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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1205-1207/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31st October 2013

Before:
THE HON. MR. JUSTICE ROTH
(Chairman)
STEPHEN HARRISON
PROFESSOR COLIN MAYER
(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

AND BETWEEN:

(1) CABLE & WIRELESS WORLDWIDE PLC
(2) VIRGIN MEDIA LIMITED
(3) VERIZON UK LIMITED Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

AND BETWEEN:

(1) BRITISH SKY BROADCASTING LIMITED
(2) TALKTALK TELECOMMUNICATIONS GROUP PLC Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

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H E A R I N G D A Y T H R E E

A P P E A R A N C E S

Mr. Rhodri Thompson QC, Mr. Graham Read QC, Ms. Sarah Lee, Mr. Ben Lynch and Ms. Georgina Hirsch (instructed by BT Legal) appeared on behalf of the Appellant, British Telecommunications PLC.

Mr. Meredith Pickford and Mr. Julian Gregory (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants (1) British Sky Broadcasting Limited and (2) TalkTalk Telecommunications Group PLC.

Ms. Dinah Rose QC and Mr. Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants (1) Cable & Wireless Worldwide plc, (2) Virgin Media Limited and (3) Verizon UK Limited.

Mr. Pushpinder Saini QC, Ms. Kate Gallafent, Mr. Hanif Mussa and Ms. Emily Neill (instructed by the Legal Department, Office of Communications) appeared on behalf of the Respondent.

1 THE CHAIRMAN: Yes, Mr. Gregory?

2 MR. GREGORY: First of all, Mr. Pickford sends his apologies today. Most of today is to be
3 made up with Cable & Wireless' witness and there is quite a lot of cross-examination to
4 prepare for next week in our case he has decided to spend today working on that.

5 THE CHAIRMAN: No problem.

6 MR. GREGORY: The second point relates to our factual witnesses, Mr. Higo and Mr. Heaney.
7 I do not know if you have the witness timetable in front of you. They are not due to appear
8 until late tomorrow morning and tomorrow afternoon. I understand that BT are content for
9 them to be stood down for today so that even if we move through the witnesses faster today
10 that they would not be called until first thing tomorrow morning and I just wondered
11 whether the Tribunal was also content for us to stand them down today?

12 THE CHAIRMAN: Yes, that is fine.

13 MR. GREGORY: I am grateful, Sir.

14 MR. READ: I think the position may be that we are shorter on the witnesses today than perhaps
15 we envisaged, in which case in light of that I think certainly rising at, perhaps, 4 or 4.30
16 would be feasible today, but can we review position after lunch time because, obviously, if
17 we only have Mr. Higo and Mr. Heaney tomorrow it may be that - unless the Tribunal
18 wants to - we do not start at 9.30, or we start at 9.30 and finish at lunch time.

19 THE CHAIRMAN: Yes, certainly.

20 MR. READ: Having said that, can I call Mr. Cox.

21 THE CHAIRMAN: Just a moment.

22 MR. SAINI: Sir, may I raise an issue? If the timetable is moving so quickly, can we just check
23 with my learned friend whether Mr. Maldoom might be available for Friday, if we get
24 through the factual witnesses?

25 THE CHAIRMAN: He is due to give evidence, I see, for a day and a half, so it is a question of
26 whether to start him on Friday afternoon - he will then be in purdah over the weekend.

27 MR. READ: I think there is a short answer to that, he is in Canada at the moment, and so will not
28 be back until the weekend. (Laughter) Can I therefore call Mr. Cox?

29 Mr. NICHOLAS ARTHUR COX, Affirmed

30 Examined by MR. READ

31 Q Mr. Cox, I wonder if you might be handed core bundle C? (Same handed) If you would
32 turn to tab 3. Is that your statement?

33 A This is my statement, yes.

34 Q If we look at p.18 that is your signature, is it?

1 A Yes, that is my signature.

2 Q Do you adopt that statement as your evidence in this case?

3 A I do.

4 Q Can I also ask you to have available BT32? If we go to tab 4A we see the same statement,
5 although it is not signed, but at 4B onwards we see the exhibit bundle to your witness
6 statement?

7 A Thank you.

8 Q It is in that bundle for your reference. If you would like to stay there, Mr. Cox, you will be
9 asked some more questions.

10 A Thank you.

11 Cross-examined by Ms. ROSE

12 Q Good Morning, Mr. Cox. I would like to ask you some questions on behalf of Cable &
13 Wireless, Virgin and Verizon.

14 A Okay.

15 Q In your witness statement you have outlined the history of the negotiations for the WES
16 contract?

17 A That's right.

18 Q Those negotiations started in October 2004, did they not?

19 A Not strictly speaking, no. We were required to publish the reference offer in October, to
20 launch the service in November, but the actual contract negotiations did not start until later
21 than that.

22 Q Forgive me, the publication of the initial offer was in October 2004?

23 A The publication of the initial offer was in October, yes, mid-October.

24 Q You have not exhibited that offer to your witness statement, have you?

25 A No, but it can be gleaned from the later editions of the contract because it was published as
26 issue 1 of the contract, so where you see exhibits where there are amended copies of the
27 contract appended to either my witness statement or Mr. Dods' witness statement then you
28 can glean the original from that particular.

29 Q The original terms did not include clause 12.3 did they?

30 A No, they did not, no.

31 Q Then, just having a look at your witness statement you say that the first responses came in
32 from the UKCTA and from Gail McInnes of Thus, and then that the issue was discussed at
33 the industry forum on 7th December 2004. As at that date there was still no clause 12.3 in
34 the draft contract, was there?

1 A No, there was not, no.

2 Q Then you refer to further forum meetings that took place on 10th and 11th of January 2005?

3 A Yes.

4 Q You refer to those, I think, at paras.16 and 19 of your witness statement. There was a two
5 day forum on 10th and 11th January?

6 A Yes.

7 Q You say: "Many matters were discussed and it was agreed that a number of sub-group
8 meetings would be set up ..." ?

9 A That's right, yes.

10 Q There was still no draft 12.3 in the contract at that stage, was there?

11 A No, no, there wasn't. It was at a particularly early stage.

12 Q Well, you say it was a particularly early stage, this is about four months after the contract
13 had first been published, was it not?

14 A The contract was published in October, yes.

15 Q I beg your pardon, three months, yes?

16 A And November was the actual launch date. Whilst I said that there were responses to the
17 contract they seemed to be relatively muted and it was only the day before launch that
18 industry actually pressed for looking further at the contract.

19 Q So that would have been in November?

20 A That's right, yes, it was November 25th because I think the launch date was November 26th.

21 Q So that would have been almost two months before the dates we are now looking which are
22 in January?

23 A That's right because what industry actually said - it arose from the PPC negotiations - was
24 that industry expressed concern about the contract for WES, in particular the review clause
25 and they wanted for BT to set up a WES industry forum, and so from that to then discuss the
26 contract.

27 Q So what happened at that forum on 10th/11th January was that it was decided that there
28 should be sub-groups to take forward discussions, is that right?

29 A That is right. There was an initial meeting on 7th December, as you will see from my exhibit
30 1, and from that it was agreed that there would be this particular meeting, the WES Industry
31 Forum was set up and so 10th January was really the first meeting of the WES Industry
32 Forum. Discussed at that particular forum was timescales - how to actually address the
33 contract and the various product developments, and also what was addressed was in order to
34 be able to address that three subgroups were set up. A contract subgroup, a product

1 subgroup and a pricing subgroup.

2 Q The pricing subgroup met on 27th January, did it not, if you look at para.
3 25 of your statement?

4 A It did, yes, because ----

5 Q I am sorry, I do not need you to tell me why, I am just trying to check the timeline. Then it
6 met again on 8th February, as you say at para. 21?

7 A That's right, yes.

8 Q At neither of those dates was there a clause 12.3 in the draft contract?

9 A No, that is right.

10 Q You refer in your statement to a draft of the contract that you circulated on 15th February
11 2005?

12 A Yes.

13 Q So that was following the second meeting of the subgroup on 8th February?

14 A That's right.

15 Q That draft has actually been exhibited by Mr. Dods. It is at bundle CW1/3 if we could get
16 that bundle out, and it is tab 7 in that bundle. What we have here is an email from you?

17 A Yes.

18 Q The individuals here, are they the people who were in the contract subgroup?

19 A Not necessarily, no, John Lee certainly didn't attend the subgroup to my recollection.

20 Q But these are people who were involved in negotiations with you on behalf of the CPs?

21 A They were involved in the development of the WES contract, yes.

22 Q And you say: "Many thanks for your table succinctly setting out your responses."
23 You say: "I thought it best to provide responses now where we can and will
24 provide further feedback at our meeting"

25 With this email you attached the draft contract as it then was, if you go on in this tab! You
26 will see there is numbering on the bottom of the draft contract?

27 A Yes.

28 Q If you go to p.10 of 14 you see clause 12: "Charges and deposits"?

29 A Yes.

30 Q And we can see the form that clause 12 was in at that time. 12.2 obliged the
31 communications provider to pay the charges within 30 days, and gave BT the right to charge
32 daily interest on late payments in accordance with the Late Payment of Commercial Debts
33 Interest Act?

34 A Yes.

1 Q And there is no equivalent of what later became 12.3?

2 A Not at that stage, no.

3 Q So the original draft, which was produced by BT made provision for communications
4 providers to pay interest to BT if they were late in paying sums due under the contract, but
5 did not make any provision for BT to pay interest to communications providers if BT was
6 late in paying sums that were due to be repaid under the contract. That is right, is it not?

7 A That's right. The original issue did not have that and that was a point that was made by the
8 communications providers when they responded to that original contract.

9 Q That issue was discussed for the first time on 8th February 2005, was it not?

10 A No, because we had a meeting on 7th December and at that meeting CPs were invited to
11 respond to BT and they responded on that particular issue, amongst a long list of other
12 issues, and we did actually discuss the Late Payments Act, it would have been on 8th
13 February and again on 18th February.

14 Q If we just look at your witness statement, you say that following the meeting of 27th January
15 other CPs raised the issue that if this default interest rate was reasonable ----

16 THE CHAIRMAN: This is para. 26?

17 MS. ROSE: Sorry, para. 26.

18 "... following the meeting of 27 January 2005, other CPs raised the issue that if
19 this default interest rate was reasonable, it should equally apply to BT in the case
20 of billing disputes."

21 And you refer to that in the spreadsheet under the summary of "Industry Responses". Is that
22 right?

23 A That's right, yes.

24 Q If we go to BT 32, tab 4B, 4. I am afraid this document is extremely difficult to read,
25 because we have a dark blue background with marginally darker and very tiny text. I do not
26 know if you are able to provide us with a more legible copy. I have struggled with this. Do
27 you know if you would be able to ask if your solicitors could get a better copy?

28 MR. READ: Sir, we do not have a A4 or A3 copy of this one, but we do have an A3 copy
29 available for the later one, which is at 4B6. Some of the points follow through because it is
30 a continuation of a table. I do not want to interfere with Ms Rose's cross-examination, but if
31 that would help I can arrange for that.

32 THE CHAIRMAN: Can you provide Ms Rose, in the first place, with a copy and then she can
33 see if she can ask her questions off that. I find it virtually impossible to read.

