofcom's budget,  
20 as it were, comes from charging industry participants and how much comes from  
21 somewhere else, and, if so, where? I'm just not making----

22 MR PALMER: You just have the footnote----

23 THE CHAIRMAN: I'm just not making the connection.

24 MR PALMER: No, well, you're not provided with it, I think. You have footnote 1, which goes  
25 beyond industry participants and says then there may also be some limited circumstances  
26 where Ofcom may receive grant-in-aid from Government. That's very much a footnote.  
27 I mean, the principal basis of Ofcom's funding is from industry participants, with the fees  
28 levied either, the funds levied either----

29 THE CHAIRMAN: What does -- sorry, what does "principal" -- I mean, does "principal"  
30 mean----

31 MR PALMER: The bulk.

32 THE CHAIRMAN: What, 50 per cent? 60 per cent? 90 per cent? 100 per cent? I mean, I'm  
33 just not -- sorry, I'm just not making the connection. It may be obvious to everybody in the  
34 industry as to what the connection is.

1 MR HOLMES: Sir, I understand on instruction that it's the significant majority of the funding, 80  
2 or 90 per cent. We can find the exact figure for you----

3 THE CHAIRMAN: Okay, well, all right----

4 MR HOLMES: -- but the cap applies irrespective of the source of the funding. So the  
5 [X] -- sorry, the cap in the statement covers all sources of income.

6 THE CHAIRMAN: In the transcript there would appear a number which should be deleted from  
7 the transcript.

8 MR HOLMES: I'm grateful.

9 THE CHAIRMAN: And anybody else who's in the room, that number shouldn't be published,  
10 please, outside this room.

11 Right, sorry, so the basic -- I mean, that's subject to anybody suggesting that the cap is  
12 a publicly known figure and I'm assuming it's not.

13 MR HOLMES: I assume not.

14 THE CHAIRMAN: But anyway, the gist -- so the structure is that the Government, or  
15 a Government department pursuant to a framework agreement, sets a cap as to how much  
16 Ofcom can spend, or its budget, but then the bulk of that money is in fact obtained by  
17 levying upon the industry.

18 MR HOLMES: Yes.

19 THE CHAIRMAN: And, what, the industry presumably has -- there's a sort of -- I'm just  
20 missing the third side to the triangle. The industry presumably has the right to say to  
21 Government, "Well, our levy on us is too high, this year it should be more, it should be less,  
22 because we're the ones that are paying." Is that right?

23 MR HOLMES: I'm sure they could make representations in the normal way.

24 THE CHAIRMAN: It's just curious that the cap -- I'm sorry, again, if I'm ignorant to this -- but  
25 the cap is set by Government, which isn't actually, unusually, funding. I mean, I would  
26 understand if Government was actually dipping into its own pocket to fund Ofcom, when  
27 Government might well say: "This is the cap".

28 MR HOLMES: Yes.

29 THE CHAIRMAN: But the Government isn't actually dipping into its own pocket to fund  
30 Ofcom, it is effectively putting a cap upon Ofcom----

31 MR HOLMES: Yes.

32 THE CHAIRMAN: If you like weighing the interests or protecting the interests of the market  
33 participants who have to then fund it. That's the way it works.

1 MR HOLMES: Yes, Sir, and it's a form of public spending, and Government constrains public  
2 spending in this context as it does in other contexts by imposing a cap on what may be  
3 raised. There isn't a -- the point being made in the statement is simply that there isn't, to  
4 use a phrase which has become popular recently, there's no magic money tree. Ofcom can't  
5 simply levy what it likes from industry participants; that's subject to control and constraint  
6 by Government----

7 THE CHAIRMAN: No, but if----

8 MR HOLMES: -- by the level of the cap.

9 THE CHAIRMAN: Okay, but, sorry, just to be rather, again, simplistic about it -- Sorry, it may  
10 be, Mr Holmes, I ought to save these questions for you for an appropriate moment when  
11 you're on your feet, but -- in fact I will save the questions for you when you're on your feet,  
12 because that's probably more productive than doing it, sort of, now.

13 Okay, right. Anyway. Sorry, so----

14 MR PALMER: Well, there's just two points to draw from that, from that discussion: the first is  
15 that, as you see from para.3 of the witness statement, the administrative fees are then set by  
16 reference to the allocation of the overall expenditure, the overall budget, which is set by  
17 reference to the cap, and are charged to individual stakeholders based broadly on the  
18 percentage of their relevant turnover. So obviously BT would be a large contributor to  
19 Ofcom.

20 THE CHAIRMAN: So, is this right: if your clients, or clients like yours, successfully challenge  
21 Ofcom and the -- there is a general principle, or starting point anyway, that the loser  
22 pays -- only a starting point----

23 MR PALMER: Yes, as a starting point.

24 THE CHAIRMAN: -- subject to all the other points, and this, that has an effect that Ofcom  
25 becomes exposed to more potential adverse costs orders than it currently budgets for, as  
26 I understand para.7 there's no separate contingency, that might result in, ultimately, the  
27 Government setting the cap slightly higher----

28 MR PALMER: It might do.

29 THE CHAIRMAN: -- in order to respond to the fact that the industry or participants in litigation  
30 are now seeking adverse costs. So it could come back to you in any event.

31 MR PALMER: Well, yes, but not in the same proportion. But what Ofcom at the moment are  
32 saying----

33 THE CHAIRMAN: No, no, I appreciate that.

1     MR PALMER: -- is to make no order, but Ofcom's position is that BT alone, because BT was the  
2       affected party by its errors, should bear all its own costs of putting that error right, even  
3       though the decision, of course, was not just targeted at dealing with BT but was made in the  
4       interests of all BT's competitors and those who sought access to its networks and who  
5       would benefit, who benefit from the scheme of regulation.

6       My broad submission is the justice of this is that where Ofcom goes wrong in an exercise  
7       like that, which is a market review, not just of BT, not inquiry into BT, the market review  
8       seeking to remedy the effects of significant market power for the benefit of all participants  
9       in that market, but then goes wrong and BT points out "Hold on, you've done  
10      unfair -- you've done us down here, you went wrong, it's not the right answer," then the  
11      consequences of putting that right should not fall only to BT but in effect should be shared  
12      across the industry in accordance with that formula.

13      And when Ofcom says, "Well, we've got no costs liability -- we've got no costs  
14      contingency," that's based on their practice of not having one because they haven't had in  
15      practice to have met substantial adverse costs orders so far, so they've decided, in their own  
16      judgment, not to make one. But that isn't a reason why they shouldn't in future. And they  
17      equally explained very candidly that they've never approached Government to say, "How  
18      would you respond to this," even in circumstances where it was -- the very possibility that  
19      they would need to provide additional funding to meet litigation costs was envisaged.

20      THE CHAIRMAN: Well, okay, but that's in a sense this is sort of going into the point I was  
21      going to ask Mr Holmes, but I'll ask you for your comment on it and then he can give his  
22      comment on it.

23      MR PALMER: Yes.

24      THE CHAIRMAN: Paragraph 11 appears to be talking about the possibility that the Government  
25      might need to provide additional funding to meet litigation costs, and Ofcom has never had  
26      to approach Government on this basis. I'm sort of -- again, it's not clear to me what's being  
27      said. Obviously what might happen is that, if there's an unforeseen item for a particular  
28      year for which the budget has already been set and an amount levied on the industry to  
29      match, then Ofcom might have to approach Government for, as it were, a top-up of an  
30      unexpected item, to put it, sort of, bluntly. But, as a broader point, that's not the only way  
31      in which the possibility of adverse costs orders could -- in the future could be addressed.  
32      The other way is, if this general rule, which you say is established in *Pay TV*, bites, and  
33      Ofcom is exposed to adverse costs orders on this basis, the other mechanism is not to

1 approach Government for Government money, public money, but is to approach  
2 Government for a rise in the cap which is then funded through industry levy.

3 MR PALMER: Yes.

4 THE CHAIRMAN: Those are two separate points.

5 MR PALMER: That's exactly right, Sir, and what Ofcom do, *per terrorem*, at para.10 is say,  
6 "Oh, well, look, we might have to cut back on future work to protect consumers." Well,  
7 presumably that would be part of the discussion with Government saying, "Look, we have  
8 a choice here: would you like us to cut back on work to protect consumers, or would it be  
9 more appropriate to raise the cap so that we can raise our charges to industry to take account  
10 of this?" And Government will no doubt take a decision in view of that choice when put  
11 before it by Ofcom. But it's not right to come to this Tribunal and say, "We are different  
12 from other public authorities who have to make tight budgeting decisions," and unlike  
13 Ofcom will be dealing directly principally with the taxpayer money, and say, "That is  
14 a reason why costs should not follow the event".

15 DR ELPHICK: May we just sort of complete the picture here? If the Treasury were to agree to  
16 increase the cap, then the levies on the companies would increase.

17 MR PALMER: Yes.

18 DR ELPHICK: But the sectoral regulators almost always regard those levies as a pass-through  
19 item in price controls, and therefore they end up being charged to consumers, not reducing  
20 the profits of the companies. Certainly where you've got----

21 MR PALMER: (Overspeaking) But that's on the broadest possible base (inaudible) all telecoms  
22 consumers across the UK.

23 DR ELPHICK: Precisely. It's not -- that completes the story.

24 MR PALMER: That, I think, is the rationale why Mr Holmes said a moment ago, "Well, this is  
25 a control on public expenditure because ultimately costs will be borne----

26 DR ELPHICK: Just (inaudible).

27 MR PALMER: -- by consumers or indeed by shareholders. It's not, you know, it depends on  
28 whether the market is regulated or unregulated.

29 DR ELPHICK: But it's regulated, it is regarded by the regulator as a pass-though.

30 MR PALMER: Yes, but of course a lot of market is unregulated. So it becomes very -- the sort  
31 of sums of money we're talking about when spread across that consumer base, across all of  
32 industry, becomes very diffuse.

33 THE CHAIRMAN: Anyway.

1 MR PALMER: So that's the point where we say the special pleading should be rejected and the  
2 ordinary principle should be applied, and it's right to do so.

3 On the merits of this costs application, the first thing I say is -- and I shan't rehearse the  
4 judgment to the very Tribunal which produced it -- but there were serious errors, errors of  
5 principle, in some cases textbook, literally textbook errors: so the role of the SSNIP, the  
6 need for it to include profitability, specifically ruled on by the Tribunal and at the very  
7 centre of BT's case on product market.

8 In support of Ofcom's decision, the Tribunal found that BT had misinterpreted -- sorry,  
9 Ofcom had misinterpreted BT's internal documents, both board papers and marketing  
10 materials. And I put particular emphasis on Ofcom's reliance on the pricing discussions  
11 which the Tribunal found were incomplete summaries, materially incomplete, and the  
12 Tribunal had chosen -- Ofcom had chosen not to refer to one CP meeting, who I won't name  
13 now, which directly undermined its case.

14 Can I just emphasise at this point that all of that material was confidential, therefore was not  
15 set out in the decision, the determination, which was made available to BT. The only way  
16 that that could be reviewed and challenged and understood was through an appeal to the  
17 Tribunal, the establishment of a confidentiality ring. Even in that context, Ofcom failed to  
18 disclose of its own volition that material until there were repeated requests for it from BT,  
19 and only then was it disclosed, when, as a matter of the duty of candour applicable to  
20 Ofcom as a regulator, that ought to have been disclosed from the beginning. I shan't take  
21 you to the correspondence, given the time.

22 THE CHAIRMAN: Well, except you'd better tell us where the find, it----

23 MR PALMER: Can I tell you where to find it?

24 THE CHAIRMAN: -- because to be fair, we've certainly never, to my knowledge, had to  
25 examine that aspect.

26 MR PALMER: No, because it wasn't relevant to the merits, ultimately.

27 THE CHAIRMAN: Right.

28 MR PALMER: But in terms of costs and process----

29 THE CHAIRMAN: Right, well, you better tell us where to find it.

30 MR PALMER: -- can I direct you to file OFA5, tabs 7A, B, C and D: 7A, 7B, 7C, 7D, and  
31 tabs 10A and 10B. May I recommend you don't access it electronically, because Ofcom's  
32 letters have become, at least when I accessed it, become distorted and are illegible.

33 THE CHAIRMAN: Right, okay.

34 MR PALMER: So it's file OFA5.

1 THE CHAIRMAN: Anyway, you say that's where we would find----

2 MR PALMER: I shan't -- I just ask you to review that correspondence.

3 THE CHAIRMAN: Right.

4 MR PALMER: I shan't----

5 THE CHAIRMAN: Your broader point is that there are points in which, as a result of these

6 proceedings, the Tribunal has found that Ofcom adopted an approach which was erroneous.

7 MR PALMER: Yes.

8 THE CHAIRMAN: And you wouldn't have found out about it had you not challenged.

9 MR PALMER: On that point. That point----

10 THE CHAIRMAN: Okay.

11 MR PALMER: -- which was an important point, because it was relied on as being strong

12 evidence by Ofcom. That could only be examined and found to be incorrect by means of

13 bringing this appeal.

14 MR HOLMES: Sir, can I just put down a marker that I'm quite concerned that this is being raised

15 for the first time orally by Mr Palmer. It wasn't a feature of his skeleton argument, and

16 we're going to really struggle to deal with it if the correspondence is illegible on the

17 electronic version. We didn't come armed with that file.

18 MR PALMER: I can, I can give my file up.

19 MR HOLMES: I simply note that it may be necessary for us to----

20 THE CHAIRMAN: Right, well----

21 MR PALMER: It's a short run of correspondence, and it should be familiar to my learned friends.

22 THE CHAIRMAN: Right, well, let's park that. I mean, in a sense, Mr Holmes, you have the

23 advantage that, unless either of my two colleagues has been doing a lot of advance reading

24 and homework, they're probably in the same position as me, which is not having actually

25 seen that correspondence. So if it's going to feature in our decision, we would have to go

26 away and read it.

27 MR PALMER: Yes. It's a short run.

28 THE CHAIRMAN: So I would have thought the sensible way to deal with that is that if you

29 have -- let's see where we get at the end of today -- which is where we do have to end,

30 I should add -- that if you -- I suppose the easiest way to deal with it is simply to give you

31 the chance to address it in writing very shortly.

32 MR HOLMES: I'm grateful, Sir.

33 THE CHAIRMAN: Because otherwise we've only got -- yes, I mean if it's going to play any part

34 in our decision-making, that's the easiest way to deal with it, I think. Right.

1 MR PALMER: There was -- I'll summarise it now -- there was a request for the documents. It  
2 was made originally in the context of something Ofcom said about switching costs, and so  
3 we got partial disclosure of those documents, but only insofar as they referred to switching  
4 costs. And we kept going back saying, "Can we have the whole thing?"

5 Ultimately, it was dragged out of them after this hearing had already begun, they were fully  
6 disclosed. My point is not as to the rights and wrongs of that misunderstanding of  
7 switching costs, my point is that as a matter of duty of candour, once we're in the  
8 confidentiality ring, given that they undermined Ofcom's case they should have been  
9 produced in the first instance.

10 THE CHAIRMAN: Okay. Yes, all right.

11 MR PALMER: That's the point.

12 So then I turn to the reasons why it's said that there should be a reduction in the costs  
13 claimed, and the first point I make is that BT fully recognises the criticisms that were made  
14 of it in the Tribunal's decision. We fully recognise the criticisms made, for example, in  
15 relation to the Basalisco evidence, and we responded to that by making clear that we don't  
16 seek to recover the costs of the Basalisco evidence, or any costs in respect of Dr Basalisco  
17 at all. We think that's a proper response.

18 THE CHAIRMAN: Right, well, when you say "the costs of Dr Basalisco's expert reports," that  
19 would include, would it, costs of lawyers in reviewing his draft expert's reports and  
20 corresponding with him and everything associated with it, not just the costs of his expert's  
21 reports? And I do not know to what extent there are other costs, but it's costs of and  
22 associated with the production of those expert reports?