34 MS ROSE: It is virtually impossible.

1 THE CHAIRMAN: Do you want to take a minute to look at that, Ms Rose, and see if you can
2 work off that one?

3 MS ROSE: Yes.

4 MR. READ: Just to be clear, sir, what I have just given Ms Rose is 4B6 rather than 4B2.

5 MS ROSE: It is not coloured.

6 MR. READ: No, it may not have the same colouration.

7 THE CHAIRMAN: The original does.

8 MS ROSE: This document does not seem to have the colour.

9 THE CHAIRMAN: The left hand column is the blue column.

10 MR. READ: I am sorry, it is my fault, I have given the wrong document. Ignore what I have just
11 said. That is 5B2. Unfortunately, we do not, I think, have an A3 copy of that.

12 THE CHAIRMAN: This cannot originally have been in this form, can it?

13 MR. READ: It is in a spreadsheet format.

14 THE CHAIRMAN: It has been printed off.

15 MS ROSE: It was originally designed to be looked at online.

16 MR. READ: We will try to arrange for copies to be printed of this one and of the later ones as
17 well.

18 THE CHAIRMAN: The question is how quickly that can be done because I do not really want
19 Mr. Cox to come back just to answer a couple of questions on a spreadsheet.

20 MS ROSE: We will have to do our best for the time being.

21 THE CHAIRMAN: Yes. Just a minute, how quickly can it be done? If it is just a case of
22 somebody going back to BT and printing this off? Your main office is by St. Paul's, is it
23 not?

24 MR. READ: It may take as long as it actually takes to print, because we do have it on USB at the
25 moment.

26 THE CHAIRMAN: I am just wondering. Just a moment. If you have it on a USB stick I am told
27 that the staff here can get it done in about 20 minutes.

28 MS ROSE: It has just been suggested that if it was emailed we could look at it on screen.

29 THE CHAIRMAN: I am not sure we can at the moment, all of us. I think we can print it out
30 here. It is on a USB stick, is it? It sounds as though we are all right on time, from what I
31 was told at the beginning. Why do we not rise for 15 minutes, try to get that printed.

32 MS ROSE: If it is emailed as well, that would be helpful.

33 THE CHAIRMAN: Yes, I am sure I can look at it on screen with one of my colleagues, but there
34 is not a screen in the witness box. We can either move on to another topic, or, if you want

1 to take it in order we can rise for 15 minutes to try to get this sorted out.

2 MS ROSE: I think this is sort of the topic.

3 THE CHAIRMAN: Yes, I understand, and there is a sequence to what goes on.

4 MS ROSE: Yes, indeed.

5 THE CHAIRMAN: So I think that is what we will do. Let us return at twenty to. While that is
6 being done, this is the one at 4, are there any others?

7 MS ROSE: There are later iterations of this spreadsheet.

8 THE CHAIRMAN: Could you just indicate to Mr. Heindl which ones you want, because
9 obviously the more that has to be printed the longer it takes.

10 MS ROSE: I understand. I think it is best if I do that outside.

11 THE CHAIRMAN: Yes, absolutely. We will say twenty to – if it takes five minutes longer we
12 will be told.

13 Adjourned for a short time

14

15 MS. ROSE: Sir, I am extremely grateful to the Tribunal. We now have A3 size copies of the
16 spreadsheet at 4B/4. There is another later spreadsheet that we will need to look at, but we
17 will get that shortly. I am extremely grateful to the Tribunal.

18 THE CHAIRMAN: I think you really should be because there are many courts where that sort of
19 service is not possible, as you well know.

20 MS. ROSE: I appreciate that.

21 THE CHAIRMAN: This applies to everyone. I do not know if anyone has worked out the cost
22 per minute of these hearings, looking round the room, but if there are documents that
23 anyone wants to refer to that are not clearly legible, please would you indicate in advance to
24 the party that has produced them so that proper copies can be produced. It should not be
25 something that arises in the middle of cross-examination.

26 MS. ROSE: I appreciate that.

27 THE CHAIRMAN: There has been ample opportunity to have this done.

28 MS. ROSE: (To the witness) Do you have the A3 size spreadsheet?

29 A Yes, I do, thank you, yes.

30 Q Have you had a chance to have a look at this. Is this the document that was circulated with
31 the draft contract on 15th February?

32 A On 15th February, yes.

33 Q If you go through to, I think it is actually p.9, but if you look down the far left side you will
34 see that there are clause numbers and contracts, and you will see clause 12.2, about nine

1 pages in - do you see that?

2 A Yes.

3 Q You can see that you have got various columns here. First of all, it says the clause, 12.2.

4 A Yes.

5 Q Then the issue. "We", and "we" in that context is the CPs:

6 "... have 28 days from date of invoice to settle, daily interest should be defined as

7 in all contracts, PPC contract is 4 per cent above LIBOR"?

8 A Yes.

9 Q Then the BT response is in pale green?

10 A Yes.

11 Q Interest is only payable in the event that a communications provider is already in breach of

12 contract. The best way to prevent any interest being payable at any rate is to settle

13 outstanding invoices on time. Then there is a summary of further industry responses:

14 "MCI asked whether this rate would be used when BT missed their committed

15 payment date of debts. Action with Nick Cox."

16 So what date was that raised with you?

17 A This spreadsheet was initially produced by Cable & Wireless on 7th February, the day before

18 the 8th February meeting. We discussed the ----

19 Q Just pause there. This bit in orange, "MCI asked whether this rate would be used when BT

20 missed their committed payment date", was that something that was said to you on

21 7th February?

22 A That's right, yes, the day before the second contract sub-group meeting.

23 Q Just pause there, I want to take it step by step. That was raised with you the day before the

24 meeting?

25 A That's right.

26 Q Then at the meeting there was a discussion, and we see that referred to at para.26 of your

27 witness statement?

28 A That's correct, yes.

29 Q You say this was discussed at the meeting on 8th February, "I said simply I would consider

30 it"?

31 A That's right, yes.

32 THE CHAIRMAN: Sorry, just so I can understand it, this spreadsheet, the actual document we

33 are looking at, it presumably was not in this full form on 7th February because of the next

34 column which is summarising the response on the 8th?

1 A That's correct, yes.

2 Q So it was a sort of rolling document?

3 A It is an illustrative document, that's right. Initially you would have had the blue column, the
4 light green column, and the next column would have been the status of it as at 7th February.
5 Then we had the meeting on 8th February where this particular issue, amongst many others,
6 was discussed. Then the BT response, which was my response that's referred to in ----
7 MS. ROSE: In the white column?

8 A Yes, that's right. I was just looking for the paragraph in the witness statement, para.21.
9 That was when we went back and said that we agreed in principle.

10 Q Just to follow it through, the first thing that happens is that originally the CPs raised the fact
11 that under clause 12.2 they have got to pay what they see as a high interest rate?

12 A That's correct.

13 Q Then your response to that is, the best thing to do is pay your debts on time and then you
14 will not have to pay an interest at all. Then they reply and say, "If we have got to pay this
15 interest rate will BT also pay the same interest rate if it is late paying"?

16 A That's right.

17 Q You say you will consider that on 8th February?

18 A On the 8th, yes.

19 Q Then you circulate this document that we are looking at now on 15th February?

20 A That's right.

21 Q With your response in the white column?

22 A Indeed, yes.

23 Q You say:

24 "BT agrees that where a CP has overpaid because of incorrect information
25 provided by BT, the CP should be compensated if BT has failed to repay an
26 amount due to the CP. In response to the question raised by MCI, BT agrees that
27 following a recalculation of the amount to be repaid and agreement of when the
28 amount is to be repaid, if BT fails to make reimbursement on that agreed date
29 interest will be payable at the Act rate from the agreed date until the date when
30 payment is made."

31 A Yes, I agree it appears somewhat convoluted. The reason was because there were particular
32 billing issues at the time and the CPs felt that if they were required to pay for being late, as
33 they regarded it, for a payment of invoice, then equally BT, if it had to reimburse money to
34 them because of a billing error, should pay at that particular rate.

1 Q There was no discussion, was there, about the appropriate treatment of interest following
2 the regulatory determination by Ofcom at this time?

3 A Not at that particular stage, no, because we were still working through this. That particular
4 wording was wording put forward by MCI, saying we are not looking for money back
5 immediately, but say BT had agreed, for instance in February, that they were going to
6 reimburse a CP in May and then failed to do so in May then interest would be payable from
7 the May. It wouldn't be immediately payable from the February.

8 Q So the issue that was being raised in relation to 12.2 was that there should be reciprocity so
9 that if it was to be the case the communication providers, if they were late in paying an
10 invoice, should be charged interest at a particular rate that had been identified, the high rate,
11 but the same should apply to BT if it was late in reimbursing against an agreed
12 overpayment?

13 A Indeed, because it considered almost a wilful act in a way.

14 Q Tit for tat?

15 A Indeed, yes.

16 Q So that issue had nothing to do with the question of the treatment of an award by Ofcom,
17 did it?

18 A No, the focus at this particular stage was purely on billing issues, either late payment of
19 invoice or late reimbursement of money. We then went through this again ----

20 Q If you can just ----

21 THE CHAIRMAN: Let Mr. Cox amplify his answer to your question. You were saying, "We
22 then we then went through this again"?

23 A Yes, on 18th February, to make sure that we had complete understanding of where we were
24 at that particular stage, and it's at that particular time when I mentioned that we wanted to
25 make sure that this was properly banded, and therefore we would seek carve-outs, as I
26 mentioned in para.29.

27 MS. ROSE: Before we get to 18th February - at the moment we are on 15th February.

28 A That's right.

29 Q And we are agreed, I think, that this is the spreadsheet that you dated on that date?

30 A That's right.

31 Q You did not circulate with it any draft revised clause to cover this point, did you?

32 A No, because we were still in discussion at this particular point, and it was important to agree
33 this in principle before - we didn't want to rush in to drafting until we were absolutely clear
34 where we were on this.

1 Q Then we have another meeting of the sub-group on 18th February?
2 A That's right, yes.
3 Q So that is three days after the circulation of this?
4 A Yes.
5 Q And you have been given evidence about what was said at that meeting at para.29 of your
6 witness statement?
7 A Yes.
8 Q What you say is that you recall saying that BT was likely to want some carve-outs?
9 A That's right, yes.
10 Q The CPs circulated another version of this spreadsheet after 18th February meeting, did they
11 not, on 23rd February?
12 A That's right, yes.
13 Q In fact, we see that spreadsheet that was circulated at CW1 3, tab 8. There is no internal
14 pagination, which is somewhat unfortunate, but if you go to about the ninth page in, the
15 easiest place to see it is looking down the right column where you can see the same text that
16 we have just been looking, "BT agreed that where a CP is overpaid because of incorrect" -
17 do you have that?
18 A Yes, I do, thank you.
19 Q You make the point at para.28 of your witness statement:
20 "(Indeed, in the further up-dated spreadsheet circulated after the 18 February
21 meeting, the CPs response on this issue turned to green indicating that they were in
22 agreement. This changing of the column to green would have been done by the
23 CPs themselves, not BT.)"
24 A Yes.
25 Q In fact, if you go back to the spreadsheet we were just looking at that was circulated by you
26 on 15th February, before the 18th February meeting, that was already green?
27 A That's right, yes.
28 Q So, in fact, it did not turn to green after the meeting on 18th February, did it?
29 A What we had here was, as I say, an iteration because the fact that we had gone back on the
30 15th, CPs were accepting of this, and then what we're talking about in the later one was after
31 the discussion of 18th February.
32 Q But nothing had changed on this spreadsheet on this issue between the 15th and 18th?
33 A Only in so far as the discussion had progressed, and therefore it was important to check the
34 colours in a particular column. Whilst I accept there is green here and there is green there,

1 the turning green in this particular instance was because of the reaction to the meeting of the
2 18th.

3 Q You have no basis for that assertion, do you, because, in fact, nothing had changed in this
4 spreadsheet?

5 A In my recollection.

6 Q Are you saying somebody said to you, "We have put this column green because we agree
7 with what you said on the 18th"?

8 A No, because of the particular way that the spreadsheets were used in the progression of the
9 discussions and my recording it on the 18th. We actually discussed this particular point in
10 depth to make sure that we had complete agreement on that particular wording because
11 where we were on the ----

12 Q Just to be clear ----

13 THE CHAIRMAN: Let him finish.

14 A Where we were on the 15th was on my particular response. Where we were on the 23rd was
15 after we had discussed my response and everybody was happy at that particular stage, which
16 is why it has gone green.

17 MS. ROSE: The spreadsheets are identical on both days.

18 A I accept that.

19 Q And there is no extra comment put in in the text, is there?

20 A No, there isn't, no.

21 Q It does not say anything about a carve-out?

22 A No.

23 Q So it is equally consistent with nothing having changed in that period, is it not?

24 A It could be interpreted in that way, yes.

25 Q As at this date, 23rd February, you have just said they had agreed the wording, but no
26 wording had been circulated, had it?

27 A Sorry, which paragraph are you talking about?

28 Q Sorry, it is something you have just said. You said it had gone green to show that they had
29 agreed the wording, but no wording had been circulated?

30 A What I'm talking about is ----

31 THE CHAIRMAN: I did not pick that up. Did you say that on the 18th February the wording of
32 the clause had been agreed or ----

33 A No, not of the clause, the wording of principle, because we needed to make sure that we
34 went through the principle. It's only once we've gone through that that you can then draft.

1 There's no point in drafting half way through.

2 Q Yes, you would not waste time drafting, absolutely. I do not think any expressing wording
3 was agreed.

4 MS. ROSE: Sorry, that must be my mistake. As at the 23rd no wording had been circulated?

5 A That's right. It was agreed at the meeting of the 18th that the CPs would respond first, which
6 they did within five days, and then we responded the following week on 2nd March.

7 Q So what then happened, as you rightly say, is that on 2nd March you circulated another
8 iteration of this spreadsheet?

9 A Yes.

10 Q Together with an amended draft contract?

11 A That's right, yes.

12 Q If we look at that, first of all, we see the covering email that you circulated, which is at
13 CW1-3, tab 6. Do you have that, it is an email of 2nd March?

14 A Yes.

15 Q From Daniel Carlton?

16 A Yes.

17 Q Was he somebody who reported to you?

18 A He was somebody I was working alongside, yes.

19 Q Who was also involved in these negotiations?

20 A That is right.

21 Q We can see that there is a reference here to various attachments, which include the
22 spreadsheet.

23 A Yes.

24 Q "Many thanks for your Excel spreadsheet succinctly setting out your further feedback
25 in volume H. The spreadsheet now summarises the initial feedback and subsequent
26 BT responses. Please find attached:
27 1) BT response no.3 to industry feedback...
28 2) amended Conditions;
29 3) amended sch ... and
30 5) updated Migration Manual.

31 Whilst we were very encouraged by the progress the contracts sub-group had been
32 making in attempting to resolve the outstanding issues, BT now seem to find the latest
33 industry feedback has re-opened several of the issues that had already been heavily
34 negotiated and agreed. BT is keen to re-kindle the spirit of co-operation the group

1 previously enjoyed and has attempted to respond positively (once again) to the
2 industry feedback.

3 However, as BT sets out in the updated spreadsheet, and in line with BT's detailed
4 response of 21 January 2005, BT does not consider it beneficial to raise any further
5 comments that have not already been considered. Each new comment raised requires
6 the investment of a very considerable amount of time to reply. There is only a very
7 short period of time remaining before the deadline by which the contracts sub-group is
8 to have concluded negotiations and there simply is not time, nor is it fair, to raise
9 additional issues at this very late stage. BT does not see it would be beneficial to re-
10 open issues that have already been agreed.

11 BT looks forward to the final contracts sub-group meeting on 9 March".

12 So BT was very clearly telling the industry at this point, was it not, that it was not prepared
13 to open any new issues at this point? Is that right?

14 A What we received in the email of 23rd was some of the issues that had already been agreed
15 had then been reopened. They were sort of retracted and also there were some completely
16 new issues that had been raised. That is right.

17 Q And you were saying that you were not prepared to tolerate that?

18 A Because we were all developing and trying to reach a conclusion on this in a relatively short
19 period. We did not think it helpful to then suddenly come out with a completely new set of
20 issues at this late stage. We are talking about receiving this on 23rd February and an aim to
21 be completing everything in March. So to actually raise completely new issues at that
22 particular stage we felt was not helpful.

23 Q So you were making it very clear here that if something has already been agreed you are not
24 prepared to reopen it. Yes?

25 A That is right.

26 Q And you are not prepared to consider new issues?

27 A That is right.

28 Q But this, in fact, is the first time, is it not, that you ever circulate the draft that became
29 Clause 12.3?

30 A It is the first time that we circulated the draft wording of Clause 3, that is quite correct, but
31 what this is is a progression of a discussion that has been ongoing throughout the contracts
32 sub-group meetings and therefore as an evolving issue, and as an issue that was of
33 importance to all parties, it was readily agreed that this was an issue that needed to be
34 concluded. Because we were at the stage, on 18th February, where we had agreed in

1 principle; we had said we wanted to produce carve-outs, and so the logic then was to
2 actually produce text at the next available opportunity, which was on 2nd March.

3 Q The spreadsheet that was attached to this email is at BT32 Tab 4B6.

4 THE CHAIRMAN: I am sorry, the spreadsheet that immediately follows the email ----

5 MS. ROSE: That is incorrect.

6 THE CHAIRMAN: That is the one that ----

7 MS. ROSE: That is the one that was erroneously exhibited.

8 THE CHAIRMAN: That is wrong, yes.

9 MS. ROSE: My instructing solicitor is still beating himself up about it.

10 THE CHAIRMAN: Well, never mind that, but just to mark it that that is the wrong one.

11 MS. ROSE: That is the wrong one. The correct one is in BT32 Tab 4B6. We still have the
12 smaller version of this one but I think we can probably manage with it.

13 THE CHAIRMAN: We have it online, do we not? We have it on screen.

14 MS. ROSE: Yes, of course. So if you go to p.6 of 20 in this document, you can see Clause 12.2
15 at the top.

16 A Yes.

17 Q We see the wording that we are familiar with.

18 A Yes.

19 Q But there is now a new column headed "BT response at meeting of 18 February and
20 subsequently".

21 A Yes.

22 Q Does everybody have that? There is a new column at the end. So we are looking at the top
23 of the page. What you say there is: "Please see new Clause 12.3 which replaces this
24 principle in the contract as requested by industry".

25 A Yes.

26 Q So what it is referring to is the request by industry that if BT was late in making a payment
27 there should be interest paid by BT at the same statutory rate. That was the request that had
28 been made by industry? Yes?

29 A That was the original request, yes, which, as I say, we fully discussed on 18th February and
30 the mention of carve-outs is put then. So the reference here is to the complete Clause 12.3
31 which was issued on that particular day, yes.

32 Q You do not say anything here in your comment about excluding interest on repayments by
33 Ofcom, do you?

34 A I do not here, no, because, as I say, we had fully discussed this. I think what needs to be

1 borne in mind is that the spreadsheet is an aid memoir. The reason why the spreadsheet was
2 issued, in fact first issued by industry was that it would be a working document with just the
3 highlights so that we knew that we would then check back, checking the spreadsheet as
4 against the contract as a working way forward.

5 Q So the position is, and I do not think there is any dispute between us on this, that the first
6 time you communicated the wording of Clause 12.3 was on 2nd March. Yes?

7 A That is right.

8 Q That it was communicated under cover of an email that said that no new issues were to be
9 raised. Correct?

10 A That is right.

11 Q And that the covering spreadsheet made no mention of the provision in the second sentence
12 of Clause 12.3 dealing with the payments following a decision by Ofcom?

13 A No, because this was referring to Clause 12.3 in its entirety which was issued all of it at the
14 same time following the discussion of 18th February.

15 Q The last contracts sub-group meeting was held on 9th March, was it not?

16 A The last full sub-contract meeting was on 9th March. There was then an industry forum
17 meeting on 10th March.

18 Q I am sorry, I want to come to those meetings in a minute.

19 A No, no.

20 Q I want to take it step by step.

21 A Yes, I am just trying to give the context.

22 Q Do not worry. I will not forget about those meetings.

23 A Okay, fine. I think it ----

24 Q The last meeting of the sub-group was on 9th March?

25 A The last meeting of the sub-group was on 9th March, yes.

26 Q Communications providers were told at that meeting that any new issues would have to go
27 over to the contract review because there was no opportunity to deal with them now, were
28 they not?

29 A That was the position at the time, yes.

30 Q And that is what they were told?

31 A Yes.

32 Q We can see that if we go to CW1-3 Tab 9. This is a report from Gail McInnes to various of
33 her colleagues on the final industry WES contract meeting "held today", 9th March, and she
34 says:

1 ... after four and a half long hours on the phone, here is a quick update.

2 In an attempt to close off items, we have agreed an early review of the contract.

3 October 2005 was suggested".

4 Then she discusses the dates. Then she says:

5 "In terms of the actual contract offer, we are expecting to see a few minor changes
6 from BT, they will aim to have a draft circulated by next Wednesday, we will have a
7 final final call on Thursday to agree. There will not be an opportunity to raise any
8 new points at the call. We will now need to refer any new issues to the next contract
9 review".

10 And you agree that that is accurate, is it not?

11 A I think that is reasonably accurate. I would just say that we actually held a meeting at
12 Westminster, as you will have seen from Carlton Daniel's invitation. The last thing we want
13 to do is hold a meeting of this order just purely on the telephone because it does make it
14 more difficult, but obviously we provided telephone input to it if people were not able to
15 attend the meeting. If you look at the contract, what we did, as we do normally with the
16 contracts, is say "and there will be a review of the contract on the second anniversary of the
17 date of publication of the contract, i.e. in October 2007", but because we were concerned,
18 obviously what we were trying to do was to complete the contract so that there would be
19 certainty in being able to move forward as soon as possible after the launch date and be
20 working to a particular timetable on the developments, not just of the contract, we agreed
21 that any particular outstanding issues we would review five months after the particular
22 contract in order to be able to clear those up as quickly as possible.

23 Q Daniel Carlton sent another email ----

24 A I am sorry, Carlton Daniel.

25 Q I am sorry, I beg your pardon. Carlton Daniel sent an email on 16th March. You will find
26 that at Tab 10 in CW1-3.