23 MR PALMER: Can I just show you the way Ofcom puts it at their para.47?

24 THE CHAIRMAN: Well, I'm just looking at your skeleton.

25 MR PALMER: Yes.

26 THE CHAIRMAN: Which I'm just trying to clarify your skeleton at para.8(a). I'm just trying to  
27 understand what you're offering, as it were, by way of a reduction. Is it just costs of i.e.  
28 what BT has been billed by Dr Basalisco, or is it more than that?

29 MR PALMER: It's the former, but can I just show you what that encompasses as well by  
30 reference to para.47 of what Ofcom has suggested? What Ofcom suggested is:

31        "... disallowing BT's cost and disbursements of the preparation of Dr Basalisco's  
32 reports, the expert meetings and joint memoranda," which would also be billed to BT  
33 as costs of Dr Basalisco, "as well as Dr Basalisco's attendance at trial. Such an order  
34 would have the effect of setting off the costs incurred by BT in preparing the

1 compliant parts of Dr Basalisco's evidence against the costs incurred by Ofcom in  
2 dealing with the non-compliant parts."

3 So we haven't offered everything that counsel did in relation to considering Basalisco's  
4 report and so forth; what we have offered is Dr Basalisco's costs which include the  
5 preparation of his reports, when he attended expert meetings, when he prepared joint  
6 memoranda with Katie Curry and his attendance at trial. That is a fair balance in  
7 recognising that there were other parts of his evidence which were compliant, so that's the  
8 simplest, neatest -- rather than -- otherwise you get into a very detailed analysis of how  
9 much time was----

10 THE CHAIRMAN: Okay, but sorry, I'm lost now. Are you saying that para.47 of Ofcom's  
11 skeleton is something you are content with or not?

12 MR PALMER: Insofar as it refers to the costs related to Dr Basalisco, yes, I am content.

13 THE CHAIRMAN: Okay.

14 MR PALMER: His bills, including attendance at trial and including some time taken considering  
15 his evidence at trial.

16 MR HOLMES: Just to avoid any confusion, Sir, the disbursements would cover Dr Basalisco's  
17 fees. The costs are the legal costs associated with all of those things stated, including his  
18 attendance at trial. So just so that there's no confusion about what Ofcom is seeking in that  
19 proposal, it would include the legal costs, including counsel's costs of attendance during  
20 Dr Basalisco's evidence.

21 MR PALMER: There you are. You have the submissions on that. So it's a balance to be drawn  
22 between some of his evidence was helpful and proper, but in the way he gave his evidence  
23 and the way he acted as something of an advocate he went too far. And we're trying to  
24 acknowledge that there was----

25 THE CHAIRMAN: And in order to assist us to understand the effect of what we're going to be  
26 asked to do in relation to any of these things, I mean I might as well ask you now: where is  
27 your, sort of, costs schedule or draft costs schedule, even in a form which would enable us  
28 to understand the impact of some of these points?

29 MR PALMER: That was supplied----

30 THE CHAIRMAN: Is this the one that's gone in 30A?

31 MR PALMER: That's the other insert, tab 30A. Exactly so.

32 THE CHAIRMAN: Well, okay, because this costs -- what is headed "breakdown of costs":  
33 breakdown of costs for what? Is this just dealing with the litigation?

34 MR PALMER: Yes, yes. It's been prepared with the assistance of a costs specialist.

1 THE CHAIRMAN: I mean, this isn't -- it's not the sort of form that I would normally sort of see,  
2 even for a summary assessment.

3 MR PALMER: That's because we're not dealing with assessment here.

4 THE CHAIRMAN: No, but you're asking for a payment on account.

5 MR PALMER: I am, Sir, and I can show you what the White Book says about that. Is doesn't  
6 suggest that you need to produce a schedule, even as one would for summary assessment;  
7 what is needed for a----

8 THE CHAIRMAN: No, but you normally get a little bit more than this.

9 MR PALMER: Well, Sir, this is sufficient, in my submission, to give an idea of the scale of the  
10 costs and roughly where they fall.

11 THE CHAIRMAN: Right.

12 MR PALMER: You will see they don't include anything for Dr Basalisco.

13 THE CHAIRMAN: Right, well, that is what I was actually trying to get to. So we don't have, so  
14 we don't know what sort of numbers we're talking about.

15 MR PALMER: Well, they've already been excluded, so why does it need to?

16 THE CHAIRMAN: Well, what has been -- I mean, are you saying that in this schedule there has  
17 been excluded the lawyers' costs of dealing in the way that is described in Ofcom's  
18 para.47?

19 MR PALMER: No. I apologise if I've not been clear. What we're seeking to exclude and  
20 concede is Dr Basalisco's costs in all his involvement, whether that be liaising with  
21 Katie Curry, preparing joint memoranda, preparing his reports----

22 THE CHAIRMAN: Which would show up as a disbursement.

23 MR PALMER: -- attending trial, all of which would be a disbursement.

24 THE CHAIRMAN: So in other words what he billed Ofcom -- sorry, what he billed BT.

25 MR PALMER: What he billed BT.

26 THE CHAIRMAN: But what you're not accepting, and which hasn't been excluded from this  
27 schedule, i.e. which is included in this schedule, are, for example, in-house solicitors' fees  
28 of liaising with Dr Basalisco about his reports.

29 MR PALMER: I think that is correct. (After a pause). That's correct. But, as I say, that's a fair  
30 balance to draw in circumstances where it's not as if all his evidence was completely  
31 misdirected or improper. Ofcom recognises that some of it was----

32 THE CHAIRMAN: Right, but your interpretation of Ofcom's para.47 doesn't appear to be  
33 Ofcom's interpretation of Ofcom's para.47.

34 MR PALMER: Ofcom can make their own submission.

1 THE CHAIRMAN: Fine.

2 MR PALMER: My submission is that that's an appropriate balance to strike which recognises the  
3 criticisms of Dr Basalisco made by the Tribunal. That is the attempt that has been made to  
4 recognise that.

5 THE CHAIRMAN: Right.

6 MR PALMER: Sir, but otherwise, we also accepted some criticism of the factual evidence and  
7 allowed a discount for that. The amount of that discount which the Tribunal considers  
8 appropriate in the circumstances to be frank is a matter entirely for the Tribunal to decide.  
9 I'm not sure you would be much assisted by competing percentages, but what's been  
10 offered is 10 per cent of the internal BT costs in dealing with that evidence to recognise the  
11 criticisms made. Beyond that, however----

12 DR ELPHICK: Why would you be -- why would you only be offering 10 per cent of the internal  
13 costs as opposed to the internal and external costs?

14 MR PALMER: That's where the volume of the costs fell in practice. It may have been some  
15 costs externally, but to deal with the justice of the case and recognise, it's easier to deal with  
16 broad percentages on a sort of rule-of-thumb basis rather than intricate detailed assessments  
17 of----

18 THE CHAIRMAN: True, but we don't--- Okay, I think the point that's being made is  
19 unfortunately, you see, we don't know without enquiring what proportion of the costs, as it  
20 were, were incurred internally or externally in dealing with the witness statements.

21 MR PALMER: I accept that point. If that's right, Sir, you may prefer just to deal with it on the  
22 basis of internal and external on a percentage which recognises it doesn't matter whether it  
23 was internal or external, some kind of discount is appropriate, and what kind of discount is  
24 appropriate is a matter for the Tribunal to consider. I'm not sure you would be much  
25 assisted by rival versions from us.

26 THE CHAIRMAN: Right.

27 MR PALMER: I'm conscious of the time. I'm in your hands whether you want to take a break  
28 now.

29 THE CHAIRMAN: Yes, we ought to take a lunch break. Right. How much longer have you  
30 got?

31 MR PALMER: Sir, I'm going to be as brief as possible. In an ordinary costs application, I just  
32 turn up and make my costs application. I've had to deal with the issues of principle; that's  
33 what has taken the time.

34 THE CHAIRMAN: Fine. So we've got one or two points for you.

1 MR PALMER: Yes.

2 THE CHAIRMAN: Then we go on to -- I suppose it probably -- would it be more sensible to deal  
3 with Ofcom's response then, rather than deal with CityFibre, or how does----

4 MR ROBERTSON: I'm going to be dead short, so I'm just responding to the points Mr Holmes  
5 makes in the skeleton argument. So it probably makes sense for you to hear me after  
6 Mr Palmer. When I say dead short, I mean five minutes.

7 THE CHAIRMAN: Relatively speaking, in the context of this case, that is dead short.  
8 (Laughter). So why don't we have you next and then Mr Holmes can deal with everything  
9 in one go.

10 Right, okay, well let's resume at 2.00 pm, if that's all right for everybody. Thank you.

11 (Adjourned for a short time)

12 THE CHAIRMAN: Yes.

13 MR PALMER: Sir, I dealt with before lunch the two points on which BT accepts there should be  
14 a thinning of its costs.

15 THE CHAIRMAN: Yes.

16 MR PALMER: Aside from that, we say that the appeal should be dealt with in accordance with  
17 the starting point that costs follow the event, BT having substantially won on product  
18 market, geographic market and competitive core.

19 Ofcom accept that much, but I should refer briefly to their table at the top of p.14 of their  
20 skeleton argument, in respect of which they say at para.30 on the preceding page:

21 "It is true that it succeeded on each of PMD, GMD and Competitive Core, but along  
22 the way it lost on a substantial number of sub-issues which took up substantial time  
23 and cost."

24 And then the table is produced. Can I make two observations about that table, is it omits, if  
25 you like, big issue 2 and big issue 3 which the Tribunal decided at paras.294 and 304  
26 respectively, which were the main points on product market definition and each of which  
27 was a win for BT.

28 THE CHAIRMAN: Sorry, just let me just make sure I know which paragraphs you're talking  
29 about there. (After a pause). Right, okay.

30 MR PALMER: It's the bit----

31 THE CHAIRMAN: This is the point that -- well, this is the point that if we applied the correct  
32 percentage, not the 20 per cent but the confidentially correct percentage, there would have  
33 to have been a large number of switchers. Yes, okay.

1 MR PALMER: But it's more -- that's really where all the strands are brought together. I'm going  
2 to go through them in a little bit more detail in the context of the 20 per cent point, but may  
3 I just point out at the moment that the table omits those two big issues as to the ultimate  
4 resolution of the profitability analysis on SSNIPs at 1G and 10G. It also misrecords the  
5 conclusions on price sensitivity, which is rather more nuanced than lost. The reference  
6 there is para.248, where the Tribunal will recall it distinguished between price sensitivity at  
7 1G and at 10G.

8 THE CHAIRMAN: I mean, what probably is correct to say is this, isn't it: that BT ran a large  
9 number of arguments, not all of which succeeded?

10 MR PALMER: Yes.

11 THE CHAIRMAN: And it is at least possible for the Tribunal to take account of the fact that,  
12 although you won, and you would say the starting point would be that costs should follow  
13 the event, it doesn't automatically follow that you get all of your costs, which you have  
14 accepted for yourself.

15 MR PALMER: Yes.

16 THE CHAIRMAN: And in order to reflect, as it were, slightly more broadly the overall balance  
17 of how costs were incurred and the result of the litigation, the court or the Tribunal can take  
18 a relatively broad brush to the computation. I mean, we're -- it's very difficult, isn't it, to in  
19 any event sort of be meticulous about how to reflect relative success and failure without  
20 a minute dissection of time spent or otherwise?

21 MR PALMER: Which I don't urge upon the Tribunal. So as propositions, I entirely accept the  
22 way you put it to me. As to how the approach to be applied in the present case, I say -- just  
23 dealing with product market, first of all -- it's important not to lose sight, as this table does,  
24 but it's important not to lose sight of the fact that on the main issue BT's core complaint,  
25 the real substance of it, not some side issue, it succeeded. It's true that some of the  
26 arguments which it deployed along the way which raised their own sub-issues were either  
27 not decided or dismissed, but they were sub-issues in support of that main core point.  
28 And Ofcom, to be fair, does recognise fairly at para.35 that:

29 "It is true that there is no automatic rule requiring reduction of a successful party's  
30 costs if he loses on one or more issues, and that any winning party in complex  
31 litigation is likely to fail on one or more issues in the case."

32 Can I just add to that, that in this particular type of case where a lot of the reasoning is  
33 redacted in the version of the decision which is put out and which the initial appeal is  
34 brought against, when BT as an appellant is in the dark until the appellant -- until the appeal

1       is actually on foot and a confidentiality ring is established, and you can see what other cards  
2       Ofcom has had up its sleeve, you are in the dark to some extent, so that is a reason why  
3       some of your arguments no doubt will fall away, others will be strengthened as ultimately  
4       were----

5 THE CHAIRMAN: Hang on, hang on. There's a sort of -- wait a minute. That, sort of, makes  
6       a logical assumption at the start which is that you have to be appealing even though you  
7       won't know against what. I mean, there is a rival sort of approach, which is that it's not  
8       every regulatory decision that necessarily prompts you to appeal.

9 MR PALMER: Certainly.

10 THE CHAIRMAN: And to some extent one has to assume that the regulator would redact or not  
11       make available material for legitimate reasons----

12 MR PALMER: Certainly, yes.

13 THE CHAIRMAN: -- which benefit everybody. And that if somebody challenging a regulatory  
14       decision adopts what I might so call a scattergun approach, and fails on a large -- or hits the  
15       target with some of its shot, but misses with quite a high proportion, is there not some sort  
16       of, something to be said for reflecting that in a costs order? Because otherwise, in a sense,  
17       you would find that the regulated community would think it's basically open season on the  
18       regulator to fire off on a scattergun approach hoping that something will turn up and they  
19       can make it stick.

20 MR PALMER: I don't disagree. I don't disagree with any of that. It's not, it's not -- my  
21       submission is not directed towards establishing that BT can fire off on a scattergun  
22       approach. On product market, what it did is fire its gun precisely in the right direction----

23 THE CHAIRMAN: Right.

24 MR PALMER: -- loaded with ammunition which hit its target. The basic deficiency of the  
25       SSNIP analysis, the loss of focus on profitability and the fact that the BT material didn't  
26       support it, as it turned out neither did other CP material support it----

27 THE CHAIRMAN: Right.

28 MR PALMER: -- and that was the strong and compelling evidence which Ofcom had relied  
29       upon. That all hit its target. The fact that we didn't in the end need to press supply-side  
30       arguments as well, because Ofcom made clear in their defence that they weren't  
31       independently seeking to support, that's a sort of issue which can fall away when you bring  
32       the appeal. But the core point here was a good one and not scattergun.

1 On geographic market definition, that appeal was driven by the core insight that by virtue of  
2 its geographic market definition Ofcom had taken a backwards step in terms of what ought  
3 to be a de-regulatory direction of travel.

4 THE CHAIRMAN: Sorry, this is core?

5 MR PALMER: This is geo. Geographic market. You will recall, Sir, that the point----

6 THE CHAIRMAN: Oh, right. Sorry, right okay. Because core, i.e. the third issue----

7 MR PALMER: I'm so sorry.

8 THE CHAIRMAN: -- was also a stage in which BT was saying "Ofcom have taken a backwards  
9 step because they were going to do regulator greater number and..." -- sorry. Sorry, it's  
10 issue 2.

11 MR PALMER: I am on geographic now.

12 THE CHAIRMAN: Right, and your point there is that -- what, that certain sectors which were not  
13 previously regulated are now going to be regulated?

14 MR PALMER: That was the backwards step for which we complained, driven by the product  
15 market definition of including VHB in the same product market, which had the result that  
16 areas of the London periphery, for example, were becoming re-regulated by the BCMR  
17 2016.

18 So that was the core insight and that was shown to be right. I particularly play that in the  
19 case of the CBDs as the evidence emerged. The central points that BT had about the  
20 boundary test formulation for the CMA and the test of competitive conditions in  
21 that context has been left open by the Tribunal, and they're not points on which BT has lost.  
22 The reason why they've been left open by the Tribunal is because these matters will require  
23 reconsideration in any event because of the quashing of the product market definition that  
24 needs to be applied.

25 So I appreciate that there were more points on which BT lost under geographic market  
26 definition than it did under product, but they again were -- the ones that actually rejected  
27 were the more peripheral points: the microwave, the large business sites, the postcode  
28 sectors, and then briefly the overall cumulative sensitivity analysis.

29 THE CHAIRMAN: I mean, as far as the CBDs go, I mean, that was a sort of something that was  
30 really carried by, more by the interveners than BT, in reality, although it notionally fitted  
31 within, or it just on one view fitted within your Notice of Appeal, and in any event you got  
32 late permission to amend. But that was certainly taken up more substantially by others.

33 MR PALMER: It was, it was. That's a fair observation.

34 THE CHAIRMAN: Anyway, but you say there are sufficient----

1 MR PALMER: On the back of -- yes, exactly.

2 THE CHAIRMAN: Yes. Sufficient points that BT won on.

3 MR PALMER: And competitive core, of course, was won by BT.

4 So we say it's -- of course there were some sub-issues which were lost, but this is not a case  
5 of such partial success that there should be a significant deduction when it succeeded on  
6 each of the core points, as Ofcom accepts.

7 I'm going to deal now with the points firstly relating to the Virgin evidence and secondly to  
8 the 20 per cent issue.

9 THE CHAIRMAN: Yes.

10 MR PALMER: The Virgin evidence I can deal with very, very briefly. This was obviously not  
11 BT's evidence, it was confidential to Virgin and BT had no sight of it, couldn't know the  
12 strength or weakness of that point until after the appeal was brought. It turned out to be  
13 a good point that was being raised. What Ofcom say is that it would be wrong in principle,  
14 as I understand it, for Ofcom to be liable for BT's costs of putting an error right which was  
15 attributable to material provided to it by Virgin.

16 We say it certainly isn't right for BT to bear the costs of Ofcom putting right an error  
17 attributed to it by Virgin. The right course, if Ofcom thought it had a good point on this,  
18 would be to seek a costs order against Virgin as a party to the appeal. It hasn't done  
19 so -- it's a matter for it, not for me -- but it's not right to lay those costs at BT's door as  
20 an alternative.

21 Then the 20 per cent issue. The 20 per cent issue ended up assuming the decisive  
22 significance in this appeal. If I can turn up para.287 of the judgment. The judgment is at  
23 tab 8 of the hearing bundle. Paragraph 288: the two important factual errors which BT had  
24 demonstrated are set out, including knocking out the most compelling evidence, and then  
25 the Virgin point. On the other hand, some other points which hadn't been shown to be  
26 wrong. Paragraph 290 is clearly material and it was this:

27 "This throws into sharp relief the critical question on the HMT, namely whether a  
28 SSNIP at 1G would be unprofitable."

29 And that in turn depended on the size of the marginal cohort. That's the context in which  
30 that point became decisive.

31 The point I make about that is that it only became decisive because of the rejection of the  
32 evidence which Ofcom in its decision had treated as the most compelling evidence leading  
33 it to make what the Tribunal termed an implied finding of profitability on 1G. That's the  
34 footnote 39 on p.122.

1      Ofcom thought it could carry out the SSNIP test without even mentioning in its decision the  
2      rudimentary critical loss analysis which is referred to at para.292 and was mentioned for the  
3      first time by Ms Curry in her evidence. It wasn't even important enough to be mentioned  
4      by Ofcom in its decision, other than the closest it came is that cited at para.291 of the  
5      Tribunal's decision. You see the context; the Tribunal will be well aware of the context in  
6      which that was put. It was not in the application of a SSNIP test in terms of profitability.  
7      Ofcom defended this appeal from start to finish on the basis that its figure was correct and  
8      20 per cent, even after BT put in reply evidence, having seen Ofcom's reasoning in its  
9      defence of the way it had approached it and the more spelling-out of the categories in  
10     paras.60 and 61 of Katie Curry, although that will be more than familiar, the categories of  
11     people affected under the SSNIP test. Having seen her put in evidence saying, "Look, this  
12     cohort is only a small, comparatively small percentage," I won't fall into the trap of  
13     mentioning that number again, although it's been frequently said. That was met with  
14     a response even after Ofcom -- BT had supplied to Ofcom the underlying figures to support  
15     that, which it did. That was met with a response in Katie Curry's second witness statement  
16     saying the figure was not 20 per cent but 26 per cent. That was Ofcom's response.

17     Now, Ofcom criticises BT in its skeleton argument for the fact that BT had undertaken  
18     a reconciliation exercise between the competing versions of the figures was not mentioned  
19     until Mr Logan was cross-examined by Mr Holmes, which he explained how they put the  
20     figures, the lists beside each other and noticed the repetition.

21     The first point is Ofcom hadn't previously asked how BT reconciled the figure of  
22     20 per cent with the smaller figure, but the reason is -- I'm not taking some sort of cheap  
23     point about sort of procedure, and they could have (inaudible) keeping up our sleeve, it  
24     wasn't that at all -- the reason was that this was not a central part of Ofcom's thinking at all  
25     in the decision which was appealed against. That's why, or one of the reasons why, the  
26     Tribunal ultimately found that it couldn't actually decide this issue one way or the other and  
27     had to be remitted because there wasn't sufficient investigation into all of this. The reason  
28     why there wasn't sufficient investigation is Ofcom never thought it was important enough  
29     to do so.

30     THE CHAIRMAN: I mean, hang on -- I understand your first point, which is Ofcom says, "We  
31     take the view that on other evidence, qualitative evidence, it's clear that a SSNIP would be  
32     unprofitable because we have looked at what people have said, internal documents, BT  
33     documents, et cetera."

34     MR PALMER: Yes.

1 THE CHAIRMAN: We've said that's misconstrued the documents and shouldn't have been -- it  
2 didn't carry the day.

3 MR PALMER: Yes.

4 THE CHAIRMAN: But on the 20 per cent number, in a sense Ofcom, having erred in the way  
5 that they did in looking at the qualitative evidence, had their error, as it were, compounded  
6 surely by being given a number like 20 per cent, which on any, to any economist is  
7 an obvious slam-dunk confirmation of the level of the marginal switchers.

8 MR PALMER: But that's not how it was treated by Ofcom, is my point.

9 THE CHAIRMAN: But in a sense, that -- it's only, as it were, not gone into, surely it's only not  
10 gone into in any greater detail because all it's doing is confirming the---

11 MR PALMER: What they wrongly believed.

12 THE CHAIRMAN: Yes, but if your number had been accurate, and much lower, as it was, we  
13 can't assume that it wouldn't have -- there wouldn't have been more analysis because it  
14 wouldn't, as it were, have appeared a slam dunk to an economist.

15 MR PALMER: As a matter of logic one couldn't assume that, but fortunately we have Ofcom's  
16 own position set out behind tab 36 of the bundle -- it's the hearing bundle -- which is  
17 Mr Holmes's closing submissions for Ofcom, even after we'd had all that evidence, and in  
18 answer to your question, Sir, Mr Holmes on page 1539 at line 17 onwards:

19 "In my submission there has been no material error shown. There is sufficient  
20 evidence that was before Ofcom which is before the Tribunal to sustain the conclusion  
21 that a hypothetical (inaudible) would be constrained by SSNIP on either 1G or 10G.  
22 I deal with each of the points. In relation to 1 we do not accept there's an error..."

23 That's in relation to the other CP's price.

24 "In relation to the other point the 20 per cent figure that was provided by BT it does  
25 appear that that figure which BT provided during the administrative stage was too  
26 high. It does not represent the core of marginal customers within that particular  
27 category. My submission would be that there is a range of relevant categories and that  
28 overall the evidence about upward migration which is not just relevant to the  
29 acceleration of the layers I shall show is sufficient to sustain the conclusion."

30 Now, that is the approach that Ofcom took on this figure from start to finish: it wasn't core,  
31 there was enough. So even if they'd the right figure, that would still have been their  
32 position. So, far from supporting Ofcom's submission that the very fact that they had  
33 a mistaken figure at the outset means that BT shouldn't be able to recover the costs of its  
34 appeal, this is at most one factor limited to the costs involved with correcting the figure,

1 rather than something which sweeps the carpet, the rug out from underneath BT's feet in  
2 seeking to recover its costs of the appeal. Because as a matter of causation it simply didn't  
3 have that effect. It was not central to the decision, and Ofcom, even once aware of the error  
4 they had made, still said "Our decision supports itself on its own two feet regardless".

5 THE CHAIRMAN: But to some extent, I mean, I think we've got to get a bit real about this, that  
6 they come to the end of the BCMR, it's a massive, long regulatory regime, it's subject to  
7 attack. They discover that they've been fed some duff information. What are they  
8 supposed to do (inaudible)? Just say, "Oh, shucks, you know, well, we'll go back to the  
9 drawing board then, again"? I mean, it's----

10 MR PALMER: They're in their litigation mentality, is one of the points.

11 THE CHAIRMAN: Well, you know, or -- in a sense I suppose it's -- I mean, are they entitled to  
12 attempt to justify in the litigation if they can and make a sustainable argument that the result  
13 would be the same? I mean, it doesn't diminish----

14 MR PALMER: As litigants, yes, but then to say, "We lost that, but we shouldn't pay any costs  
15 having fought it," is another matter entirely. I'm not saying it's improper for them to  
16 have -- I'm not saying Mr Holmes's submission was improper or anything of the kind, of  
17 course. It's a valiant attempt to sustain a bad decision.

18 THE CHAIRMAN: Yes, but I think what I'm -- sorry, maybe I'm not being quite clear about  
19 this. I thought what you were sort of doing was assimilating Mr Holmes's submission on  
20 this to, as it were backwards, to say, "Well, Ofcom never regarded this figure as...". It's all  
21 critical. Or, "They never did this, they never did that".

22 MR PALMER: I'm not just taking one bad point made in closing submissions by counsel and  
23 saying that's -- I don't take it in isolation. You take it as part of the whole picture, which is  
24 that from start to finish Ofcom never viewed this as a critical point. So if BT had not made  
25 that error, would it have prevented Ofcom from making the decision it did? Clearly no.  
26 Clearly not. Would it have made the whole appeal unnecessary? Clearly not. Because of  
27 their errors on what they thought was the strongest and most compelling evidence, because  
28 they didn't actually think they needed to carry out any form of assessment of profitability  
29 when undertaking the SSNIP test, because the critical loss analysis which was rudimentary  
30 in nature only happened in their heads and not on paper and was never consulted upon,  
31 these errors occurred.

32 So this point at most is a matter for deduction of costs incurred in correcting the error, not  
33 pulling the rug out from BT's feet in seeking to recover its costs of the appeal at all, as  
34 Mr Holmes contends.

1 THE CHAIRMAN: Okay. Let me just run one other point past you in that respect, then. I mean,  
2 I think everybody would obviously acknowledge that it's very difficult to reconstruct with  
3 the benefit of hindsight what turn events may have taken on a different hypothesis, and this  
4 is one of the problems that we have. We don't know in fact what -- it's very difficult to be  
5 clear about what would have happened if the world had taken a different turn a year ago or  
6 whenever it was. To what extent can the Tribunal take the view that it should encourage  
7 people to be careful with evidence given and material given to regulators? Is there  
8 a broader question here that to some extent we've had costs incurred in this litigation -- you  
9 say to no great extent; Ofcom would say to a greater extent -- as a result of some inaccurate  
10 information given in the course of the regulatory process? As a matter of general principle,  
11 you accepted that it's one of the factors that can be taken account. How do we do it? I  
12 mean, how would you accept or reject the proposition that we can do that?

13 MR PALMER: There shouldn't be a sort of *pour encourager les autres* approach of  
14 deterring -- I mean, this was, if you remember, the genesis of the error: pretty vaguely  
15 worded enquiry by email met by a pretty vaguely expressed, casually expressed email back.  
16 You know, to say that that's going to----

17 THE CHAIRMAN: Well, actually, I'm not sure how -- you say "vaguely expressed"; there was  
18 a very specific question which (inaudible).

19 MR PALMER: It was confusing enough to confuse the person who responded. I mean, that's the  
20 point. So that is the genesis. At most it can go to disallowing some costs incurred with  
21 setting the record straight. It shouldn't be taken as a broad proposition, you know, to  
22 encourage people to -- that's as far as it can be taken at its highest.

23 THE CHAIRMAN: Okay. So in any event you say, on the facts in any event you say Ofcom,  
24 even once they knew that there had been an error in that respect, nevertheless carried on, as  
25 it were, litigating the point on different grounds and lost.

26 MR PALMER: Yes.

27 THE CHAIRMAN: Okay.

28 MR PALMER: Consistent with that whole thrust.

29 The last point on all of this is it's said that we can't recover the grounds which the Tribunal  
30 didn't need to determine which related only to the Dark Fibre remedy. That's grounds E1  
31 to 3. There is an authority which deals with this point, which is referred to in my skeleton,  
32 called *M v Croydon*, which is at tab 19.

33 THE CHAIRMAN: I mean, this would go to the whole of the remedies section, in fact.

34 MR PALMER: Yes.

1 THE CHAIRMAN: It's not just, as it were -- well, it's all of the remedies challenge is what  
2 you're now dealing in essence. It's everything we didn't decide but which necessarily fell  
3 away----

4 MR PALMER: Yes.

5 THE CHAIRMAN: Because of the----

6 MR PALMER: It was targeted as Dark Fibre remedy exclusively.

7 THE CHAIRMAN: Right, okay.

8 MR PALMER: And the main ground, the overarching ground, was that the remedy was  
9 disproportionate because it targeted the most competitive sector. So assuming there was  
10 one product market the VHB was the most competitive bit that the Dark Fibre remedy  
11 would undermine precisely that part of the market. That was the thrust of it, building on the  
12 criticisms of the market definition.

13 In *M v Croydon*, which was a judicial review case in the High Court, there is consideration  
14 of the principles that should apply in particular where cases settle in the Administrative  
15 Court. It's tab 19.

16 DR ELPHICK: Yes, thank you.

17 MR PALMER: In particular where cases settle and in particular cases settle on one issue with the  
18 result that other issues don't need to be decided. And the issues which were raised by that  
19 question were answered not just by reference to principles associated with settlement but  
20 more generally as well.

21 I just want to show you two passages. The first is at paras.52 to 53. This overlaps with the  
22 position of public authorities on costs following the event. If I can just ask you to read  
23 paras.52 to 53 first.

24 THE CHAIRMAN: (After a pause). Yes.

25 MR PALMER: Underscoring the rationale of costs following the event. And then at paras.59 to  
26 61.

27 THE CHAIRMAN: (After a pause). Right. Is Lord Neuberger really directing his attention to  
28 the position we've got, which is where certain points were just simply not the subject of any  
29 decision or debate because it became unnecessary because of an earlier point? Is he really  
30 addressing the point?

31 MR PALMER: What he's addressing himself to is the circumstances where, going back to  
32 para.59, a claimant obtains all the relief which he seeks, whether by consent or after  
33 a contested hearing. And that's just going back to the discussion that we had at the very  
34 beginning of my submissions about the form of order. What the relief that was sought was

1 as to setting aside not only of the market definition (inaudible) findings resulting, but the  
2 remedies as well. I can go to the Notice of Appeal and show you that if that's helpful, but  
3 that was the relief that was sought and that is the effect of the order that has been given. So  
4 that is the outcome, even though in order to reach that outcome, the Tribunal didn't need to  
5 resolve a large number of the grounds to arrive there.

6 So I fully accept that those grounds have not been resolved one way or the other, but the  
7 relief which was sought has been obtained not in part but in whole, and whether pursuant to  
8 a contested hearing as here, or in a settlement as in *M v Croydon*, puts you into category 1  
9 which confirms that the starting point at least, unless there's some good reason to the  
10 contrary, it's hard to see why the claimant should not recover all his costs. That's premised  
11 upon the assumption of the principle that costs follow the event applies. I accept that. My  
12 (inaudible) is it does. And on that basis the costs should be recovered in respect of those  
13 grounds too.