27 A Yes.

28 Q "Further to our contracts sub-group meeting on 9th March and the WES industry forum
29 meeting the following day, I attach the WES contract with schs 1-5 in delta view form
30 (advanced redline) ...", and other materials, and he says:

31 "As agreed in the last contracts sub-group meeting the following changes have been
32 made".

33 And he identifies a number of changes there. He does not identify Clause 12.3, does he?

34 A No, he does not because that was agreed at that particular meeting. If it had not been agreed

1 then, yes, it would have been in issue and it would have been tracked. What he did was to
2 say that -- well, what was agreed was that we wanted to see about the working of this
3 particular clause. CPs were concerned about that and so that was put on the issues list for
4 the review five months after the application of the contract.

5 Q What he is doing here is recording the changes that had been agreed at the last contracts
6 sub-group meeting, was he not?

7 A That is right, yes.

8 Q But he does not include 12.3 amongst them?

9 A No, he would not have included it if it had been agreed.

10 Q He is referring to ones that were agreed. That is what he is seeking to identify.

11 A I am sorry?

12 Q "As agreed in the last contracts sub-group meeting on 9th March the following changes have
13 been made".

14 A Yes, "changes", changes to the previous draft contract.

15 Q You have referred to some other meetings. At paragraph ----

16 THE CHAIRMAN: Before you go on, over the page on that email, the penultimate paragraph:
17 "We note that the following issues remain under a 'to watch' brief", and at (5) "The interest
18 rate in Cl 12 and whether this proves to be workable". That, I take it, is a reference to the
19 situation where an interest rate is specified but it is not dealing with the particular bit of
20 Clause 12.3 that we are here concerned with, namely where no interest is payable. Have I
21 understood that correctly?

22 A I think that would be so. I think that the fact that clause 12 is put there rather than clause
23 12.2, for instance, then yes, the whole of clause 12 would be re-examined. But I agree that
24 the primary interest in that was to do with the default either with invoices or reimbursement
25 of money.

26 Q Thank you.

27 MS ROSE: Could we just go back to your witness statement at para.36. You have identified
28 some other meetings that were held after the 2nd March email. The first is the WES audio
29 conference on 7th March. That was in fact to discuss pricing issues, was it not?

30 A I believe it was, yes.

31 Q So not these issues?

32 A No, it wasn't a contract meeting, but it was a general meeting -- sorry, audio -- so that if
33 anybody had any particular issues that arose from what was raised on the core then they
34 obviously would have been taken back.

1 Q But it was about pricing?

2 A Primarily, yes.

3 Q Then there is the WES forum meeting on 10th March.

4 A Yes.

5 Q That was not a negotiation meeting, was it? It was about updating people?

6 A In some ways it is a bit of both because obviously if you notice at tab 7 of mine, there was a
7 report back from the contracts group meeting, but it then also provides an opportunity for
8 anybody who is at the meeting to raise any particular issues. So in that respect it can be a
9 bit of both.

10 Q Then at D, the final no go/go conference call on 17th March?

11 A Yes.

12 Q Again, that was not for negotiation; that was just the final sign up, was it not?

13 A Again, it is possible that somebody might well have raised a particular issue or point of
14 clarification on that one. As I recall, they actually set the conference call for that one at 10
15 o'clock in the morning with the proviso that if anybody had raised any issues or sort of last
16 minute raising of any particular issue, then we did have the rest of the day to try to deal with
17 that.

18 Q But it had already been made clear, had it not, that any new issues could not be considered
19 then, they would have to go over to the contract review?

20 A That was our particular position, but it doesn't stop people raising issues.

21 Q In general, what we have seen from the course of these negotiations is that what happens is
22 that BT produces a draft contract and the CPs comment on it. Is that not right? The draft
23 always comes from BT?

24 A Yes, because BT had a responsibility to produce a reference offer, so yes.

25 Q So if the CPs want something different they have to persuade BT to amend the draft, do
26 they not?

27 A What we do is we discuss issues in principle and then we will – if the issue is agreed, yes, it
28 will then be moved into the contract.

29 Q And if you do not agree it, it does not go in?

30 A That's right.

31 Q Of course, the context for these negotiations, as we understand, is that BT has significant
32 market power, does it not?

33 A Yes.

34 Q BT controls the great majority of these networks, does it not?

1 A It has SMP status.

2 Q Yes. So that if the communication providers want to compete with BT in these markets and
3 offer services to their customers, they have no alternative but to contract with BT, do they?

4 A I don't think BT is the sole provider; BT has SMP status. I don't think that's the same.

5 Q It is not the sole provider, but the reality is that there is nobody who is able to substitute for
6 BT in this market, is there?

7 A I would need to check with my regulatory colleagues.

8 Q The only recourse for the communications providers, if BT will not agree to amend a clause
9 that it wants in, is for them to complain to Ofcom about it, is it not?

10 A Yes, I mean they do have that recourse, that's true.

11 Q If Ofcom thinks that the particular term is not fair or reasonable, or will distort competition,
12 Ofcom can require the term to be amended or taken out of the contract, correct?

13 A Indeed.

14 Q BT understand that when it negotiates, does it not?

15 A We are very aware that when discussing the contract CPs can raise a complaint to Ofcom.
16 In fact, that is primarily why the Ofcom representative was present at the meetings, in order
17 to make sure that behaviours were reasonable, so that this would not be leading to a dispute.

18 THE CHAIRMAN: That is Mr. Nasralla?

19 A Mr. Nasralla, that's right, yes.

20 Q We see he is copied in on a number of these emails. What role did he play at these
21 meetings? Was he a silent observer; would he speak sometimes?

22 A He would speak at times. He was there – it was helpful, I would say, in making sure that
23 the behaviours of both parties – BT and industry – were correct, as well as being able to
24 help on a certain amount of clarification. So almost a sort of facilitation role in a way. We
25 appreciate that Ofcom doesn't want to fetter its discretion, but nevertheless it is quite helpful
26 to be able to say in this particular instance: how do you think Ofcom might react on a
27 particular issue.

28 MS ROSE: Just to be clear (I want to come back to Mr. Nasralla in a minute) we were discussing
29 the way that you negotiate and that you negotiate in the knowledge that if you agree a
30 provision in these negotiations Ofcom has the power to amend it or return it, does it not?

31 A Situation at least as far as I was personally concerned, was that we would wish to avoid a
32 dispute with CPs and a referral to Ofcom. So we are aware that CPs have the opportunity of
33 redress by taking a dispute to Ofcom.

34 Q And that that redress could involve changing a term that is in the contract?

1 A It might, it might not.

2 Q You understood that when you were negotiating?

3 A We understand that Ofcom, in a way, if there is a dispute raised, then Ofcom would respond
4 to that dispute.

5 Q Yes, and it could respond to that dispute by requiring you to change the contract, could it
6 not?

7 A To be honest, I would need to check the position with my regulatory colleagues, because my
8 understanding was that Ofcom's position is to ensure that the terms and conditions that BT
9 publishes are fair and reasonable. That doesn't necessarily mean that Ofcom would
10 micromanage and say: this particular wording has to go into a contract, but it would say to
11 BT, if it felt that a term was not fair and reasonable, for BT to produce terms that were fair
12 and reasonable.

13 Q Just to deal with Mr. Nasralla, he was not a lawyer, was he?

14 A No.

15 Q In fact, he was a technical specialist, was he not?

16 A That's right. Mr. Nasralla was appointed by Ofcom to oversee the WES development as a
17 whole. He chose to attend the contract subgroup meetings – whether he chose to also attend
18 the pricing subgroup meeting and the product subgroup meeting, I don't know. But it was
19 helpful having him at the contract subgroup meetings, not only because, as I say, he was
20 able to observe behaviours of the parties, but also because of his technical knowledge, there
21 is a bridge between the product developments and the contract. Obviously, with the
22 contract we needed to make sure that we were reflecting the product as well as taking into
23 account BT's commercial policy.

24 Q He is now a senior communications and systems engineer for New Zealand Airways, did
25 you know that?

26 A I noted that from Mr. Heaney's exhibit, yes. But, as I say, I would assume that Ofcom had
27 confidence in him in having appointed him for the WES developments as a whole.

28 Q At the time that this contract was concluded there remained significant issues, did there not,
29 that the communications providers were unhappy with?

30 A There were issues that were recorded. I think I included them in one of my exhibits.

31 Q They included, for example, the fact that under this contract BT had the power to change the
32 terms of the contract when it wished to?

33 A Under prescribed circumstances.

34 Q Yes, and the CPs were very unhappy about that, were they not?

1 A This is what first raised the particular issue and led to the contract subgroup meetings,
2 because of a complaint that was raised during the PPC negotiations the day before launch of
3 WES. So yes, they said that they were extremely unhappy about clause 17, changes to the
4 contract.

5 Q That was different from BT's earlier standard terms and conditions, was it not?

6 A It's different from the standard interconnect agreement terms and conditions; it is not
7 different from other standards that were in BT Wholesale at that particular time.

8 Q Of course, that is an issue that was going to be of significance on a day to day basis for the
9 communications providers, was it not?

10 A Sorry, in what way?

11 Q Their contract review, there would be continuing commercial uncertainty if you could
12 change the terms of it at will.

13 A As I said, under prescribed circumstances, as you can see from clause 17.1.

14 Q Similarly, your power to raise the price with 90 days' notice. That was a concern to them,
15 was it not?

16 A That, I believe, is a reflection of the condition set out by Ofcom for the reference offer is
17 that it is 90 days for changes of prices, 28 days for new products.

18 Q As at the date that this contract was entered into there remained a number of issues that
19 were of concern to the CPs, were there not?

20 A Those are set out in the spreadsheet.

21 Q We can see the issues they were not happy about, because they are the ones that are not
22 marked in green?

23 A Sorry? We are talking about the issues that were – sorry, can I just check. (Pause) In tab
24 4B 10 were the issues that the CPs raised and which they wished to have reviewed after a
25 period of five months.

26 THE CHAIRMAN: Those are the issues listed on the email, is it, that you are talking about, or in
27 the spreadsheet?

28 A This arose from the industry meeting, so I'm talking about tab 4B10 in BT 32.

29 MS ROSE: I have no further questions.

30 Re-examined by Mr. READ

31 Q Sir, I have just got one question in re-examination. You were referred to the Gail McInnes
32 email which is at bundle CW1-3 E9, the email of 9th March. You, I think, said it was a
33 reasonably accurate summary?

34 A It's an internal memo within THUS.

1 Q Let me ask again, do you think that that reflects what was discussed at the meeting of 9th
2 March 2005?

3 A No, it's hardly complete, as Gail McInnes points out. She was on the phone for four and a
4 half hours, so we would have had an extremely fulsome meeting on 9th March, not just
5 discussing those particular issues. Yes, we would have discussed clause 12. We also would
6 have discussed the definition of "site" because one of the things was that CPs were
7 extremely concerned about or, at least, wished to see developed was where can WES go to
8 and from, forecasting, migration, KPIs, care packages, there are a whole host of issues that
9 were discussed and so it was a very fulsome meeting.

10 Q Could you take bundle BT32 tab 4B 7? This is the WES Industry Forum minutes of 10th
11 March 2005, which I think you were referred to. We see as item 3 on the minutes:
12 "Contracts Up-date - Industry Lead – Ali Brewis" and then we see that it says that:
13 "Ali explained that 'a lot of progress' has been made on the issue list. This table
14 can be found on the WES Industry Forum website. Issues have either been solved/
15 will be discussed further with OFCOM / BT / or put on hold (with a watching
16 brief). A final issue list will be collated to ensure all remaining issues are captured
17 appropriately. This final issue list will form part a basis for the 5 month review."
18 Did that reflect your understanding as a result of the meeting of 9th March?

19 A Any particular aspect?

20 Q Is it a fair summary of what was said and agreed, and so on?

21 A I would say so, yes, that there was a lot of progress had been made. I would have said it
22 was a very positive experience through the development of the negotiations.

23 THE CHAIRMAN: 9th March was contract subgroup?

24 A That's right, yes.

25 Q And 10th March is the Forum?

26 A Yes, the way this was actually set up was that there would be monthly forum meetings and
27 those would always be on 10th of the month. Then there would be three subgroup
28 development meetings that were produced that would meet more regularly but would report
29 back and be subservient to the industry forum. In addition to that we published information
30 on the website to make sure that everybody could participate and see how things were going
31 on, as you can see in para. 6 of that particular minute.

32 MR. READ: Sir, do you have any further questions?

33 PROFESSOR MAYER: Mr. Cox, could I please just refer to your witness statement, para.29. I
34 would like to move a bit from process to substance. You talk about wanting to have some

1 "carve outs"?

2 A Yes.

3 Q Can you just explain to me what was the basis for thinking that a carve out in relation to an
4 Ofcom Determination was a justified basis for a carve out? What was your thinking behind
5 that?

6 A My thinking on 18th February was that, whilst I agreed in principle to what had virtually
7 been dictated to me by MCI, because I wanted to make sure that that particular bit was
8 correct. I wanted to make sure that there was clarity surrounding that, and so at that
9 particular meeting I mentioned that I wanted to check back with colleagues internally about
10 carve outs, and so I checked with my regulatory and pricing colleagues (a) to ensure that
11 they were happy with the MCI principle, which they confirmed, and also to ensure that there
12 was clarity what we should put in this particular carve out. As you can see, there were two
13 carve outs that came back, one which was in relation to the payment of interest by BT was
14 that it was information provided by the communications provider then BT would not pay
15 interest on that.

16 Secondly, I was advised to make it clear that there would not be any interest payable if there
17 was a determination.

18 Q It is latter I would like to focus on more. What was the thinking behind that? What
19 justified, if you like, the asymmetry and treatment between interest ----

20 A My understanding was that it was not asymmetrical, it was, in fact, symmetrical, so that if a
21 dispute was raised by CPs, because BT said that it would raise the charge under clause
22 17(1)(b) then BT, during the time of exploration of that, did not put the charge up and
23 therefore, if then Ofcom found in BT's favour then obviously there was a period when BT
24 would recoup that amount of money but would not pay interest on that.

25 Similarly, if BT had put a price up and then there was a challenge, and so BT then had to
26 pay retrospectively then there would not be any interest on that. So in that respect we
27 thought that it was symmetrical.

28 Q And was that argument put forward as a justification?

29 A The text was put forward and the text was accepted with little discussion.

30 THE CHAIRMAN: Just following up from that, I am looking at your witness statement, as was
31 Professor Mayer, at para. 29 you summarise the discussion, or at least a part of it on 18th
32 February, when you say BT was likely to want some carve outs. Was it that you put that in
33 that general way at the meeting because you felt you better reserve the position and you
34 wanted to check with your colleagues?

1 A Yes, just reserving our position, yes.

2 Q So you did not specifically refer to an Ofcom determination?

3 A No, I didn't. No, no, I checked back with my colleagues on that particular one.

4 Q And then it was one or more of your colleagues who said we had better put something in
5 about an Ofcom determination?

6 A Just for the clarification, yes.

7 Q To deal with that, that should be one of the carve outs?

8 A Yes.

9 Q You said you checked I think with colleagues in pricing and regulation ----

10 A Pricing and regulation, yes.

11 Q -- can you remember whether it came from pricing or regulation, or can you not recall?

12 A Offhand I cannot recall, I am afraid.

13 THE CHAIRMAN: Anything arising from that? Thank you very much, Mr. Cox, you are
14 released as a witness.

15 A Thank you.

16 (The witness withdrew)

17 MR. READ: Sir, I will call Mr. Ewbank.

18 Mr. JOHN ANTHONY EW BANK, Sworn

19 Examined by Mr. READ

20 Q Mr. Ewbank, if you could take your core bundle C, and go to tab 4. That is a witness
21 statement and, if we go to the final page, we see your signature on it?

22 A Yes.

23 Q That is your statement and your signature?

24 A It is.

25 Q And do you adopt that as your evidence in this case?

26 A I do.

27 Q And if you could also have to hand BT 3, and then go to tab 5A - do you have it?

28 A Yes, I do.

29 Q We see another copy of your witness statement, and then from 5B onwards, we see various
30 exhibits that you have exhibited to your witness statements?

31 A I see those.

32 Q If you would just like to stay there you will be asked some more questions.

33 A Thank you.

34 Cross-examined by Ms. ROSE

1 Q Good morning, Mr. Ewbank.

2 A Good morning.

3 Q If we can just take up your witness statement, it is probably easiest in the core bundle, and
4 can you go to para. 8? You refer to three industry reviews that have taken place since
5 launch, and you say two took place during the dispute period, and you say:
6 " I was involved in these industry reviews. I specifically deal with the reviews in
7 2007/2008 and 2010 in this statement."

8 A Yes.

9 Q Then you say:
10 "These reviews provided ample opportunity to CPs to renegotiate the standard
11 terms of the agreements, including clause 12.3. However, clause 12.3, and in
12 particular its second sentence, was not raised by the Appellants as a major issue
13 during these reviews; they had either raised it briefly before abandoning the point
14 or have failed to raise it at all. Consequently, it was not subject to significant
15 changes. This is in stark contrast to many other clauses of these agreements which
16 were raised by CPs during the industry reviews and were subject to subsequent
17 changes."

18 A Correct.

19 Q Is the point that you are seeking to make there that if the CPs had raised the second sentence
20 in 12.3 BT would have been willing to amend it?

21 A We certainly would have considered doing that but obviously we would have had to have
22 taken that back into the business to discuss that.

23 Q Would you have been prepared to amend it?

24 A We would have considered it.

25 Q But would you have been prepared to do it?

26 A As I say, I would have had to take that to our commercial forum group within BT to seek,
27 basically to test that one within the business.

28 Q Are you suggesting that you have never done that exercise?

29 A No, we have done that on a significant number of occasions, yes.

30 Q And what was the response?

31 A It varied, depending on the issue.

32 Q I am sorry, I mean on this issue?

33 A On this issue, no we haven't.

34 Q You have never done that?

1 A No.

2 THE CHAIRMAN: Have I understood it right, you say if it had been raised you would have done
3 it?

4 A Indeed.

5 Q But it was not raised and so you did not do it?

6 A Indeed.

7 MS. ROSE: Let us just take a look at the reviews. You explain at para. 20 that there is a periodic
8 review of these contracts every two years, approximately?

9 A Yes.

10 Q And the way it works is that a list of issues is produced by the CPs?

11 A Indeed.

12 Q As you explain, these may be very lengthy?

13 A They are, yes.

14 Q You say there may be hundreds of issues?

15 A That's correct.

16 Q They are then narrowed down by BT to about 12 issues, is that right?

17 A No, I mean it's a natural consequence of the negotiation process that the list is quite
18 extensive and we work through that list in full. What tends to happen as we work through
19 that process is as we come towards the end of the review there are usually around about a
20 dozen or so issues which we may not have come to an agreement on, which need a further
21 discussion and we asked the CPs quite often to prioritise those issues for us so that we can
22 give them the correct focus at that latter point.

23 Q So you ask the CPs to prioritise their issues, and essentially what happens is that the issues
24 that do not get prioritised do not get discussed, do they?

25 A No, that is not the case. We will work through the full list in total.

26 Q The first review that you refer to is the 2008 review and that is at starting at para.31 of your
27 witness statement. Are you aware that the CPs were unhappy about the way that their
28 ability to raise issues in this review had been limited and restricted?

29 A I am aware towards the end of the review they were not happy that we had not given their
30 priority list the attention it deserved, so what we did was we extended the term of the review
31 to make sure that we had additional meetings to cover those off again. It would be a second
32 or third go at those same issues because we will have been through them already.

33 Q Let us just look at the correspondence at the time. CW1-3 Tab 23. This is an email from
34 Gavin Rowson. Is he somebody who works with you?

1 A He was one of my colleagues.

2 Q You are copied into this email as we can see. He is responding to somebody called Bailey
3 from Tower House Consulting.

4 "We refer to your email below to John Ewbank. It is disappointing you now appear to
5 have changed your position on a number of issues which we felt were resolved during
6 our meetings. The spreadsheet is and has been regularly updated by John prior to each
7 meeting. It is, therefore, unhelpful to introduce this new column now. It appears to
8 re-open a number of issues we felt were closed. If you felt that John had not properly
9 captured the position in his spreadsheet it would have been more productive to deal
10 with that at the subsequent meeting and not a number of months later. This does not
11 appear to be an efficient way to deal with the 100+ issues.

12 We only have a few weeks now until conclusion of the review and to make the best
13 use of that time it would help if you would start to prioritise the issues otherwise we
14 will not be able to complete the review and we don't have the resource to attend more
15 dates or continue beyond the end of March".

16 So this is on 3rd March.

17 A Correct.

18 Q And you are saying that you have got to finish the review by the end of March.

19 A Yes, as I said a little earlier, we did extend the review out until April. It had begun in
20 October/November and usually reviews are scheduled to last three months. We had
21 extended it once and we did so again, so the full duration was actually one of about seven
22 months.

23 Q Another email was sent by Mr. Rowson four days later, 7th March, on the following page.

24 "Further to our discussions on Wednesday and just to confirm the process to complete
25 the review which we have extended to try and deal with the important issues that still
26 remain".

27 So this is after the review has been extended, yes?

28 A Hm mm.

29 Q "On the issue of prioritisation we appreciate your attempts to identify the key areas
30 but there does need to be more of a push on those big issues and less time taken on
31 what appear to be fairly minor issues. We do have a limited amount of time and
32 resource and we are unable to extend meetings and timeline beyond that which is set
33 out below".

34 Then the review is to be extended to the end of April.

1 A That is correct.

2 Q It is right, is it not, that the CPs were not happy with the situation of time, were they?

3 A I would not say that was the total position because some CPs do come into the meetings for
4 quite a considerable number of weeks and months, and a certain number would have liked it
5 to continue but I do not think that is necessarily the general position.