14 THE CHAIRMAN: Is this right: can I put your submission in a different way just to make sure  
15 I understand it. I mean, what you essentially are saying is this: that -- well, firstly you've  
16 got to bring all your regulatory challenges together.

17 MR PALMER: Yes.

18 THE CHAIRMAN: That's number 1.

19 MR PALMER: Yes.

20 THE CHAIRMAN: And it's always been the case that if you succeeded on your product market  
21 definition or geographic market definition, that inevitably that would undermine the  
22 remainder of the decision.

23 MR PALMER: Yes.

24 THE CHAIRMAN: And you did succeed on that.

25 MR PALMER: Yes.

26 THE CHAIRMAN: And so in a sense that's always been, it's always been the case that if you  
27 succeeded on the first grounds that the rest would fall, everything else would fall----

28 MR PALMER: There are other grounds too, but we don't need to determine that to get to the  
29 same result.

30 THE CHAIRMAN: Right. So to that extent in a sense you've achieved everything you wanted to  
31 achieve on the first ground.

32 MR PALMER: Yes. That's the effect.

33 THE CHAIRMAN: I mean, because what Lord Neuberger -- I don't think he's really, unless I've  
34 misread it, he's not quite -- I mean obviously the broad principle about obtaining everything

1 you seek, wholly successful, but he's not specifically addressing his mind to a case there  
2 where, because you succeed on ground 1 upon which everything else is dependent, you  
3 succeed in whole. He's not really addressing the question about what should happen to the  
4 untested issue, the costs relating to the untested issues, I don't think, is he?

5 MR PALMER: What he's doing is contrasting those cases with what he calls category 2, where  
6 there's been success only in part following a contested hearing pursuant to settlement,  
7 which he then expands upon at para.62:

8 "... deciding how to allocate liability for costs after a trial, the court will normally  
9 determine questions such as how reasonable the claimant was in pursuing the  
10 unsuccessful claim, how important it was compared with the successful claim, and  
11 how much the costs were increased as a result of the claimant pursuing the  
12 unsuccessful claim."

13 And so forth, which might lead you to being disallowed those costs. But here there isn't  
14 any part of the claim which has been unsuccessful for the reasons we said earlier.

15 THE CHAIRMAN: But putting it in a slightly different way, we have no idea whether your  
16 arguments on remedies as a separate topic were good, bad or indifferent.

17 MR PALMER: Yes.

18 THE CHAIRMAN: Because we never got there.

19 MR PALMER: Yes. And they weren't resolved because after the decision to split the hearing  
20 you didn't even hear argument or evidence on those points as a consequence of Ofcom  
21 having lost their appeal, the TalkTalk appeal in the CMA.

22 THE CHAIRMAN: Do you say the costs have got to go somewhere?

23 MR PALMER: The costs have got to go somewhere.

24 THE CHAIRMAN: And the only two options are either presumably no order or, you say, your  
25 costs because those elements of the decision necessarily fell with the first elements.

26 MR PALMER: And there's a considerable saving. I mean, a lot of costs which would have been  
27 incurred if we'd had to go on to September, or if we'd had one hearing in the first place,  
28 albeit a longer one, have been avoided, so that's a benefit to all parties. But in terms of  
29 those original costs involved with putting the appeal together directed at the same target,  
30 those are costs which fairly fall to be recovered.

31 THE CHAIRMAN: Okay.

32 MR PALMER: Then that finally takes me to the interim payment point. So it's familiar  
33 principles: the discretion under the Tribunal Rules----

1 MR HOLMES: Again, I hesitate to interrupt. It's a point that we haven't yet made, but if a costs  
2 order is made against BT in a substantial amount -- sorry, against Ofcom in a substantial  
3 amount, we wouldn't contest the making of an interim payment on account on the terms  
4 proposed by BT. So that may save a little time.

5 THE CHAIRMAN: In the amount? If you say you would accept the general principle of  
6 an interim payment, that I would understand.

7 MR HOLMES: Yes.

8 THE CHAIRMAN: But if you are saying----

9 MR HOLMES: It's the former, Sir, yes. The amount will depend on what the Tribunal decided  
10 would be----

11 THE CHAIRMAN: The amount (inaudible). Right, okay. So the principle of an interim  
12 payment if there's an order against Ofcom is accepted, i.e. in general principle it should be  
13 an amount which the court -- sorry, the authorities say it's not quite this, but you generally  
14 tend to arrive at a figure which you have a reasonable degree of assurance will be recovered  
15 on assessment.

16 MR PALMER: The lowest figure in the likely range. We pitched this low----

17 THE CHAIRMAN: Right. How do we know----

18 MR PALMER: -- it's less than 20 per cent of our headline claim, so we've tried not to, you  
19 know, be overambitious about it and tried to be sensible, and the Tribunal will form its own  
20 view. But in terms of a likely range, even if you were to take a 10, 20, 25 per cent cut in  
21 relation to the matters that we've discussed, or even if you were to exclude the Dark Fibre  
22 entirely, which wouldn't be half the costs because the costs of the hearing only involved  
23 market definition, even then you'd be above that basic threshold, we would say.  
24 Comfortably so.

25 THE CHAIRMAN: Right, but just looking at your costs schedule at tab 30A, just trying to  
26 understand what this is. You told me this morning it only relates to litigation, so it is the  
27 litigation only. We don't have any breakdown by reference to the issues which we did  
28 determine and the remedies questions which we didn't determine, so we don't know what  
29 proportion is referable there.

30 MR PALMER: Obviously the costs of going to the hearing and the actual trial of the matters  
31 obviously substantially outweigh the costs of drafting the Notice of Appeal (inaudible) the  
32 evidence. All we seek is a broad----

33 THE CHAIRMAN: Hang on, hang on. Sorry, I'm trying to understand how broad this brush is.  
34 The evidence on the remedies section and the submissions and the drafting -- sorry, of the

1 Notice of Appeal and all the stuff in relation to the remedies section is included in here but  
2 we've got no means of knowing what proportion of this would relate to that.

3 MR PALMER: Other than by broad assessment of the scale of the appeal. You can see that the  
4 drafting stage was roughly half and half, split into two halves, essentially, and we allocated  
5 time for it again. It was split into two halves.

6 THE CHAIRMAN: In terms of the -- I mean, obviously I can identify the solicitors and counsel.  
7 In terms of the other parties whose disbursements, and economists you've listed there----

8 MR PALMER: DotEcon is Dr Dan Muldoon. That's exclusively concerned with the remedy.

9 THE CHAIRMAN: So DotEcon is remedies only.

10 MR PALMER: Yes. He was the only expert on remedies.

11 THE CHAIRMAN: That's fine. Communicate Consulting?

12 MR PALMER: (After a pause). I'm told that roughly one-third of those costs were remedy,  
13 two-thirds product market.

14 THE CHAIRMAN: Who are they? Sorry, more fundamental: who is Communicate Consulting?  
15 It's not a----

16 MR PALMER: It's consultancy work undertaken to independently stress test the merits of the  
17 arguments which were put forward on this appeal. It's like a second view: can you  
18 independently examine this and tell us what you make of them in terms of the strength. So  
19 it's a consultant who wasn't giving evidence, but was an expert who was in a position to do  
20 so.

21 THE CHAIRMAN: So like an external examiner of Mr Beard.

22 MR PALMER: Yes.

23 THE CHAIRMAN: Okay. Shepherd & Wedderburn (secondees). I know who Shepherd &  
24 Wedderburn are.

25 MR PALMER: One of the solicitors working on the case was seconded. That's solicitors' costs.

26 THE CHAIRMAN: Right, so they're sort of seconded in-house, as it were.

27 MR PALMER: Yes.

28 THE CHAIRMAN: So that's to add to -- okay. Paralaw (UK) Ltd?

29 MR PALMER: Paralegal work: copying, bundling.

30 THE CHAIRMAN: Okay. You've obviously been having good lunches during the trial.  
31 (Laughter). Don't worry, don't respond. Don't bother responding to that. That's all right.  
32 I did look at my sandwiches at lunchtime with a little envy. Right. That's not going to be  
33 the (inaudible). Analysys Mason. Sorry, obviously I know who Analysys Mason are.

34 MR PALMER: That was Dr Yardley; he's product market.

1 THE CHAIRMAN: What I don't know is whether that was solely referable to the points that we  
2 looked at or whether they had evidence related to remedies as well.

3 MR PALMER: Only product market.

4 THE CHAIRMAN: It's only product market.

5 MR PALMER: Yes.

6 THE CHAIRMAN: Right. Okay, so we'll just have to make the best we can with that, you  
7 would say, and adopt -- you say you've adopted a modest, or at least a cautious, percentage  
8 which is less than 25 per cent.

9 MR PALMER: Less than 20 per cent, yes.

10 THE CHAIRMAN: Less than 20 per cent. Okay. Right, good. Thank you very much.

11 Yes?

12 MR ROBERTSON: Sir, members of the Tribunal, I will be try to be even shorter than I promised  
13 before lunch. The purpose of our submissions are just to indicate to the Tribunal where we  
14 adopt BT's submissions in addition to our written skeleton for this CMC, which sets out our  
15 written applications for costs.

16 THE CHAIRMAN: Yes.

17 MR ROBERTSON: I'm not going to go through that on a paragraph by paragraph basis. There  
18 isn't the time and those are our submissions.

19 So the additional points I wish to make are these. Firstly, we adopt BT's submissions on  
20 the Tribunal's discretion to award costs against Ofcom.

21 THE CHAIRMAN: And the starting point, presumably.

22 MR ROBERTSON: Yes.

23 THE CHAIRMAN: Yes.

24 MR ROBERTSON: Secondly, there are two aspects to our application for costs. The first is in  
25 relation to the extant remedies appeal. As the Tribunal has just been discussing with  
26 Mr Palmer, the remedies are predicated on there being a correct market definition. The  
27 decision having been set aside on that basis, in our submission, it follows that we should  
28 have our costs of pursuing remedies.

29 The other aspect of our application for costs is our invitation to the Tribunal to revisit and  
30 vary the order of 29<sup>th</sup> June, which is at tab 9 of the bundle. I don't ask you to turn it up, but  
31 that deals with the price control matters.

32 THE CHAIRMAN: Right.

33 MR ROBERTSON: We've explained in our skeleton that the Tribunal has the discretion to vary  
34 an earlier costs order. That's under r.115. We've referred in our skeleton to the

1 Court of Appeal authority under the equivalent provision of the CPR, the *Tibbles* case,  
2 which establishes that this discretion can be exercised if there is a material change in  
3 circumstances. We say the material change in circumstances that has taken place since June  
4 is very obviously the Tribunal's ruling and then judgment.

5 The price control exercise, in our submission, is one that has proved to be unnecessary in  
6 light of the Tribunal's ruling and judgment. Therefore, in those circumstances, it's not fair  
7 or just that we should have to pay Ofcom's costs of that. In our submission, either we  
8 should have our costs of that or alternatively, there should be no order as to costs. We  
9 would invite the Tribunal to vary the order to that extent.

10 As to Mr Holmes's point about disposal of our appeal, there's no magic in the words  
11 "dismissal" or "allowing the appeal". This Tribunal can make orders, recording what has  
12 happened. What has happened here is there has been no need to deal with the remedies  
13 issue because the basis for it, the whole edifice, to use Ofcom's words at the last  
14 case management conference, has gone as a result of the Tribunal's ruling and, in particular,  
15 the judgment.

16 THE CHAIRMAN: Right. Can we just track back to the CMA point? You unsuccessfully  
17 challenged the CMA in front of the CMA, I think. Correct?

18 MR ROBERTSON: Yes.

19 THE CHAIRMAN: It was inevitable in a sense or it was clear that once you had raised your  
20 specified price control matter, that would have to be dealt with by the CMA because that's  
21 the regime.

22 MR ROBERTSON: Yes.

23 THE CHAIRMAN: I think everybody agreed it had to be dealt with, essentially, before the main  
24 appeal because otherwise -- well, we couldn't have sensibly approached it.

25 MR ROBERTSON: We're inviting the Tribunal to stand back and look at what is now fair and  
26 just in the light of the ultimate outcome before this Tribunal. So we're asking the Tribunal  
27 to----

28 THE CHAIRMAN: I mean, take an ordinary piece of civil litigation. In an ordinary piece of civil  
29 litigation, if you have significant interim or interlocutory hearings, let's say in relation to  
30 an application for a freezing injunction or something like that, they're normally dealt with  
31 separately and irrespective of the ultimate outcome.

32 I mean, it's not normally the case that when you know the ultimate outcome of the trial you  
33 then go back and unpick, as it were, discreet areas of interlocutory costs or interim costs that  
34 have been dealt with as a separate matter. Why should these proceedings be any different?

1 MR ROBERTSON: These proceedings are different because at the end of the day, the whole  
2 basis upon which that went ahead was because of Ofcom's decision, which has now been  
3 shown to be adopted on a completely flawed basis.

4 THE CHAIRMAN: But let's assume that you have an ordinary piece of civil litigation and say  
5 a claimant -- I'm just trying to understand what the analogy would be. A claimant seeks  
6 a freezing injunction which is defended and defended so the court rules unmeritoriously  
7 resulting in a costs order in relation to the costs of the interim injunction, freezing injunction  
8 or some other form of injunction -- perhaps just take the freezing out of it, just an injunction  
9 to preserve the status quo pending the trial of the ultimate case -- and the court makes  
10 a determination that because of the way that particular application was defended, the  
11 defendant should pay the costs because, frankly, he should have agreed that pending the  
12 ultimate trial, the status quo should be preserved.

13 As it turns out at trial, the claimant fails and the defendant wins. The defendant doesn't  
14 normally go back and say, "Well, actually, do you know, now we know that I was right all  
15 along and therefore, I get a change to that".

16 Now, I'm struggling at the moment to see why that isn't an analogy.

17 MR ROBERTSON: In this case -- well, turning to what was done in this case, it's set out at  
18 para.9 of our skeleton argument where we said that from the outset -- and I'm quoting from  
19 our skeleton argument -- we made the point that:

20 "Issues going to the findings of SMP made in respect of BT should be determined before  
21 the challenges to remedies (and in particular any specified price control matters.)"

22 So in our original Notice of Appeal we submitted that if the Tribunal decided that its appeal  
23 raised specified control matters, the better course would be to stay the reference to the CMA  
24 pending resolution of the non-price matters. So that's the position we adopted from the  
25 outset.

26 THE CHAIRMAN: Yes.

27 MR ROBERTSON: The reference to the CMA came on essentially because of Ofcom's approach  
28 to the timing of the remedies. That's what accelerated matters in front of the CMA and  
29 that's why that cart got put before the horse.

30 THE CHAIRMAN: Well, but in a sense -- okay. I'm trying to remember, but in essence, the  
31 problem here was that we were always working to a timetable.

32 MR ROBERTSON: It was of Ofcom's making because of the timing of the remedies.

33 THE CHAIRMAN: That's true, but in a sense, that's driven by the timetable of the periodic  
34 reviews, isn't it, in reality?

1 MR ROBERTSON: Yes.

2 THE CHAIRMAN: I mean, it's not Ofcom have just picked 1<sup>st</sup> October out of the air and just

3 thought it would be a good day.