6 Q Can you just take up Bundle CW3? This is an email to you ----

7 THE CHAIRMAN: Which tab?

8 MS. ROSE: I beg your pardon. It is Tab B1.

9 A Yes.

10 Q This is an email to you from Christine Roberts of Colt Telecom.

11 A Yes.

12 Q On 26th March 2008, so this is about three weeks after the email we just looked at. Yes?

13 A Yes.

14 Q "WES/BES contract reviews". She says:

15 "We had a CP call yesterday in preparation for our meeting and discussed your
16 proposed agenda. Given the spreadsheet was circulated at close of business on the
17 day before Easter, we have not had sufficient time to review the updates. We have not
18 yet received a re-draft of the service documentation. We would like the meeting
19 though to focus on the main conditions, definitions and proposed warranties.
20 We also have certain ongoing concerns with the review which we would like to bring
21 to your attention ahead of the meeting today.
22 CPs are concerned that the push at this stage on certain key issues will mean that other
23 issues are overlooked. Given the time constraints at this stage in the review we agree
24 with an attempt to prioritise issues but that should not be taken to imply that the other
25 issues that were raised are insignificant. From our perspective, the reason that so
26 many issues were raised at the start of this review was that the contracts needed a lot
27 of work.
28 Throughout the review Openreach and CPs appear to have had different attitudes
29 towards this purpose. CPs expected this to be a full and thorough review and
30 negotiation. We were somewhat dismayed therefore when you stated at the last
31 meeting that this was a review rather than a negotiation. Having been asked for our
32 issues at the beginning of the process we had expected these would be fully
33 considered and debated, however, we feel that this is not the case leaving the CPs
34 concerned that we have not achieved what we expected to at the start of the review.

1 Our perception is that this has been exacerbated by insufficient resource from
2 Openreach as evidenced by the difficulty we have experienced in scheduling
3 additional meetings and updated documentation being provided far too late for us to
4 review in any detail before each meeting.

5 CPs would like to make it clear we will not necessarily be 'either accepting or
6 rejecting the package and in the case of the latter to provide reasons' ... We expect
7 CPs will make their own decisions as to the courses of actions they may take once the
8 final draft is published".

9 So she, on behalf of CPs, was there expressing their unhappiness with the way that the
10 debate on issues had been narrowed over the course of this review, was she not?

11 A It was not narrowed. We had been through all the issues that were on the issues list. What
12 was happening at the late stage was looking at the priority list that the CPs wished to look at
13 at that late stage.

14 Q Yes, I understand that you may not accept that her concerns are valid but those concerns
15 were being expressed to you at the time by the CPs, were they not?

16 A By this particular CP, yes.

17 Q But she is talking on behalf of the CPs, is she not?

18 A I do not believe that that necessarily was representative of the CP position, no.

19 Q That is the terms in which she writes, is it not? She talks about "the CPs are concerned"?

20 A Yes. Like I say, I do not believe necessarily that she is speaking on behalf of all of them.

21 Q In fact, the issue of the second sentence in Clause 12.3 was raised at this review, was it not?

22 A It was. If I could expand on that?

23 Q Just a minute. We are going to deal with it in one minute. We have the spreadsheet of the
24 issues that were raised in this review. It is at CW1-3 Tab 21.

25 MR. READ: Sir, I do not know what your copy is like but mine is pretty - I wonder if I might
26 trespass and have an extended A3 sheet?

27 THE CHAIRMAN: Yes.

28 MS. ROSE: Yes, I found this one easier but it may be ----

29 THE CHAIRMAN: We do have those but this is all right.

30 MS. ROSE: Because it does not have the dark colours on it I think it is easier to read. It is the
31 second last page, I am sorry it does not have pagination, but the second last page, just
32 between the hole-punches, do you see the heading on the left-hand side "Adjustment to
33 when interest is payable"? Yes?

34 A Yes, I do.

1 Q Then we have "Detail" of the issue: C&W: ".. for the period beginning on the date on that
2 which the 2 parties agree BT shall make the repayment and ending on the date BT actually
3 makes payment". So that is an issue about the first sentence on 12.3.

4 A Indeed.

5 Q Then Exponential-e says: "overpayment cannot happen due to CP because only BT date was
6 used for calculation see 12.1. Therefore delete phrase". That is the first carve-out which
7 was talked about that says BT do not have to change interest if it is a result of information
8 from a CP.

9 A Indeed.

10 Q Then this: "Interest payment shall be from the date of overpayment until date of repayment.
11 Regulatory determination interest for net present value adjustment is payable if the regulator
12 determines that it should be".

13 A Indeed.

14 Q So what they are saying is, regardless of this second sentence at 12.3, interest or the
15 equivalent, if you like, of payment to the time it is expired, would be payable on the
16 determination of the dispute if the regulator says so.

17 A That was a request, yes.

18 Q It is not a request. It is a comment, is it not?

19 A Indeed.

20 Q That it is payable if the regulator says it should be. Then Easynet: "No interest available on
21 retrospective price changes - can go either way but we may want interest to be incurred. To
22 be discussed. Please explain this caveat It is surely a hangover from the old SIA provisions
23 which allow provisional traffic data calculations based on CP figures. Not appropriate in
24 non-switched services. In relation to fact interest will not be payable on any amount due as
25 a result of a recalculation. CP would expect to be payable on this".

26 A Yes.

27 Q So they are clearly saying that interest should be payable?

28 A Yes, although I think it is worth making the point that when we had the discussion in the
29 meeting Easynet seemed very unsure as to whether they actually wanted that or not. They
30 were almost debating with themselves as to whether or not they actually wanted it or not. It
31 was certainly not put forward with any fervour or real concern. I actually got the feeling
32 they were not sure themselves whether they wanted it to not. That came across in the
33 discussions. The actual discussion then very quickly moved to what seemed to be their
34 more substantive request, which was the actual definition of interest rate itself. So

1 consequently the negotiation that took place thereafter very quickly focused on the
2 definition of interest rates and, in fact, the reduction in interest that would be applicable.
3 That consequently, the amendment, was made in the contract itself so that is how the
4 discussion progressed. But it was not even a particularly long discussion because they
5 really did not seem to want to major on the point at all in the context of quite a few hundred
6 issues and a number of substantive commercial issues that were raised. The amount of time
7 they wished to spend on this point and the amount of discussion they wanted to have around
8 this point was actually quite small.

9 Q If we go back to your witness statement, to para.44, you ----

10 THE CHAIRMAN: Just before that, can you just help me on this? If we read across in the
11 spreadsheet there is a third column from the right, "Discussion at mtg of 23/1 and
12 conference call of 31/1", it says: "12.3" I suppose "to be adjusted to take account of new
13 interest rate definition. Openreach researching the issue around retrospection and also
14 C&W's issue about date the refund applies from". This spreadsheet was produced by
15 whom? By you?

16 A By myself, yes.

17 Q So what is that recording in that column?

18 A That is the subsequent discussion. As Nick mentioned earlier, these are very much sort of
19 aid memoir documents so they will not necessarily record every single discussion but they
20 are meant to give a flavour of the discussion that took place over a period of time.

21 Q That is the focusing on the other point on 12.3 but not the point raised by Easynet about
22 retrospective price changes?

23 A Indeed, and the reason for that was, as I mentioned earlier, they really didn't seem to know
24 for sure themselves whether they wanted to press the point or not. There was very little
25 discussion, to be perfectly honest, on that point.

26 MS. ROSE: If we go back to your witness statement, para.44, you refer to the 2010 Connectivity
27 Services Contract Review. By this stage the WES and BES contracts had been consulted,
28 had they not?

29 A That's right.

30 Q Into a single Connectivity Services Contract.

31 A Sorry, which paragraph again?

32 Q Sorry, para.44, I was just looking at the heading where you refer to that review. You do not
33 refer in this witness statement, do you, to the next contract review that took place in 2012?

34 A That's correct, and the reason for that was purely a timing one. Obviously the subject matter

1 of this case predates that review.

2 Q You were involved with the 2012 contract review, were you not?

3 A Yes, I was.

4 Q In connection with it you sent BT's comments to the communications providers on
5 22nd February 2012. Can you pick up file CW3.

6 THE CHAIRMAN: That is the one we were just looking at, is it not?

7 MS. ROSE: CW3, the slim file. If you go to tab B2, this is an email from you to the individuals
8 from the various CPs who were involved in this contract review - yes?

9 A Yes.

10 Q Dated 22nd February 2012, and the subject, as we can see, is "CS", that is "Connectivity
11 Services"?

12 A Indeed.

13 Q "Contract Review, tomorrow's call. For tomorrow's conference call I attach a consolidated
14 version of the issues list". Then you say, "This issue is minus the Sky/THC comments", and
15 that is signed by you. The list you sent on that date is at CW1-3. tab 24. If you go six pages
16 into this document, do you see in the third column along a reference to 12.3?

17 A Yes.

18 Q And it says, "Level 3, Global Crossing", they are particular communications providers -
19 yes?

20 A That's correct.

21 Q Who were raising this issue, "We do not agree with the last sentence of this clause", so this
22 is their comment - yes?

23 A Yes.

24 Q "Where Ofcom makes an order that a charge be recalculated or readjusted
25 retrospectively, interest is payable in accordance with that Ofcom order, and in the
26 absence of such an order at the default interest rate".

27 A Yes.

28 Q Then we have your response on behalf of BT:
29 "I am unable to agree to this to request as it does not match Openreach commercial
30 policy, so unable to amend."

31 A Yes.

32 Q You must have taken some instructions within BT ----

33 A Indeed.

34 Q -- to determine what BT's commercial policy was?

1 A Yes, on this point, in discussion with CPs it had become quite clear that this particular point
2 was suddenly of a lot of interest to them, because obviously they were aware of the details
3 of this case by then. It suddenly went up their priority list to probably the top item. So I
4 consulted with colleagues and their advice was that it was probably better for all concerned
5 that we don't actually focus on this particular request for that reason. Consequently, I had
6 that discussion with a couple of the CPs and we sort moved on from that point as a result of
7 that.

8 Q So when you gave evidence earlier saying you had never discussed this issue with the
9 policy people inside BT, that was not correct, was it?

10 A In the terms of the - up until - with regard to my witness statement, so in the terms of the
11 contract reviews that are addressed in there then that is correct, yes.

12 Q Yes, but you left out of your witness statement the 2012 contract review, did you not?

13 A Indeed.

14 Q The fact is that in relation to the 2012 contract review, this issue was raised with you, you
15 took it back to BT and you refused to agree it, did you not?

16 A I did take it back into BT, but I was advised that it wasn't appropriate to have that
17 discussion.

18 Q The reason is that they were told that it did not match Openreach commercial policy?

19 A Indeed.

20 Q You also informed Ofcom of the situation, did you not, BT did - are you aware of this?

21 A I'm not aware of that, no.

22 Q If we just take CW1-2, tab 23, this is a response by BT to the disputing CPs' responses in
23 this complaint.

24 A Yes.

25 Q If you go to p.8 of 34, BT stated:

26 "In any event there has been no negotiation (other than the now historic
27 discussions in 2008) between the parties. prior to the referral of the disputes. about
28 the terms of clause 12.3 prior to any dispute being referred to Ofcom."

29 If you go to footnote 26, it says:

30 "The contract was reviewed in 2010: however, no CP raised this interest provision
31 as an item for review. The contract is currently being reviewed and this interest
32 provision has been the subject of review. The current status is that BT and the
33 negotiating CPs have agreed to disagree."