4 MR ROBERTSON: It's not at our instigation. We pointed out this problem at the outset.

5 THE CHAIRMAN: Yes.

6 MR ROBERTSON: Therefore, we were a victim of events. (After a pause)

7 THE CHAIRMAN: So I mean, in a sense---- I mean, you---- (After a pause)

8 Yes. I mean, you're saying effectively you're the victim of events or the victim of the

9 decision that we, or that I, made to refer the matters to the CMA----

10 MR ROBERTSON: Yes.

11 THE CHAIRMAN: -- as and when.

12 MR ROBERTSON: Yes. It's down to who should bear that costs risk.

13 THE CHAIRMAN: Why should Ofcom?

14 MR ROBERTSON: Well, we would like to recover our costs from someone.

15 THE CHAIRMAN: Yes. Well, I sort of appreciate that. In a sense, everybody -- I mean----

16 MR ROBERTSON: It's because, you know, at the end of the day, they pay for the costs

17 consequences of their errors in the judgment.

18 THE CHAIRMAN: Well, you get----

19 MR ROBERTSON: I couldn't make this application if it weren't for the fact that the decision has

20 been set aside and remitted.

21 THE CHAIRMAN: You gave, as it were, two options: either CityFibre should have its costs or

22 the costs order against you in relation to the CMA hearing should be set aside.

23 MR ROBERTSON: Yes, and no order as to costs.

24 THE CHAIRMAN: There should be no order as to costs on the basis that even though you lost in

25 front of the CMA, if, as it's transpired, the course you had suggested had been followed or

26 if it would have been capable of being followed, it would have been seen that you wouldn't

27 have had to get involved in the CMA.

28 MR ROBERTSON: Yes.

29 THE CHAIRMAN: That would tend to suggest that your request to be paid your costs by Ofcom

30 is a little bit adventurous, whereas isn't it more realistic to say that everybody had to get

31 involved with the costs -- sorry, had to get involved with the CMA issue? I mean,

32 I'm just----

33 MR ROBERTSON: Should bear their costs, but not be liable to the other parties' costs, as we

34 currently are under this order.

1 THE CHAIRMAN: Yes, that's undoubtedly, I would have thought, a stronger argument.  
2 Is there any other -- is there any authority that bears upon this type of situation?  
3 MR ROBERTSON: Not that we're aware of.  
4 THE CHAIRMAN: No. Sorry, and you referred us to *Tibbles*, I think it was. Was it *Tibbles*?  
5 MR ROBERTSON: *Tibbles* is the threshold test for revisiting an order, which is has there been  
6 a material change in circumstances? Here we say that is the judgment.  
7 THE CHAIRMAN: Can we just have a look at r.115. This is just the general power of the  
8 Tribunal, is this?  
9 MR ROBERTSON: Yes, equivalent to the general power under the CPR r.3.17.  
10 THE CHAIRMAN: This is -- the order that was made -- sorry, the order that was made is in----  
11 MR ROBERTSON: Tab 9.  
12 THE CHAIRMAN: Tab 9. (After a pause)  
13 I mean, presumably at the time this order was made -- sorry, and you'll have to tell me.  
14 I can't remember. Was there an argument about this order or was it simply an agreed order  
15 that I made at the time? I do not have a recollection of any great argument about this or  
16 indeed your client saying that----  
17 MR ROBERTSON: No, we don't believe there was any discussion about it.  
18 THE CHAIRMAN: No. So it might be said, might it, that because this thing was always on the  
19 cards, the possibility that the appeal might succeed, perhaps it would have been appropriate  
20 to have reserved.  
21 I mean, if there's a material change of circumstance, it's one that could have quite easily  
22 been foreseen at the time this order was made. In other words, you could have made the  
23 submissions you're now making to me at the time of this order to say, "This order should be  
24 deferred until we know the ultimate decision".  
25 MR ROBERTSON: The point just doesn't seem to have been raised, appreciated, at the time.  
26 THE CHAIRMAN: Sorry, I do not mean you personally because I don't remember you  
27 personally being here for that.  
28 MR ROBERTSON: No, I wasn't. That's correct.  
29 THE CHAIRMAN: No. So when I say you, I mean you collectively.  
30 MR ROBERTSON: Yes. No, for those of us collectively, I'm afraid the point wasn't  
31 appreciated. It is being raised now for the first time.  
32 THE CHAIRMAN: Because isn't material change of circumstances normally one either that  
33 wasn't in existence or couldn't have been reasonably foreseen or is there some restriction on  
34 it?

1 MR ROBERTSON: There's no restriction in terms of foreseeability.

2 THE CHAIRMAN: I'm just wondering why, for example, this predicament that we are now in,  
3 you know, perhaps to use a neutral way of describing it, isn't one that couldn't have been  
4 addressed at an earlier stage.

5 MR ROBERTSON: I cannot assist your Lordship any further with that. It wasn't----

6 THE CHAIRMAN: Anyway, you're saying whether or not it was then, we have the discretion to  
7 do something about it now if we think it's appropriate to do so.

8 MR ROBERTSON: Yes, that's correct, sir.

9 THE CHAIRMAN: Right, okay. All right.

10 Shall we take a short transcriber break? Is the transcriber content with a very short break?  
11 Right, okay. We'll keep it, if we may, fairly short, just two or three minutes, or five.

12 (A short break)

13 THE CHAIRMAN: Mr Holmes, just before you kick off, I just need to clarify something with  
14 Mr Robertson.

15 I have been made aware of what's being going on in front of the CMA and I just want to  
16 clarify what we're talking about here. As I understand it, the order that I made on 29<sup>th</sup> June  
17 was that CityFibre pay Ofcom's costs in relation to the specified price control matter.

18 MR ROBERTSON: Correct.

19 THE CHAIRMAN: That's the, as it were, inter partes costs order----

20 MR ROBERTSON: Correct.

21 THE CHAIRMAN: -- which you're saying I ought to reverse or at least flatten into a no order as  
22 to costs.

23 MR ROBERTSON: Yes.

24 THE CHAIRMAN: So far as the CMA itself is concerned, as I understand it----

25 MR ROBERTSON: Paragraph 27 of our skeleton.

26 THE CHAIRMAN: -- the CMA has very recently ordered costs in relation to the CMA's costs.  
27 This is -- because I have now seen the order.

28 MR ROBERTSON: Yes.

29 THE CHAIRMAN: It's the costs incurred by the CMA have to be paid by CityFibre in the sum  
30 of £250,000ish.

31 MR ROBERTSON: That has to be the subject of a separate appeal.

32 THE CHAIRMAN: I see, and so----

33 MR ROBERTSON: That's outwith the scope of what we're talking about today.

34 THE CHAIRMAN: Right, okay. One of your submissions -- yes, okay.

1 MR ROBERTSON: So para.27 of our skeleton is there to keep the Tribunal updated on what's  
2 happening, but that's for information only. It is not relevant to the applications we're  
3 making today.

4 THE CHAIRMAN: Yes. (After a pause)

5 I suppose the judgment of the -- in the judgment of the CMA, your submissions were that  
6 you shouldn't face any order for costs in relation to CMA costs because you succeeded in  
7 the ultimate appeal. In fact, you sought a wasted costs order against this Tribunal.

8 MR ROBERTSON: I believe that's correct.

9 THE CHAIRMAN: Right. But none of that, you say, has any bearing upon what we're dealing  
10 with today because we're dealing today only with the costs of your appeal inter partes.

11 I mean, the two -- I'm just struggling to make the lack of linkage between the two. You're  
12 going to have to separately pursue your appeal in relation to CMA costs.

13 MR ROBERTSON: Yes.

14 THE CHAIRMAN: But in part, it seems that you are contending that, as it were, this Tribunal  
15 wrongly put you in a sufficient (sic) to justify a wasted costs order against this Tribunal and  
16 in fact put your client into the position that they're in. Is that right?

17 MR ROBERTSON: I'll just take instructions. (After a pause)

18 I'm told that's what's been submitted, but our submission is it's not relevant to our costs  
19 applications before this Tribunal.

20 THE CHAIRMAN: I suppose is this right: but you also---- I'm just looking at -- this is the  
21 judgment. As an interim stage, your alternative order was, what, an order for costs against  
22 Ofcom? So what you were saying and what you're saying in relation to the CMA's costs, is  
23 this right, is either no order or an order against Ofcom in relation to CMA costs? Sorry,  
24 I'm trying to understand how we deal with this. (After a pause)

25 MR ROBERTSON: Sir, I can't give you much assistance on this issue in relation to costs and the  
26 CMA. I have not been involved in that. Those instructing me have. The submissions have  
27 been made by a costs consultant. I do not have them in front of me. I don't think I have  
28 actually seen them.

29 DR ELPHICK: The last two sentences of para.26 of your submission is the essence of what you  
30 feel we need to decide and everything else is for information.

31 MR ROBERTSON: Yes. Yes, but para.27 is for information only. The figure shows you the sort  
32 of scales of costs that are confronting us as a relatively new entrant into this industry, but  
33 that's no more than that.

1 THE CHAIRMAN: The appeal against the CMA's costs determination goes where if you're  
2 minded to pursue it?

3 MS MORRISON: Sir, it will come back to the Tribunal, but what it is is the CMA has its own  
4 power to make costs in its favour under the Act. That's another appealable decision under  
5 s.192, but we would have to follow the process again to appeal that.

6 I think what's happened is some of the submissions in the jurisdiction questions might have  
7 been confused, but in our submission to you, we're dealing exclusively with the inter partes  
8 part, which is the bit that this Tribunal has the jurisdiction for.

9 THE CHAIRMAN: True, but---- okay. Sorry, I'm just trying to get it. The CMA has made  
10 an order in relation to its own costs against CityFibre.

11 MR ROBERTSON: Correct.

12 THE CHAIRMAN: The appeal from that determination by the CMA goes where?

13 MS MORRISON: It comes to the CAT.

14 MR ROBERTSON: To this Tribunal under a----

15 THE CHAIRMAN: This Tribunal?

16 MR ROBERTSON: No, not this----

17 THE CHAIRMAN: Another Tribunal.

18 MR ROBERTSON: A Competition Appeal Tribunal, not this.

19 THE CHAIRMAN: Right, not us.

20 MR ROBERTSON: It is not in these proceedings. It is a separate appeal.

21 THE CHAIRMAN: Yes. So you might be pursuing it in front of another Tribunal in the CAT----

22 MR ROBERTSON: Yes.

23 THE CHAIRMAN: -- another differently constituted Tribunal, an appeal in relation to -- which  
24 would involve the same sort of arguments that you're asking us to look at in relation to the  
25 sequencing of the CMA decision, in essence.

26 MR ROBERTSON: If an appeal's made, it may or may not. We haven't -- I have not been  
27 involved in formulating such an appeal. So those are matters that may come before  
28 a differently constituted Tribunal. I can't say anymore than that at this stage.

29 THE CHAIRMAN: How long do you have to formulate such an appeal if you're making it?

30 MR ROBERTSON: Two months.

31 THE CHAIRMAN: Okay. I'm just trying to avoid getting into -- I'm just trying to understand  
32 whether we're going to get into the position of making a decision for ourselves in relation to  
33 your costs as against Ofcom on an issue which involves the question of sequencing, to put it  
34 more widely. Why are your clients in the position they are in and us expressing a view on it

1           which is actually relevant to another appeal which will come in front of a different  
2           Tribunal?

3           Yes, okay. Well, it may be that there's no -- it may be there's no way of avoiding that  
4           scenario other than potentially to wait and see what, if anything, you do by way of  
5           an appeal.

6           MR ROBERTSON: Yes, sir.

7           THE CHAIRMAN: We may have to give some thought to that. But in any event, your primary  
8           point is that we can, irrespective of anything that you may be doing in relation to the CMA  
9           costs in front of some other body, determine the question of whether we should vary or set  
10          aside that order of 29<sup>th</sup> June.

11          MR ROBERTSON: Yes.

12          THE CHAIRMAN: Right, okay. I have got the point. Thank you.

13           Right, Mr Holmes. Thank you. Sorry for the delay.

14          MR HOLMES: Sir, while CityFibre is fresh in everyone's minds, if I might very briefly deal with  
15          that. In our submission, there should be no order for costs against Ofcom, CityFibre not  
16          having succeeded against Ofcom in relation to any of its grounds of appeal.

17          Those grounds of appeal which were determined, the price control matters, were decided in  
18          Ofcom's favour and against CityFibre. The grounds of appeal on market definition which  
19          overlapped with BT's grounds which were determined were withdrawn on the basis that  
20          CityFibre would pay Ofcom's costs. The other grounds of appeal on remedy are now  
21          academic and don't fall to be determined.

22          The situation is, therefore, in our submission, analogous with that of the  
23          Football Association Premier League in the *Pay TV* case. If I can take you to that paragraph  
24          of that ruling which you haven't yet seen, which is at tab 21 of the bundle. (After a pause)  
25          You see at para.69 they begin a discussion of FAPL's appeal. FAPL brought several  
26          grounds of appeal, one of which was determined against Ofcom and others of which were  
27          not determined. They didn't bring an appeal on the ground on which Sky succeeded.  
28          The Tribunal, as you will see from para.71, agreed that FAPL had a legitimate interest and  
29          that the appeal was conducted reasonably:

30           “However the fact remains that, of the six grounds of appeal advanced by FAPL, only  
31           one was determined by the Tribunal in the Judgment, and on that ground FAPL was  
32           unsuccessful. The other grounds, which related to the WMO remedy, did not need to  
33           be decided by the Tribunal and it is not known whether FAPL would have succeeded  
34           on any of them. The fact that the Judgment produced the outcome which FAPL

1           desired in bringing its own appeal is therefore entirely the result of Sky's appeal. In  
2           those circumstances we do not consider that it could be right to allow FAPL's appeal,  
3           or to order Ofcom to make a contribution to FAPL's costs."

4           So the appeal was, therefore, dismissed. As regards the costs, no order was made as to  
5           costs.

6           As regards the costs of the CMA proceedings, there's no good reason to disturb the order as  
7           to costs made by the Tribunal in June of this year. CityFibre advanced a price control  
8           appeal before the CMA which contended that the price control was at the wrong level  
9           because Ofcom had used the wrong costs measure. It was separate and independent of the  
10          market definition ground on which BT has since succeeded.

11          If CityFibre had succeeded, there would have been an adjustment in the level of the price  
12          control soon after April 2017. That would have served CityFibre's commercial objective,  
13          which was to raise BT's prices so as to lessen the price competition which it faced.

14          Equally, a precedent would have been established for subsequent price controls.

15          As it turns out, the appeal was not well-founded and was rejected by the CMA. Ofcom  
16          incurred costs in fighting the appeal and it's entitled to those costs.

17          As regards whether there has been a material change of circumstances within the *Tibbles*  
18          case, we say that it was entirely foreseeable at the time that the order was made that Ofcom  
19          might not succeed in defending its market definition. CityFibre did not propose either that  
20          the costs should be reserved or that there should be costs in the case, as it could have done.  
21          There is, therefore, nothing to bring the case within the principles enunciated in *Tibbles*.  
22          If I could briefly take you to *Tibbles*. It's at tab 17 of the authorities bundle. The facts of  
23          the case need not concern us. The principles deriving from the case law which  
24          Lord Justice Rix reviewed are set out at para.39 of the judgment.

25          You'll see at 39(1) that while the power to overturn an order or to change an order once  
26          made is broadly expressed in the Civil Procedure Rules as in the CAT's rules, it is subject to  
27          principled curtailment in order to avoid the undesirability of allowing litigants to have two  
28          bites at the cherry and the need to avoid undermining the concept of appeal.

29          If I could -- at the second roman numeral at para.39 Lord Justice Rix extracts the principles  
30          from the case law that normally it will only be appropriate to exercise the discretion to  
31          change an order in circumstances where there has been a material change of circumstances  
32          since the order was made or where the facts on which the original decision was made were  
33          innocently or otherwise misstated.

34          If I could just draw your attention also to (v):

1       “Questions may arise as to whether the misstatement (or omission) is conscious or  
2       unconscious; and whether the facts (or arguments) were known or unknown, knowable  
3       or unknowable. These, as it seems to me, are also factors going to discretion: but  
4       where the facts or arguments are known or ought to have been known as at the time of  
5       the original order, it is unlikely that the order can be revisited, and that must be still  
6       more strongly the case where the decision not to mention them is conscious or  
7       deliberate.”

8       We’re not suggesting there was any conscious or deliberate decision, but clearly  
9       an argument to reserve costs would have been available to CityFibre at the time that the  
10      Tribunal decided as it did.

11      For completeness, paras.41 and 42 record a further circumstance in which an order may be  
12      revisited. They observe that there is or there may be room:

13       “...for a prompt recourse back to a court to deal with a matter which ought to have  
14       been dealt with in an order but which in genuine error was overlooked (by parties and  
15       the court) and which the purposes behind the overriding objective, above all the  
16       interests of justice... would favour giving proper consideration to.”

17      At para.42 Lord Justice Rix emphasises, however, the word “prompt”:

18       “The court would be unlikely to be prepared to assist an applicant once much time had  
19       gone by.”

20      We say that applies in this case. The order was made now some months ago and there’s no  
21      basis to revisit it now.

22      So unless I can assist you further on CityFibre’s application, those are our submissions on  
23      that.

24      Turning to BT’s costs application, may I begin by just highlighting some points of common  
25      ground between BT and Ofcom in relation to the Tribunal’s task in determining costs.

26      First, r.104 confers a wide discretion on the Tribunal to make such order as to costs as it  
27      thinks fit.

28      Second, the factors listed in r.104 are not exhaustive. The Tribunal may take all relevant  
29      considerations into account, including, as Mr Palmer fairly accepted, conduct of the parties  
30      during the prior administrative stage.

31      Thirdly, there is under r.104 no equivalent of the general rule applicable under the  
32      Civil Procedure Rules that the unsuccessful party will be ordered to pay the costs of the  
33      successful party. We say that that point distinguishes the cases to which Mr Palmer referred  
34      which have been decided under the Civil Procedure Rules, in particular the

1      *Everything Everywhere* case in which he observed a costs order was made. The High Court  
2      and the Court of Appeal in determining costs in those cases were bound to follow the  
3      general rule which is set out in the Civil Procedure Rules.

4      Fourthly, the Tribunal has taken the sensible and reasonable approach of developing broad  
5      principles to structure the exercise of its discretion in particular categories of case. These  
6      principles include guidance as to the starting point for the Tribunal's assessment. I would  
7      emphasise that where there is a starting point, it is certainly not the end point. The Tribunal  
8      may decide to depart from it.

9      THE CHAIRMAN: Yes.

10     MR HOLMES: The fifth point is that BT accepts that in one particular category of s.192 appeals,  
11     the correct starting point is that costs should not ordinarily be awarded against Ofcom in  
12     circumstances where it has acted reasonably and in good faith, but they say that this case  
13     does not fall within that category, that category being confined to dispute resolution. I'll  
14     come in a moment to what we say is the appropriate starting point.

15     Just to reinforce the point that the starting point may be departed from, that it's not the end  
16     point, one sees this from the *T-Mobile* case to which Mr Palmer took you, which is a dispute  
17     resolution case and is, therefore, within the scope of the general starting point which I've  
18     just described. Costs were awarded in that case in circumstances where there was no  
19     unreasonableness, taking into account all of the considerations and the serious errors which  
20     had been identified.

21     So it's common ground that the starting point is not the ending point, whether or not the  
22     starting point is as BT says and as was set out in the *Pay TV* case or as Ofcom contends.  
23     Likewise, if it were accepted that the starting point prior to *Pay TV* did not reveal  
24     a consistent practice that costs should not be awarded against Ofcom, it's nonetheless  
25     striking that in each case, in the exercise of the Tribunal's discretion, the decision was taken  
26     in the round that a costs order against Ofcom would not be the appropriate order to make.  
27     The sixth point is that the relevant considerations for the Tribunal to consider in the context  
28     of a s.192 appeal include the specific statutory context and the degree to which an award of  
29     costs would expose Ofcom to a chilling effect. One sees that in the *Pay TV* judgment at  
30     paras.15, 50 and 52. I don't know if it would assist the Tribunal to see those again. I think  
31     you were shown at least one of them by Mr Palmer.

32     THE CHAIRMAN: Sorry. I mean, you're saying that one relevant consideration could be the  
33     chilling effect of an order for costs.

1 MR HOLMES: Indeed, and that the statutory context is also a relevant consideration, as the  
2 Tribunal recognised.

3 THE CHAIRMAN: Right. In other words, it's not spelt out in 104(4), but you're saying it  
4 appears to be a possible effect.

5 Now, just to be clear about this, how do you take into account the chilling effect of an order  
6 for costs? Is it that you take it into account just generally or do you have to do it sort of  
7 a little bit more specifically by reference to some factor?

8 MR HOLMES: Well, sir----

9 THE CHAIRMAN: Because a lot of the statements are sort of there shouldn't -- to the effect, and  
10 I very loosely paraphrase, there shouldn't be, as it were, two rules, one for regulatory bodies  
11 and another rule for ordinary litigants or for litigants. So if that's right, how do you take  
12 into account the chilling effect? How specifically do we give voice to that?

13 MR HOLMES: In my submission, it's relevant in two ways. One is it's relevant to determining  
14 the appropriate starting point, the position of principle on which Ofcom and BT differ.  
15 There it's a general consideration. It's not a consideration by reference to the specific case.

16 THE CHAIRMAN: Right.

17 MR HOLMES: So when determining what as a matter of principle is the starting point in s.192  
18 appeals, one relevant consideration is the risk that a public authority, in this case Ofcom,  
19 have been deterred from taking decisions in the public interest.

20 THE CHAIRMAN: One possibility is that it goes to the starting point question.

21 MR HOLMES: The starting point. Another is that in an individual case, the Tribunal should  
22 when considering the scale of the costs being sought take account of the impact that that  
23 might make.

24 THE CHAIRMAN: Right. Now, it's in that latter case I was really directing my question, not the  
25 former. So what do the Tribunal just do? Say, "Well, that seems to be an awful lot for  
26 a public body to bear, so we'll just sort of cut it down", or does it come in in a more  
27 nuanced or identifiable way? How do we take it into account?

28 MR HOLMES: Well, it can't be a determinative factor, but it's one relevant factor.

29 THE CHAIRMAN: But how? Let me assume you're right and it's a relevant factor. But what  
30 I'm trying to get you to help me with is okay, but how do I or how does the Tribunal use it?  
31 Do we just say, "Well, it seems -- that bill seems a bit heavy for a regulator to bear, so we'll  
32 just lop a bit off", or do we have to be -- does it have to have some tangible connection to  
33 some other factor that we're dealing with?

1 MR HOLMES: I won't go that far, sir. What I would say is that if you're finely balanced as to  
2 whether to award costs, taking into account the other case specific factors or to award  
3 a particular component of costs, it would be relevant to consider the impact of the overall  
4 bill upon Ofcom in deciding on which side to fall, on which side to err.

5 THE CHAIRMAN: You see, I could sort of understand, for example, you -- to take a thought that  
6 had occurred to me, in order to -- assume for the purpose of this argument we have already  
7 decided that the starting point is loser pays.

8 MR HOLMES: Yes.

9 THE CHAIRMAN: Okay. But one of the relevant factors that we're actually definitely looking  
10 at is whether a party succeeds on part of its case even if that party has not been wholly  
11 successful or in other words, we're reflecting issue-based or issue by issue. How many  
12 issues did each side win on, let's say, which is something that's potentially relevant here.

13 MR HOLMES: Yes.

14 THE CHAIRMAN: Might it be said that, for example when deciding the extent to which we  
15 reflect relative success and relative failure in terms of issues and time, that we should take  
16 into account, as it were, the chilling effect which would be suffered by a regulator if people  
17 who challenge regulatory decisions were, as it were, encouraged to use a scattergun, I think  
18 was the expression I used earlier.

19 MR HOLMES: Yes.

20 THE CHAIRMAN: In other words, that we could take into account in that respect the chilling  
21 effect of a large costs award, i.e. making the winner who has fired a scattergun and won on  
22 one point but lost on a number of others recovering all of their costs, whereas we could  
23 reflect that more subtly if we were prepared to adopt a more segmented approach issue by  
24 issue. In a sense, that I could understand, in a sense, potentially.

25 MR HOLMES: I gratefully adopt that argument.

26 THE CHAIRMAN: I'm not saying it's my view. You know, it's always dangerous to agree with  
27 judges who throw out comments because it may well be that they realise in the fullness of  
28 mature consideration that they weren't any good. But let's assume that that might be at  
29 least a way of sort of giving some voice.

30 What I'm struggling with as a more general proposition is the idea that because you are  
31 a regulator, because you might face a large costs bill, that we have a more roving discretion,  
32 which I think is what's sort of being said. We have a more roving discretion to do very  
33 broad things about the bill that you should face or whether indeed to award costs or at all.

34 MR HOLMES: Yes.

1 THE CHAIRMAN: Because I feel that's quite a difficult proposition to square with some of the  
2 comments that we have already seen in the authorities about not treating regulators doing  
3 their job any different from the regulators who are entitled to challenge and have to  
4 challenge to vindicate their rights.

5 Sorry, that was a very long sort of question, but I hope I have at least raised it.

6 MR HOLMES: No. No, it's a very helpful clarification.

7 So if one looks at the *Sky* case to see how the consideration was applied -- so this is the  
8 *Pay TV* costs ruling at tab 21.

9 Let me first, while we're in it, just show you where the principle -- the consideration was  
10 recognised as relevant notwithstanding the starting point. One sees it at para.15:

11 "Relevant consideration whether and if so to what extent in any particular case the  
12 possibility of a substantial award of costs is likely to have a chilling effect."

13 It's picked up again at----

14 THE CHAIRMAN: You see, there they're dealing with it as part of the question about whether,  
15 as a general principle -- in other words, really what I call potentially the starting point.  
16 I mean, it's really sort of what he's saying there is----

17 MR HOLMES: I'm not sure I read it -- certainly relevant. I think he's saying that it's a relevant  
18 consideration in the individual case. He's in the process here of concluding that there is no  
19 consistent practice in support of a starting point that Ofcom should only be liable for its  
20 costs.

21 THE CHAIRMAN: Yes, sorry. In this para.15, the first bit says it's a relevant consideration.  
22 The second bit says but it's not so as to displace the general principle that an adverse costs  
23 order can be made.

24 MR HOLMES: No.

25 THE CHAIRMAN: So it's really expansion of the first bit that I would be interested in.

26 MR HOLMES: Yes. In terms of the Tribunal's own assessment, one sees at para.64 you can see  
27 that the Tribunal did apply it as kind of a cross-check about the overall level.

28 THE CHAIRMAN: Yes, okay, but there they just said it will be substantial, but it won't carry  
29 significant risk of a chilling effect.

30 MR HOLMES: Yes.

31 THE CHAIRMAN: Okay. So are you saying that I can read or we can read into that that if  
32 the number had been bigger, what, they might have just cut it down?

33 MR HOLMES: They might have, for example, in considering -- I mean, your example is a good  
34 one of how it would be relevant to their individual assessment in deciding whether to apply

1       an overall decision that costs should follow the event in relation to the appeal as a whole or  
2       whether to look in a more nuanced way at individual points which arise.

3 THE CHAIRMAN: Right.

4 MR HOLMES: That does appear (inaudible) which the point attaches.

5 THE CHAIRMAN: What I'm trying to tease out is whether you're suggesting to us that this  
6       chilling effect or the way that we give effect to this chilling effect is without attaching it in  
7       any way, like I did in that argument, simply to say if we think the number's too big, you  
8       will be chilled. Therefore, we knock it down. So is it as broad as that?

9 MR HOLMES: No. I think if one accepts that the starting point is loser pays, then it's not so  
10      broad that one can simply in an unprincipled way deduct costs. One needs to have some  
11      basis on which costs are to be adjusted in an individual case.

12 THE CHAIRMAN: So have regard to the chilling effect, but you need to bring it into a more  
13      specific context, I think is what you're saying.

14 MR HOLMES: Yes, subject to the prior point of principle where it arises in all cases.

15 THE CHAIRMAN: Yes, right. Okay.

16 MR HOLMES: So the other relevant feature to consider is the statutory context which will  
17      inform the approach to costs in an individual case as well as more generally.  
18      Considering the statutory framework in this context, we would highlight that this is  
19      a market review in which Ofcom is required to define this particular market and to assess it  
20      for SMP and to impose remedies where SMP is found.

21      Another important relevant feature of the statutory context is that this is a merits appeal.  
22      That's not true of all of the cases before the Tribunal. The merger cases and the market  
23      investigation cases by reference to which the Tribunal reached its conclusion as to the  
24      starting point in *Pay TV* are judicial reviews which typically are two to three day affairs.  
25      They are short and they only apply only judicial review principles.

26 THE CHAIRMAN: But the point that's made against you, I think broadly speaking, in relation to  
27      that argument is this: you, in our view rightly, said that we should not overturn Ofcom's  
28      decision unless we were satisfied that Ofcom erred. In other words, that there was  
29      something actually materially wrong with what Ofcom did----

30 MR HOLMES: Yes.

31 THE CHAIRMAN: -- we shouldn't overturn it simply because we took a different view on the  
32      merits because on the merits doesn't in fact allow you to do that. It's said in this case if you  
33      set, for your own protection, the review standard high, I mean, it's effectively like a judicial  
34      review if you lose.

1 MR HOLMES: Yes, I understand that point, but it still goes well beyond a judicial review to the  
2 extent that new evidence is admissible upon appeal. So in determining whether Ofcom has  
3 made a factual error which vitiates or could vitiate its conclusion, there is something -- it's  
4 quite a novel and a *sui generis* creature this jurisdiction because the Tribunal can admit  
5 evidence which wasn't before the decision maker.

6 THE CHAIRMAN: True, although it might be said, might it not, that in this particular case you  
7 might well have failed if this had been a judicial review.

8 MR HOLMES: Might well have failed if this had been a judicial review?

9 THE CHAIRMAN: Yes, if we had been applying the judicial review standard, the result might  
10 have been -- might well have been the same.

11 MR HOLMES: That's true. It would have been arrived at on the basis of a significantly shorter  
12 hearing with significantly less cost.

13 THE CHAIRMAN: But the principle -- maybe that goes back to your chilling point, but the  
14 principle of approach is quite analogous to a judicial review, in effect.

15 MR HOLMES: So principle is analogous to a judicial review. Well, in relation to evidence, it's  
16 clearly not.

17 THE CHAIRMAN: Well, a public body. A public body, and there are plenty of them out there  
18 who perform statutory functions and have to, as it were, step up to the plate and make  
19 decisions, regulatory decisions, get judicially reviewed and have to pay. If they are found to  
20 have erred in the sense of judicially review, then the judicial review succeeds.

21 MR HOLMES: Yes. We now----

22 THE CHAIRMAN: Why is Ofcom in any particularly different position in relation to this  
23 statutory function and indeed this decision?

24 MR HOLMES: Well, we're now -- we're turning to the question of principle, if I understand your  
25 question rightly, about whether the starting point should be as it was determined in *Pay TV*.  
26 The point I'm making here is that it's common ground -- and I'll come to that.

27 THE CHAIRMAN: Okay.

28 MR HOLMES: The point I'm making for the moment is that it's common ground that the  
29 statutory context can be relevant.

30 THE CHAIRMAN: Well, it can be.

31 MR HOLMES: To make concrete how it might apply, along similar lines to the argument which  
32 you were advancing a moment ago about a shotgun approach, in this case when the  
33 Tribunal is considering how to deal with an error which arose as a result of material  
34 provided during the administrative process by the appellant which led Ofcom to making the

1 stand as to the extent of the number of marginal, ultra-marginal, consumers who might  
2 switch in response to a SSNIP.

3 When considering what the bearing that should have upon costs, it is relevant to look at the  
4 statutory framework and to say, well, this appeal goes beyond a judicial review. It goes  
5 beyond an appeal in many contexts to the extent that the Tribunal can hear material which,  
6 through no fault of Ofcom's, is not before Ofcom at the time and can reach a decision that  
7 Ofcom erred in fact on the basis of that material.