34 A Yes.

1 Q BT has not subsequently changed its stance on that, has it?

2 A No, it hasn't.

3 Q I have no further questions.

4 MR. READ: Sir, I have no re-examination, do you have any further questions?

5 THE CHAIRMAN: No, we have no questions. You are released.

6 A Thank you.

7 (The witness withdrew)

8 MR. READ: Sir, that is the factual evidence for BT. The expert evidence comes next week.

9 THE CHAIRMAN: Yes.

10 MS. ROSE: Sir, the first witness for the communication providers is Mr. Dods.

11 Mr. DOMHNALL MCDONALD DODS, Sworn

12 Examined by Ms. ROSE

13 Q Sir, just to clarify what I am about to do, we have got obviously two versions of all these
14 witness statements, one in the core bundle and one in the appeal bundles. In almost every
15 case, for some reason, the versions that are in the core bundle are unsigned, and the signed
16 ones are in the appeal bundle. So I am going to take the witnesses first to the signed ones
17 and then to the core bundle, in case you are wondering why I am doing it that way. (To the
18 witness) Mr. Dods, could you please take up bundle CW1-3, and if you turn to tab E at the
19 front of that bundle, do you see a witness statement with your name on it?

20 A I do.

21 Q If you go down to p.20 is that your signature?

22 A It is.

23 Q And do you adopt this as your evidence?

24 A I do.

25 Q If we go then to core bundle C, tab 12, is that the same witness statement, on this occasion
26 unsigned?

27 A I believe so, yes.

28 Q If you go to the following tab in the same core bundle, do you see a statement saying
29 "Second statement"?

30 A I do.

31 Q Again, if you go to p.9, is that your signature?

32 A It is.

33 Q Do you adopt that as your evidence?

34 A I do.

1 Q Would you just wait there.

2 Cross-examined by Mr. READ

3 Q Good afternoon, Mr. Dods?

4 A Good afternoon.

5 Q Perhaps I should say, Sir, as an opening remark, we think that in a lot of the CP statements
6 they are properly matters of submission, and we are not going to bother cross-examining on
7 that. What we plainly want to do is try and stick to the core issues as regards the witness
8 evidence. (To the witness) Mr. Dods, I want to start by looking at the contract negotiations
9 in 2005, and I want to look, first of all, at para.7.2 of your second statement. I think the
10 easiest place for you to find these because they are together, is core bundle C, tab 13. Have
11 you got it?

12 A Yes.

13 Q This is the famous wrong spreadsheet. You accept that the one that you exhibited to your
14 original witness statement was, in fact, the wrong version?

15 A Yes, I was referring, when I was drafting my statement, to the correct one, but the solicitors
16 bundled the wrong one.

17 THE CHAIRMAN: I think we follow what happened.

18 MR. READ: Can I just explore that a little bit further, because if we go back to your first
19 statement which is in tab 12 of that core bundle C, so just the tab before, you give the
20 reason there in para.30 why you want to go back and investigate why you have not - do you
21 have it?

22 A Paragraph?

23 Q Paragraph 30. You are explaining there why you thought you failed to spot the clause
24 which, as you say, so obviously favoured BT, and you add half way through that paragraph:

25 "In preparation for this case I reviewed the correspondence and draft versions of
26 the Contract from the time. I now see that the reason I had not picked up on it
27 earlier was because clause 12.3 did not feature until the near final version, and
28 when it did suddenly appear it was not flagged in the 2 March 2005 covering email
29 from Carlton Daniel at BT or in the attached issues list."

30 A Yes, what I mean by that is that this is a standard way that BT and industry uses to negotiate
31 the contracts. The normal practice when a new clause is introduced is that it would be
32 referenced, say, in this case in 12.2 in the remarks column and a new line would be added
33 saying: 12.3 new clause, and then it would detail what it was. That didn't happen in this
34 case.

1 Q No, but it was in the attached issues list, was it not?
2 A It was in the comments for 12.2, correct.
3 Q Yes, so it is not as if, from the attached issues list, you could not see that there was a new
4 clause 12.3?
5 A I accept an error was made. Had time permitted and we hadn't been all working in such
6 haste, I accept that there was a remark in relation to another clause which would have
7 identified that 12.3 was there, yes. I accept that we were all working at haste, as Mr. Cox
8 and Mr. Ewbank have outlined, and we were all under a great deal of pressure, and an error
9 was made, yes.
10 Q You say you were under a great deal of pressure, and if we can look at your second sentence
11 at para.8.2 tab 13 of that bundle: "I agree with Mr. Cox that at the time all parties were
12 under immense time pressure." That is what you are saying, is it not?
13 A I think that's what I have just said to you as well, yes.
14 Q But you are talking about what is happening at the end of February/beginning of March
15 2005, are you not? That is what you are saying in para.7.7 for example above?
16 A Yes.
17 Q But Mr. Cox was not talking about that time period, was he, when he referred to para.14.
18 Perhaps you would like to have a look at what he says in para.14. It is in the same bundle
19 tab 3. Can you see that?
20 A I do, yes.
21 Q He says:
22 "In its Energis Determination, Ofcom gave BT just 30 working days to publish a
23 reference offer (which would have included contract terms) and just 60 working
24 days to provide the products, both time periods running from the date of the
25 Determination. This put immense time pressures on the drafting of any relevant
26 contract. BT could not, therefore, possibly consult properly upon the contract before
27 it published its reference offer. Instead, BT made it clear that it would discuss any
28 changes with industry and, in respect of those agreed, BT would retrospectively
29 amend the agreement back to the WES launch date on 26 November 2004. ... 15.
30 However, I should comment that, even though this process helped to relieve the
31 immediate time pressure imposed by Ofcom in its Energis Determination, there still
32 was a pressure on BT (and indeed as there should have been on the other parties) to
33 agree the terms promptly ..."
34 So in respect of immense time pressures, that is a slightly different thing, is it not, because

1 that is relating to the period when the product had to be got out.

2 A I think there were two different types of pressure. Obviously, BT were under immense
3 pressure to meet the Ofcom deadline for their reference offer to come out. But then, as Mr.
4 Cox says in 15, we were all under immense pressure. It may be semantics whether it was
5 pressure or immense pressure. We were all working extremely hard to get this concluded as
6 soon as possible. I think Mr. Cox agrees with what I'm saying there, yes.

7 Q If we just go back to your first statement (and I am sorry to keep moving you around
8 between statements) tab 12 para.6 p.3 you are suggesting there that the: "Wholesale
9 Extension Services ("WES") were first provided from March 2005 under BT's original
10 contract for WES". That is not right, is it? They were provided much earlier, as we have
11 just seen from Mr. Cox's statement.

12 A I think possibly what I'm meaning there is they were first provided to us as a company, so
13 CPs weren't signed up prior to March is my understanding. So yes, they may have
14 theoretically been provided, but they were not consumed (as the term often used in industry)
15 until March under the new contract.

16 Q So that is what you mean by para.6 saying they were first provided from March 2005?

17 A I think they were first provided and purchased, that might be a more accurate way to put it,
18 yes.

19 Q I do want to put the point to you, I think it is only fair to put the point to you, Mr. Dods, that
20 we know you have got the wrong exhibit, we know that probably this was not as clear as it
21 could be --

22 A I don't accept I've got the wrong exhibit, no. I think those who were preparing the bundles –
23 I had no part in preparing bundles for the Tribunal. Someone has made an error in
24 providing a document. But I was referring to the correct document.

25 Q Which is the one that was exhibited to your statement? Did you check your exhibits before
26 you signed the statement?

27 A Yes.

28 Q Let us move away from that and go back to where we started, which is looking at the
29 attached sheet, the issues sheet, and the fact that you now accept (if you did not accept
30 previously but you say you do accept previously) that in fact it flagged up clause 12.3 very
31 clearly in the issues sheet, yes?

32 A There was a comment against another clause in relation to the new clause, but they didn't
33 follow the normal procedure which is to identify on a new line that a new clause had been
34 included. So there was an oversight. I didn't spot it in the comment in relation to clause

1 12.2, I accept that.

2 Q If we take the bundle that contains your original statement, CW1-3, if you go to what is in
3 my bundle marked as E6 but I think it may just be 6 in that bundle, tab 6. Have you got a
4 tab 6 there?

5 A Tab 6, yes.

6 Q That should be an email from Carlton Daniel which attaches, as we see, the industry
7 response. We know that the attached sheet issues log is the wrong one. But if we go on
8 further into that tab we come eventually to the WES contract draft.

9 A Indeed, yes.

10 Q If we go on to clause 12.3 which appears on p.10 of the contract draft (internal page
11 number), do you have that?

12 A Yes, I do.

13 Q We see that it is marked in tracked changes.

14 A We do.

15 Q And stands out as a new clause?

16 A As I've explained in my statement, yes.

17 Q What you are saying is that even though you received the issues log which made mention of
18 clause 12.3, and even though it is in tracked changes on this document, you did not spot it?

19 A As I've explained in my statement, I accept that an error was made. My recollection is I
20 wasn't at these meetings myself; I was providing legal support at a distance. The email was
21 forwarded to me; the tracker spreadsheet didn't flag it up in the normal way. When I looked
22 at the contract that was attached, it appeared to be the one which I reviewed previously
23 which did not contain 12.3, and my only assumption I can make at a distance of some eight
24 years is that I looked at the version number, assumed it's the same one, assumed it's already
25 been reviewed and I didn't review this. So in retrospect that's an error.

26 Q Let us just explore your involvement. You have just accepted there that you were not at any
27 of the meetings. I want to really just explore how much detail you did actually look at the
28 contract negotiations. Can I ask you to take bundle BT32. Further into the bundle there is
29 an exhibit 4.B1. Can you find 4.B1, which is the first WES industry forum meeting. You
30 accept that you were not at that?

31 A No, none of us who were responsible for negotiating the contract would go to the WES
32 industry forum. It was another one of our colleagues, Mark Bennett, who was a product
33 manager, who would attend these, because the WES industry forum wasn't specifically
34 focused on contracts. So no, contract people from our company wouldn't have attended.

1 Q If we can go forward in this bundle to tab 4.B5 we see an email from Ali Brewis dated 7th
2 February 2005. Have you got that?

3 A I do.

4 Q Ali Brewis was Cable & Wireless, was she not?

5 A She was, yes.

6 Q She was actually taking the lead in the negotiations over this?

7 A Yes, that's typical in these negotiations that one or another CP will take the lead, yes.

8 Q If we look at the addressee list we can see that Gail McInnes is down there as an addressee,
9 but you are not?

10 A No, indeed.

11 Q You did not exhibit this, obviously, in your original witness statement. Presumably that is
12 because you never received it?

13 A It's hard to say. Although I obviously didn't receive the original email from Ali Brewis,
14 Nicola McKenna and Gail McInnes were both copied on that. We worked very closely.
15 Indeed, prior to this we had been members of the same team and so we worked very closely
16 together, and they may well have exhibited this to me. I don't know.

17 Q If we can just look at what you say in para.7 of your second statement.

18 A Tab 13, yes?

19 Q Sorry, tab 13 bundle C:

20 "As I explained at para.30 of Dods 1, in preparation for this appeal I sought to reconstruct the
21 history of the negotiations by re-reviewing the correspondence and draft contracts from the
22 time, which for the most part I was directly copied on."

23 A I have sought to reconstruct my recollection of events from emails which I have in my
24 possession, yes. I would either have been copied on the original emails, or had been
25 forwarded to me by Gail, Nicola or any other colleagues involved.