8 That is an example of how the statutory framework can and should inform your assessment  
9 of costs in an individual case, quite distinct from the point of principle as to the relevant  
10 starting point.

11 THE CHAIRMAN: Okay.

12 MR HOLMES: So that was my attempt to outline the points that were common ground and to  
13 build upon them to make certain submissions, but there is, as I say, an important distinction  
14 of principle between Ofcom and BT.

15 BT relies upon the *Pay TV* case. We accept that that point has been determined in that case  
16 against Ofcom. Ofcom's position remains the one which it advanced in *Pay TV*.

17 You will have seen from the skeleton argument that Ofcom applied successfully for  
18 permission to appeal against the *Pay TV* judgment. Permission was granted by the  
19 Court of Appeal. The appeal was not heard only because the Tribunal was overturned on  
20 the substance of its decision in *Pay TV* with the consequence that the costs order which was  
21 the subject of Ofcom's appeal was set aside in any event. Therefore, the appeal was  
22 withdrawn by consent on the basis that it had become academic.

23 THE CHAIRMAN: Sorry, just let me make sure I have understood that. You succeeded on  
24 appeal? Sorry, there was----

25 MR HOLMES: The decision -- the substantive decision of the Tribunal which led to the costs  
26 ruling that you have seen was the subject of an appeal of substance.

27 THE CHAIRMAN: Yes.

28 MR HOLMES: As it happens, the appeal was brought by BT with Ofcom intervening in support.

29 THE CHAIRMAN: Okay.

30 MR HOLMES: But the appeal succeeded and the Tribunal's order was set aside -- as to costs was  
31 set aside.

32 THE CHAIRMAN: Right. So the Court of Appeal never got to look at the costs question.

33 MR HOLMES: It never went on to consider the costs issues which were the subject of a pending  
34 appeal.

1 THE CHAIRMAN: Right, but what I was trying to be clear about, which I wasn't sure, the  
2 question of whether there should be an appeal on the costs issue alone, i.e. separately, was  
3 that the subject of a separate grant of permission to appeal?

4 MR HOLMES: Yes, it was a separate appeal which was separately permitted to proceed on the  
5 basis that it raised a point of general importance.

6 THE CHAIRMAN: Okay, right.

7 MR HOLMES: So where I was getting to with that is that Ofcom doesn't accept that *Pay TV* is  
8 the correct starting point. It appealed the decision and the appeal would have been heard  
9 had the order, which was based on the reasoning you have been shown, not been set aside.  
10 So we do regard it as incorrect. We accept that for you to proceed differently, you would  
11 have to be convinced that the Tribunal was incorrect.

12 THE CHAIRMAN: Yes.

13 MR HOLMES: Now, I'm conscious of the time, sir, and I don't propose to take you afresh  
14 through all of the case law which preceded *Pay TV*. I simply observe that since *Pay TV*, the  
15 position really hasn't moved on. We are still in the position that we were at the time when  
16 we appealed against the *Pay TV* judgment.

17 It will depend upon instructions, of course, but Ofcom -- this is an important point of  
18 principle for Ofcom which it will then seek to pursue by way of further appeal.

19 THE CHAIRMAN: Although curiously, this is probably one of the last on the merits appeal.

20 MR HOLMES: I'm very glad you raised that, sir, because we saw with interest those paragraphs  
21 of the judgment. It is true that the standard of review has been amended by the  
22 Digital Economy Act and that now we get----

23 THE CHAIRMAN: Broadly speaking, it's a judicial review standard.

24 MR HOLMES: Well, save, sir----

25 THE CHAIRMAN: Possibly.

26 MR HOLMES: Save, sir, that it needs to be determined in a manner consistent with Art.4 of the  
27 Framework Directive, which requires that the UK guarantee an appeal to an independent  
28 body in which due account is taken of the merits.

29 THE CHAIRMAN: Yes, of merits. Right.

30 MR HOLMES: So it won't be the general judicial review case law which applies. It will be the  
31 very specific judicial review case law, some of which you saw, sir, when you were  
32 preparing the judgment in the *T-Mobile* case, in which the merits do require to be taken into  
33 account.

1 So this is not -- this hasn't become an academic point. It's a point that is of continuing  
2 significance and relevance and importance to Ofcom.

3 THE CHAIRMAN: So you may or may not agree with the last sentence of para.82 of the  
4 judgment, I think is what you're essentially saying.

5 MR HOLMES: I'm so sorry. Where are you, sir?

6 THE CHAIRMAN: Paragraph 82 of the judgment, of the decision which we handed down----

7 MR HOLMES: Yes.

8 THE CHAIRMAN: -- where we just said quite broadly that it would be the same principles as  
9 applied by a court in an application for----

10 MR HOLMES: Well, no, it's strictly accurate, sir, otherwise we would have corrected you in our  
11 proposed corrections.

12 THE CHAIRMAN: All right.

13 MR HOLMES: But the principles that a court would apply in a judicial review where Art.4 was  
14 in play are not the same as those which would apply in another judicial review.

15 THE CHAIRMAN: Phew. Thank goodness for that. Right, okay. We got one thing right.

16 MR HOLMES: You see the point, sir. This is a point that is of continuing significance or it could  
17 be as far as Ofcom is concerned.

18 THE CHAIRMAN: It could be.

19 Who gave permission, just out of interest, to----

20 MR HOLMES: Lord Justice Lewison. We can provide you with the order, if that would be  
21 useful. I do not know if it found its way into the bundles.

22 THE CHAIRMAN: Well, it probably would be helpful if you could, if you've got a copy. That's  
23 all.

24 MR HOLMES: Yes, overnight, sir, we'll get it.

25 THE CHAIRMAN: Anyway, the point is you, in any event, say -- as I recall, you accept that we  
26 would have to be, I think you said, convinced that Mr Justice Barling or the Tribunal in  
27 *Pay TV* was incorrect.

28 MR HOLMES: Yes, that's the (inaudible) standards.

29 THE CHAIRMAN: That's the task which we will review. If we're not convinced that he was  
30 incorrect, we would follow his approach or follow the Tribunal's approach.

31 MR HOLMES: Yes.

32 THE CHAIRMAN: But you have fully argued before us the same arguments that would have led  
33 or did lead Lord Justice Lewison to give permission. Doubtless you might wish to appeal  
34 the costs order on similar grounds.

1 MR HOLMES: Yes, sir. When you say that we've fully articulated our position, we have done  
2 so as fully as is reasonable and proportionate in the context of a costs application.

3 THE CHAIRMAN: Okay. No, that's fine. So that if you do decide -- well, whatever we do, if  
4 we're against you and you want to appeal, you have preserved the argument for the  
5 Court of Appeal.

6 MR HOLMES: Indeed, sir. We would apply to you first and then we'd renew before the  
7 Court of Appeal if you were minded to go in a different direction from  
8 Lord Justice Lewison, to put the matter entirely neutrally.

9 Now, in view of the time, I do not propose, sir, to take you through the arguments that we  
10 have advanced. In very brief summary, we do not accept that a consistent practice had not  
11 coalesced.

12 THE CHAIRMAN: Yes.

13 MR HOLMES: We do not accept that the number was confined on its face to s.185 dispute  
14 resolution appeals. We think that the starting point should not be analogised with that of  
15 a judicial review using the *Merger Action Group* line of cases. This is a very different  
16 statutory setting.

17 THE CHAIRMAN: Yes.

18 MR HOLMES: There are very important public interests at stake. Ofcom is a repeat player that  
19 has to determine this against very well-resourced appellants. There are parties on each side  
20 in nearly every case which Ofcom decides. It's not only disputes where that situation  
21 arises.

22 Indeed, the Tribunal may recall that the BCMR the last time around was the subject of  
23 an appeal from disappointed communications providers who wished Ofcom to have  
24 imposed a dark fibre remedy. BT, of course, in this case has made no bones about the fact  
25 that the main focus of its appeal was to avoid a dark fibre remedy.

26 So one way or the other, whether the appeal focused on the market definition or the SMP  
27 assessment or whatever other feature was detected as a point of weakness in Ofcom's  
28 substantial and wide-ranging analysis, there would be an appeal.

29 THE CHAIRMAN: Okay. Anyway, now----

30 MR HOLMES: So perhaps turning then to the specifics of this case, if I may.

31 THE CHAIRMAN: Yes.

32 MR HOLMES: We say, sir, that there are three particular factors in this case which merit either  
33 no order for costs or a substantial reduction in the costs to be awarded to BT. The first is

1 that BT brought a very wide-ranging case against Ofcom's decision and it lost on a number  
2 of sub-issues which took up substantial time and costs.

3 You have seen the table on p.14 of our skeleton argument. The point was taken against us  
4 that this did not identify separately issues two and issues three, but in truth, issues two and  
5 issues three consisted of the sub-issues which are set out there.

6 The Tribunal, like the High Court, has in the past made deductions from the costs of  
7 a successful party to reflect the fact that it lost on certain issues. We would urge the same  
8 approach upon the Tribunal in this case.

9 Moreover, the remedies issues have not been and will not now be determined in the context  
10 of these proceedings. The Tribunal is not in a position to form any view as to their merits.  
11 Some of them may well become relevant in subsequent proceedings, in which case they will  
12 not have been wasted and will be the subject of a costs determination in due course.

13 If I can take to you the *Pay TV* case again, in that case, in our submission, a similar position  
14 arose. Sky prevailed on the basis of the factual evidence about whether it had refused to  
15 supply its channels. Indeed, that was a much cleaner win than the one which BT has  
16 sustained in this case. But its detailed arguments about the proportionality and design of the  
17 remedy were not determined by the Tribunal and the Tribunal decided not to award costs in  
18 respect of those grounds.

19 So returning to tab 21, if you look at para.62 of the ruling on p.23 you see there that:

20 "In the light of the Tribunal's findings in respect of ground 2 [the ground on which  
21 Sky succeeded], we did not need to form any concluded view as to the respective  
22 merits of the parties' arguments on grounds 3 and 4."

23 Equally, they formed no view as to whether those were disproportionate or unreasonable, as  
24 Ofcom had contended:

25 "Nevertheless, and despite Sky's overall success in the appeal, we believe that in all  
26 the circumstances it would not be appropriate to require Ofcom to bear any of Sky's  
27 costs of these undecided issues. We are therefore of the view that the costs of  
28 grounds 3 and 4 should lie where they fall."

29 We would urge the same approach upon you in relation to the remedies grounds which  
30 weren't determined in this case.

31 The second factor on which we place reliance in this case concerns product market  
32 definition and the fact that the sustainability of Ofcom's decision was undermined by  
33 erroneous information provided in particular by BT as the appellant.

1 Now, Mr Palmer took you to my submissions in closing. It's always a painful thing to be  
2 reminded of the transcript and to see one's words on the page. The proposition that I was  
3 advancing there was that there was evidence from a number of sources on which Ofcom  
4 placed reliance. I do not resile from that at all.

5 But as matters have turned out and given the Tribunal's conclusions upon other items of  
6 evidence which Ofcom regarded as material but which the Tribunal has formed a different  
7 view about, the materiality of the number of switchers did become a very significant  
8 consideration, as the Tribunal recognised in the judgment.

9 THE CHAIRMAN: Sorry, wait a minute. I'm not quite -- you have got to be careful how you  
10 phrase that.

11 MR HOLMES: Yes.

12 THE CHAIRMAN: Because the stated basis for Ofcom's decision, i.e. the one that Ofcom placed  
13 primary reliance upon, had fallen away, namely the evidence from BT's internal documents  
14 and CP discussions had fallen away, but because Ofcom had been found to be correct in  
15 other aspects of its review, the question arose, as we said at the start of the judgment, as to  
16 whether Ofcom's decision could be supported on other grounds than were in fact stated,  
17 because that's -- I think as we said at the start, you don't as an appellant succeed just by  
18 demonstrating that something went wrong in Ofcom's reasoning.

19 MR HOLMES: No, indeed.

20 THE CHAIRMAN: You actually have to show that the decision was wrong.

21 MR HOLMES: Yes.

22 THE CHAIRMAN: So if it can be supported on grounds other than are stated, it would survive.

23 MR HOLMES: Yes.

24 THE CHAIRMAN: I think it was perhaps primarily in that regard that we looked at the question  
25 of whether, as it were, you could pass the SSNIP test or we could see that there was  
26 evidence that if you had applied the SSNIP test, you would have reached an appropriate  
27 result.

28 MR HOLMES: I understand the distinction you're drawing, sir, yes.

29 THE CHAIRMAN: I don't think anywhere it was suggested that in fact at the time of Ofcom's  
30 decision there had been that sort of analysis. Your defence, as it were, of the decision on  
31 the basis that it wouldn't have made a difference I think was primarily effectively after the  
32 event, having been presented with the new number or saying, "Well, essentially, we can  
33 support this decision in any event".

1 MR HOLMES: Yes, sir. The 20 per cent figure, which was the one provided during the  
2 administrative process, was one that Ofcom did place some reliance upon in the decision.

3 THE CHAIRMAN: Yes, because in a sense, it was -- I think as I described it earlier, to  
4 an economist it seemed to be a slam dunk if you get told 20 per cent is your margin or  
5 cohort.

6 MR HOLMES: Yes.

7 THE CHAIRMAN: Of course you're -- in a sense, it's just you -- I think as we said, Ms Curry  
8 essentially said that was -- off the back of her head, she knew 10 per cent was about  
9 the number. If you're told 20 per cent, it's hey, no problem.

10 MR HOLMES: Yes.

11 THE CHAIRMAN: But when you say the number came more into focus, it came more into focus  
12 in the proceedings, the actual number. Whether you could support the SSNIP analysis was  
13 more, as it were, in this court or in this room rather than anything that went on at Ofcom at  
14 the time, surely.

15 MR HOLMES: Of course. You mean the revised number, the number once it had been corrected  
16 during the appeal process at the reply stage in January 2017.

17 THE CHAIRMAN: Yes, and what's said against you on that is at an early stage in the  
18 proceedings, knowing that the number you'd been given was wrong, the 20 per cent----

19 MR HOLMES: At an early stage of the proceedings?

20 THE CHAIRMAN: Well, early stage of these proceedings.

21 MR HOLMES: These proceedings, sir.

22 THE CHAIRMAN: Okay. All right, reply.

23 MR HOLMES: It was in reply evidence for the first time, which was in mid January 2017, about  
24 twelve weeks before the trial, sir, that the evidence first emerged that the 20 per cent figure  
25 was incorrect by that time.

26 THE CHAIRMAN: Right, I take back earlier.

27 MR HOLMES: By that time----

28 THE CHAIRMAN: Before a lot of the cost was incurred of the hearing and the actual trial.  
29 I think it's said against you that you had, as it were, twelve weeks before we spent a lot of  
30 the money in actually running the thing up to trial and litigating it. The true number  
31 there----

32 MR HOLMES: Well, what we had, sir, was a witness statement from Mr Logan in which he  
33 identified a different figure on the basis of different data, the data now, not the data -- or the

1 data at a different point in time from that which was used to generate the 20 per cent figure.  
2 So it was not the same data set which was being differently cut.

3 It emerged only when Mr Logan was in the witness box being cross-examined by me that  
4 you could reconcile that figure with the figure in the Analysys Mason evidence and that the  
5 same proportion of marginal customers existed at the time when Ofcom was -- when that  
6 evidence was compiled and which Ofcom had before it when it was reaching its decision.  
7 We had no way at that point of knowing that there was any possibility of reconciling that  
8 with the Analysys Mason -- the new data with the Analysys Mason data.

9 So it was not at all clear to us that the change -- the change could have been as a result of  
10 a large number of marginal users with multiple circuits switching as a result of the  
11 10G EAD service which had been introduced between the time when the Analysys Mason  
12 data was put forward and the time when BT did its new cut of the evidence in January 2017.  
13 This was a point that Ofcom made in its skeleton argument. It was only in the witness box  
14 that Mr Logan revealed -- it was late into the cross-examination, if you will recall, sir, that  
15 Mr Logan revealed that actually they had been doing some playing around. They still had  
16 the data set that Analysys Mason were working from and they had done the cut again. They  
17 could, therefore, exclude the explanation which Ofcom identified in its skeleton argument  
18 as a possible reason why the figure was a lot lower than the 20 per cent figure by the time of  
19 BT's reply evidence.

20 While it's perfectly legitimate for BT to bring forward new evidence and for that to be  
21 considered by the Tribunal, where Ofcom can't be faulted is if the change of the data is  
22 simply as a result of market conditions moving on from the time when Ofcom was defining  
23 the market because of people moving from two times 1G to 10G during the market review  
24 period.

25 So I don't accept that there was really a clean point at which Ofcom could have known that  
26 it should compromise these proceedings prior to the commencement of the trial. I really  
27 don't accept that at all.

28 Taken at its highest, it would be a submission for allowing BT its costs from the time when  
29 it served its reply evidence, but for the reason I've given, I don't accept that that would be  
30 a reasonable approach to take because the reply evidence that was put forward by BT and  
31 by another CP was extremely short, brief and not sufficiently explanatory to permit Ofcom  
32 to form a view as to the appropriateness of compromising the proceedings.

33 THE CHAIRMAN: Now, that's one area where you say that, as it were, a loss was -- your loss  
34 was attributable to BT's conduct or BT's information.

1 MR HOLMES: Yes, that's my second point. So my first point is there were some wins and there  
2 were some losses.

3 THE CHAIRMAN: You say you could not be faulted for, as it were, continuing to investigate it  
4 at trial.

5 MR HOLMES: Yes.

6 THE CHAIRMAN: Right.

7 MR HOLMES: Well, we did. We immediately sought to clarify the nature of the unexplained  
8 evidence provided by Mr Logan. That's set out at para.38 of our skeleton argument. There  
9 was correspondence. I remember you asking me, sir, very fairly, whether there was  
10 correspondence in relation to the new data.

11 THE CHAIRMAN: Right, and that would go to, as it were, reduce to some extent the incidence  
12 of costs, assuming we're into a situation of starting point.

13 MR HOLMES: Yes.

14 THE CHAIRMAN: We've put that argument to one side. This is to deal with how the starting  
15 point being that loser pays, that might be ameliorated on the facts of this case, you would  
16 say.

17 MR HOLMES: Yes.

18 THE CHAIRMAN: You would have to accept, would you not though, that there were a number  
19 of issues upon which you did lose in a way that was unaffected by the material that you  
20 were----

21 MR HOLMES: Yes, of course, sir. The judgment speaks for itself, yes.

22 THE CHAIRMAN: So your submissions sort of suggest that it is either no order or a reduced  
23 order for costs is what you say is appropriate. The no order must be on the basis of the  
24 starting point being different, I suspect.

25 MR HOLMES: I think that's fair, sir, yes.

26 THE CHAIRMAN: Because I don't think you're suggesting -- sorry, tell me whether you are  
27 suggesting -- that if I was to start from the proposition or if we were to start from the  
28 proposition that loser pays, the sum total of all the factors that you draw to our attention  
29 would be in fact to reduce it to no order as to costs.

30 MR HOLMES: No, sir. In considering the extent of the adjustment, I would make simply this  
31 point. It's relevant to consider not only the costs that would be disallowed from BT, but  
32 also the cost which Ofcom incurred in relation to those issues which were lost. That might  
33 result in a greater reduction than would result if one simply removed particular components  
34 of BT's costs insofar as they were referable to particular topics on which they lost.

1 THE CHAIRMAN: Yes.

2 MR HOLMES: The third point, sir, is that significant costs were expended by both parties as  
3 a result of the inappropriate economic expert evidence filed by BT and by BT's -- or BT's  
4 irrelevant prolix and argumentative factual evidence. I do not need to labour this point.

5 The Tribunal has already expressed a view and it's familiar with the material. It was at the  
6 hearing.

7 I would stress two points. First, this is not a matter which can simply be left for detailed  
8 assessment. This Tribunal has a much better perspective on the evidence, having heard the  
9 case, than a costs judge could ever hope to form even with the benefit of the Tribunal's  
10 adverse comments.

11 THE CHAIRMAN: But where this is going is you're saying it doesn't do adequate justice to it to  
12 simply disallow Dr Basalisco's costs or disbursements. It goes further than that, you say,  
13 because it goes into dealing with his material and dealing with the factual evidence, which  
14 was quite argumentative in places.

15 MR HOLMES: Yes, and just to develop that last point, it wasn't visible at the hearing, but  
16 considerable effort had to be spent understanding the factual evidence, working out how it  
17 related to the appeal and deciding whether it was safe or not to cross-examine.

18 Where there are a number -- you know, a very, very large number of claims which are  
19 largely detached or arguably detached from the Notice of Appeal, unless the Tribunal was  
20 going to go through the arduous process of a blue pencil exercise of a kind which I think at  
21 one stage it canvassed as a possibility with Mr Beard, it was necessary for Ofcom's counsel  
22 to take a view about what to cross-examine on and what not to cross-examine on.

23 I can only speak from personal experience, at the risk of being witness at my own hearing  
24 that I myself attended. It was a tremendously and time consuming process picking through  
25 those statements, working out what we had to put and what we did not have to put. That's  
26 before one comes to the testing of Dr Basalisco's economic evidence, which was plainly  
27 necessary because it was relevant, even if it was in places inappropriate.

28 So my point is that there were considerable costs incurred by Ofcom in dealing with the  
29 expert evidence and the factual evidence.

30 Even if you disallowed all of the legal costs that BT expended on preparing and handling  
31 these witnesses, preparing these witness statement, handling these witnesses, there would  
32 still be a pot of wasted costs that Ofcom incurred in dealing with this appeal because of  
33 deficiencies which should have been apparent from the outset.

34 THE CHAIRMAN: Yes.

1 MR HOLMES: I think you probably have this point already, sir, but we don't regard BT's  
2 proposed adjustments as in any way sufficient to address this.

3 THE CHAIRMAN: Yes.

4 MR HOLMES: You made the point in argument with Mr Palmer that the 10 per cent discount of  
5 internal costs doesn't reflect the external costs that were incurred by BT or the internal and  
6 external costs that were incurred by Ofcom in connection with the factual evidence.

7 Equally, Dr Basalisco's disbursements don't reflect either BT's legal costs, including the  
8 attendance of BT's and Ofcom's counsel at the hearing.

9 Therefore, a more significant adjustment is appropriate. In our submission, one way in  
10 which the Tribunal could fairly do that, given its wide discretion, would be to take it into  
11 account alongside the points on which BT lost as part of the adjustment to the overall level  
12 of costs and disbursements that may be claimed as a percentage before the costs judge.

13 THE CHAIRMAN: Yes.

14 MR HOLMES: Sir, unless I can be any further assistance, those are----

15 Oh, yes. I'm so sorry. I'm reminded by Mr Vinall that it was rather ambiguous from BT's  
16 skeleton argument whether it was seeking costs on the standard or on the indemnity basis  
17 because the order that was proposed referred only to the award of reasonable costs as  
18 opposed to reasonable and proportionate costs.

19 Now, we may well have misunderstood. If we have -- I apprehend, I think, from Mr Palmer  
20 that we have misunderstood.

21 THE CHAIRMAN: I think you have been a bit oversensitive. I don't think there's any -- there  
22 has been no suggestion that the costs are going to be awarded on the indemnity basis and  
23 I don't need----

24 MR PALMER: No, it's in the same terms as the order they got against CityFibre. It was their  
25 order.

26 THE CHAIRMAN: I don't----

27 MR HOLMES: The fault was ours.

28 THE CHAIRMAN: I do not need to trouble you on that.

29 MR HOLMES: I'm grateful, sir.

30 THE CHAIRMAN: One thing I do want to separately ask you about though are the costs of the  
31 hearing that took place in relation to the handing down or the making of the order, because  
32 they were reserved to today.

33 MR HOLMES: Yes.

1 THE CHAIRMAN: I think that would be for you to make your application in that respect because  
2 my understanding is that you say that those costs fundamentally, I think, should be paid to  
3 you by BT. BT, I think, say, and I paraphrase, that they simply are, as it were, part and  
4 parcel of the case----

5 MR HOLMES: Costs in the case, yes.

6 THE CHAIRMAN: -- in which case, they would actually get them.

7 MR HOLMES: Yes, sir. So in our submission, there should be a costs order made in Ofcom's  
8 favour in relation to those costs on the basis that BT resisted the making of an order in terms  
9 which Ofcom had proposed and which had previously been agreed on grounds that were  
10 found to be unsustainable.

11 THE CHAIRMAN: Might I tease you by saying that your submission is that loser should pay as  
12 the general rule in that respect. It was a discrete issue rather than something that needed to  
13 happen so far as the order is concerned.

14 MR HOLMES: You may certainly tease me, sir.

15 THE CHAIRMAN: Right.

16 MR HOLMES: That's the prerogative of every tribunal towards counsel that appear before it.

17 THE CHAIRMAN: Right, okay. But anyway, you say in essence that was a hearing at which BT  
18 sought some relief and they didn't get it.

19 MR HOLMES: Yes, sir.

20 THE CHAIRMAN: You resisted it and you should get your costs of that little outing as a discrete  
21 part of the hearing.

22 MR HOLMES: Yes, sir. For what it's -- I don't want to embark on a long discussion about the  
23 starting point, but given the reasons that support the starting point for which Ofcom  
24 contends, it is entirely appropriate that that principle should apply in an asymmetric fashion.

25 THE CHAIRMAN: Right, okay. Is there anything else which you want to add on any those?  
26 We do need to give Mr Palmer the chance to come back certainly on any fundamental  
27 points of reply -- but very, very briefly, I hasten to add -- but specifically on that. But is  
28 there anything else you wanted to add?

29 MR HOLMES: On the costs of that hearing?

30 THE CHAIRMAN: Anything. If you're done now----

31 MR HOLMES: Unless there is anything that you feel you need to trouble me with.

32 THE CHAIRMAN: No, okay. Thank you.

33 Mr Palmer one specific point of reply we want to hear from you.

1 MR PALMER: There's just two points with your leave I will make. The first goes to the  
2 20 per cent point. A key point there was that the underlying data was provided following  
3 the reply. Ofcom didn't ask how it was possible to reconcile the 20 per cent to the lower  
4 figure.

5 The wider context of that point is to bear in mind that it was relevant only to the 1G SSNIP.  
6 It didn't bear on the 10G SSNIP, and I ask the Tribunal to bear in mind, of course, that the  
7 question before Ofcom in applying the SSNIP test concerned the competitive interactions of  
8 both products on the other, and that the Tribunal found there was scant, hardly any,  
9 consideration of the 10G. So in considering Mr Holmes's submissions on the importance  
10 and the significance as he stressed of the 20 per cent figure, you have to bear in mind the  
11 context in which it fell in the larger appeal.

12 On the point about the remedy, this is a remedy which was necessary because BT had won  
13 the appeal. That's why we're in the business of having any discussions about what the  
14 order should be and when it should be given. It wasn't just BT who was concerned about  
15 the timing and effect, it was all the interveners as well who also made submissions, and the  
16 decision to have a hearing was no doubt based on the totality of those submissions with  
17 which the Tribunal was faced, not just BT's.

18 And the particular position that BT was concerned about was its inability to take any  
19 instructions from the business. It was only the confidentiality ring lawyers who knew and  
20 understood what the proposed order would be. That in itself is a very unusual circumstance  
21 where normally you are able before agreeing to an order, after receiving an embargo draft  
22 judgment, to take instructions from your client.

23 The issues that were raised were embargoed by Ofcom first by reference to the  
24 confidentiality ring and then telling us they wouldn't agree any bilateral confidentiality  
25 orders, just so we could discuss those matters with the client. That is why we had to bring  
26 that here. That's very unusual, but it's all part of that consequential fallout from the order  
27 which we agreed in substance, it was agreed between us, but which didn't provide for us to  
28 have any ability to take instructions from our clients as to what the transition to any new  
29 regime should be or how that should work.

30 THE CHAIRMAN: But it would be said against you, I think, that that may be all -- you may be  
31 right -- but you were always barking up the wrong tree by asking me to do something about  
32 it, or this Tribunal to do something about it, because your real beef in relation to what  
33 Ofcom were doing in relation to the emergency regime was one that, if you had a remedy,  
34 you had to pursue in another Tribunal or in judicial review, and that was really what you

1 should have been doing. You were trying to use this Tribunal as a mechanism to achieve  
2 something which I said in the judgment you couldn't achieve. So at the end of the day you  
3 may be right, but you were in the wrong place, and so ultimately the hearing was -- you lost  
4 the hearing.

5 MR PALMER: Well, we're in the right place to be making submissions as to what the order  
6 should be and when it should be (inaudible) because it was an order which resulted.

7 THE CHAIRMAN: You'd already agreed what the order should be. What you were trying to  
8 achieve was something that in essence in the end I simply said, well, you may be right but  
9 you're going to have to make the arguments in another place.

10 MR PALMER: Yes. But that is all in the context of consequential matters arising from Ofcom's  
11 errors. So the ordinary position would be that would be swept up into the case as a whole.  
12 If, on this occasion, the Tribunal thought a different order was appropriate, then it should be  
13 as to no order, rather than to awarding costs against -- in favour of the unsuccessful party  
14 against whom the order was being made.

15 THE CHAIRMAN: Right. Yes.

16 MR PALMER: Sorry, there's one other point about the Basalisco and factual evidence. It was  
17 suggested that you should consider the deficiencies as identified by the Tribunal in that  
18 evidence alongside the issue table which was given. Of course, one can't do that without  
19 duplicating costs, because the evidence that was given by those experts often went to some  
20 of the issues or the sub-issues which BT didn't succeed. So one has to be a bit cautious  
21 about saying that, and particularly cautious about acceding to Mr Holmes's submission that,  
22 even if you disallow all of BT's costs, there would still be a pot of wasted costs.  
23 To disallow all of the costs of all of the factual evidence and Dr Basalisco's evidence, the  
24 expert evidence, would have left very little indeed to support the appeal which succeeded.  
25 So there was proper evidence there, properly given, as Mr Holmes suggests, upon which the  
26 Tribunal took into account in reaching conclusions which led to the success of the appeal.  
27 It's not right to disallow all of that cost and then say, "And there's still a pot of costs which  
28 Ofcom wasted". That would be over-recovery on Ofcom's part.  
29 So we ask you to apply such proportionate reduction in broad percentage terms to an overall  
30 order in BT's favour as the Tribunal considers appropriate.

31 THE CHAIRMAN: Okay, thank you. And in fact now I've remembered what I was going to ask  
32 Mr Holmes about, which I couldn't remember on the spur of the moment.

33 Sorry, did you actually want to say anything about CityFibre?

34 MR HOLMES: I did, Sir, at the start of my submissions.

1 THE CHAIRMAN: Anything else?

2 MR HOLMES: No.

3 THE CHAIRMAN: So no reply from CityFibre then.

4 MR ROBERTSON: Nothing more from us.

5 THE CHAIRMAN: Fine, other than what was said at the start, to which you don't have anything  
6 to reply.

7 MR ROBERTSON: No reply, Sir.

8 THE CHAIRMAN: Fine. Right. Nobody here for anybody else who wants to say anything?

9 Good.

10 I think it's apparent that, given the breadth of the argument, we're going to reserve our  
11 decision, which we will communicate to you in the usual way by way of a draft judgment  
12 for your corrections, I would have thought. There's no reason why we shouldn't just do it  
13 in the ordinary way. So we'll just do it in the ordinary way. We'll reserve the decision.

14 All right. Thank you all very much.