26 Q Do you think you would have seen this email before?

27 A I honestly couldn't tell you.

28 Q Again, one of the ones you do exhibit which, if we look at bundle CW1-3 (I am sorry to
29 have to keep switching you between bundles but that is unfortunately the way it is), tab 7
30 we see that this is another email from Nick Cox, again which she is copied in on, and Nicola
31 McKenna is copied in on, but you are not copied in on.

32 A Correct.

33 Q So would it be a fair summary to say that certainly for the first half of this – most of the
34 period for the contract negotiations from 7th December to middle/end of February, you were

1 not really taking much of an interest in the whole contract review process?

2 A No, that would not be fair at all. That would be a complete misrepresentation in fact. We
3 were a relatively small organisation. We had one person who was able to attend these
4 meetings. It was not cost effective for us to all be flying up and down the country to attend
5 two hour meetings, and it certainly wasn't cost effective to have my time devoted, because
6 when I come to a meeting in London I have wasted the whole day for a two hour meeting.
7 So it was deemed that those in the carrier relations team, it was their primary responsibility
8 to negotiate with bodies such as BT, would attend the face to face meetings. We would then
9 meet after and indeed we would meet beforehand on many occasions to prepare for the
10 meetings and to review the stage afterwards, because none of those responsible were legally
11 trained. They wanted to make use of the legal resource available to them and so they
12 consulted with me afterwards, so no, I wouldn't accept that at all.

13 Q But the problem with that approach is that you are entirely dependent upon what other
14 people are telling you actually went on?

15 A I accept that, although nothing I was told was in any way inconsistent with my experience
16 before or since in dealing with negotiations with BT, it was nothing out of the ordinary.

17 Q Could you just look in CW1-3 - I hope that you should only have three files up there. One is
18 BT 32 ----

19 A Yes.

20 Q -- which is the one I do not want you to look at and the other one is CW1-3 which should
21 have the blue sticky label on it?

22 A Yes.

23 Q And it is that one I want you to look at. Can you go to tab 9, please? It is a document we
24 have already seen earlier, which is a print out of an email from 9th March, and you can see
25 there that Gail says:

26 "The final BT/industry WES contract meeting was held today after four and a half
27 long hours on the phone."

28 So she was not there at the face to face but she was on the phone and she had four and a half
29 hours of discussion and she is attempting to summarise that in a half page email, is she not?

30 A Yes.

31 Q You see how could you possibly have a flavour of all that was discussed at that meeting
32 from just a short email?

33 A My recollection is this wasn't the only email, the others were rather more 'indelicate' shall I
34 say, about the approach being adopted by BT. There was a degree of frustration described

1 to me in the 'take it or leave it' approach you might put it as has been displayed in the
2 negotiations. So this was the summary of the key issues, I think, as to what we had to do
3 next. But, no, I don't think it was ever meant to be a complete blow by blow record or
4 minute of the meeting, no.

5 Q The problem with all of this, Mr. Dods, is that you are giving evidence here today on the
6 basis of what you have been told by other people who are not here today and you, yourself,
7 cannot verify whether that is an accurate recollection or not?

8 A I cannot verify what is an accurate recollection?

9 Q Whether what they are reporting back about the discussions is an accurate reflection of what
10 actually happened because you were not there?

11 A I don't dispute I wasn't there.

12 Q One of your issues, if I can put it like that in your statement is that you effectively feel that
13 BT slipped in this clause 12.3 at the last moment without properly flagging it up?

14 A Well, that suggests I am accusing BT of some sort of subterfuge or degree of mischief, I am
15 not suggesting that in the slightest. I am merely stating that the normal procedure was not
16 followed. It was not terribly prominent. Other issues were flagged up in covering emails,
17 Carlton Daniel has some emails where he highlights the changes that have been made. This
18 one, as we all now know, is a fairly significant change. It wasn't flagged up other than in a
19 comment in relation to another clause. I don't wish to suggest anyone was doing anything
20 underhand, I don't believe that for a second.

21 Q But we know from para. 30 of your first statement that I have already taken you to - if you
22 want to look at it, feel free to do so, it is in bundle C, tab 12. You say:

23 "I do recall wondering how I could possibly have reviewed the contract but failed
24 to spot a clause which so obviously favoured BT."

25 Then you say:

26 "In preparation for this case I reviewed the correspondence ..."

27 A Yes.

28 Q So what you are doing in preparation for this case is trying to recreate what you thought was
29 the position at the time in 2004/05 why you missed this clause?

30 A What I've done is I've gone back over my email archives, as I believe anyone would if they
31 were trying to recall something after eight years, reviewed the situation as an aide memoire
32 as to what happened. I am trying to recreate my understanding as at that time.

33 Q I just want to explore this with you, Mr. Dods.

34 A I wasn't there, no.

1 Q You were not there, you were reliant completely on what other people have told you and in
2 trying to work out what has happened you are entirely dependent upon an email traffic,
3 quite a bit of which you do not seem to have actually been the direct recipient of.

4 THE CHAIRMAN: Well, to be fair, Mr. Dods said that even if it was not sent to him it would be
5 forwarded on to him, and realising that he did not spot it at the time he was trying to work
6 out how that could be, so he looked back over all the emails that came at the time to try and
7 explain it.

8 A I am not relying solely on my emails.

9 Q And I think you say you discussed it with Miss McInnes - she still works with you, does
10 she?

11 A No, she doesn't. Since then she's left the industry in fact, she now works in the energy
12 sector, so no, she no longer works for us, but we remain in contact.

13 Q Is this just you seeing her, or were there lawyers present or how did it go?

14 A It's just me chatting to her to try and recall what happened.

15 Q She, like you, is trying to recollect it from 2012 because that is the first time she presumably
16 was asked about it? Is that right?

17 A Yes.

18 Q Because if one just takes, for example, one example in your first witness statement at para.
19 24 - tab 12 - you say here:

20 "Gail McInnes informed me, and I believe that, the people attending the meetings
21 from BT were not decision makers and had no power to agree amendments."
22 So that is what you are relying upon from what she says?

23 A It is entirely consistent with the experience I've had since 1996 of negotiating with BT, and
24 it is perhaps feature of the hierarchical size of the organisation that those who are in
25 attendance at the meetings will very rarely be able to accept or revise anything there and
26 then. The typical approach is to say: "We note what you've said, we'll take it away and we'll
27 take instructions." There's nothing wrong with that.

28 Q Except you seem to be inferring that this demonstrates that BT was behaving autocratically
29 and would not agree to change things?

30 A I don't see whether someone has the power to agree the change or not, or whether the
31 rejection comes from someone else in the organisation, the fact is that when you are
32 negotiating with BT it's a very slow and painful process, but typically the changes proposed
33 by industry of any standing or substance simply don't occur.

34 Q I can take you through all the material but you have seen some of the emails. Nick Cox,

1 whom we have heard from today, was the person who was leading the negotiations for BT
2 was he not?

3 A Yes.

4 Q He is a solicitor?

5 A He is, yes.

6 Q He was actually the one who drafted clause 12.3?

7 A I believe so.

8 Q Are you saying that he is not somebody who could be a decision maker within BT - he
9 might have to refer it to other people ----

10 THE CHAIRMAN: I think that is the point that is being made. That is all that is being said, and
11 frankly I do not think it is intended by Mr. Dods that that point is a criticism of BT.
12 Certainly, we do not see it as a criticism of BT, speaking for myself. It is a large
13 organisation, Mr. Cox is a solicitor not a commercial person, so he has to go and take
14 instructions, maybe because of the structure of BT it takes slightly longer to get instructions
15 than if it is a small firm. What really matters is what are the instructions that come back. I
16 think Mr. Dods' criticism, which may be right or not, is that the instructions that tend to
17 come back are not to agree to significant changes. That is the point and not the authority of
18 who attends the meetings.

19 MR. READ: Sir, I do not want to start making submissions whilst cross-examining - I take what
20 you say, Sir, and I will not take up time in cross-examination ----

21 THE CHAIRMAN: Yes, Mr. Dods has, I think, confirmed that this is not the fact that the
22 decision makers at BT do not attend the meeting is not intended by him, in itself, as a
23 criticism.

24 MR. READ: Let us move on to a separate point then.

25 THE CHAIRMAN: That is right, is it, Mr. Dods?

26 A Correct. I have dealt with Mr. Cox over a number of years and I have nothing but respect
27 for him. It's not meant to demean him in any way, no.

28 Q Before you move on, you explained why you did not spot it at the time and, as best you can
29 guess, or she has explained it, Miss McInnes did not. You say you noticed it in 2007, can
30 you explain to me what led you to notice it in 2007?

31 A I think generally Thus had taken a great deal of interest in the interest provisions - excuse
32 the pun. My then boss, Richard Sweet, who was the director of regulatory affairs had taken
33 a particular interest in this and we had identified that in a number of contracts there was an
34 asymmetry in that BT was entitled to charge a much higher interest rate for CPs when there

1 was late payment of a bill by CPs, and yet where Ofcom might have found against BT in a
2 determination, for example, about overcharging there was a much lower rate of interest or,
3 in this case, no interest to be paid to the CP.

4 We began a programme of engaging with BT on a number of contracts to seek to negotiate
5 change because we felt that this was a completely unfair position. It was explained to me,
6 for example, by BT Wholesale, that it was necessary for a deterrent factor to be in BT
7 contracts to discourage late payment by CPs because they characterised it as bad behaviour,
8 whereas there was no need for a deterrent factor against BT because any overcharging
9 which Ofcom might find and an award might be made for retrospective adjustments, would
10 be the result of an entirely innocent mistake, and there was therefore no need for a deterrent
11 because there was no bad intent on the part of BT. So we had identified the entire area and
12 this was one of the contracts which we identified as being particularly poor in this regard.

13 Q You say you started a process of engaging with BT to negotiate change. You refer to it a
14 little bit, and perhaps we will come to that, but ----

15 A Yes, I think the primary contract, or first in the queue if you like, was the PPC contract, and
16 the SIA was another one and then WES and BES was further down the list. But again, we
17 didn't have enough resource to be able to tackle it across the piece.

18 Q You could have raised it with the other CPs, you worked ----

19 A We did work closely with other CPs, yes.

20 Q Are you saying in 2007 when, under the impetus of your new boss, this was picked up you
21 sought to involve the other CPs and do something about it?

22 A Yes, we were engaged in particular with a gentleman called Angus Flett at BT. I can't
23 remember his particular title at the time, but we were discussing with - from memory -
24 Cable & Wireless, Global Crossing, and others, but yes, there was a group of CPs who
25 identified that this was an issue, and I think it would be fair to say Thus was taking the lead
26 in that group and representing the other CPs, but we were all involved in discussions with
27 BT.

28 Q So that I am clear, Mr. Dods, I am talking now about 2007/2008, you are saying that you
29 had spotted in 2007 that the clause was missing and it is of concern to you. Is that right?
30 Sorry, that the clause is there and it is of concern to you?

31 A I think we had spotted that interest across BT contracts in general was an issue and we then
32 looked at this one particularly.

33 Q Yes.

34 A We then looked at this and realised that not only was there a poorer rate of interest, in fact

1 | there was no interest.

2 | Q | Let us take this in stages because, if need be, we can get the contract, but you would agree
3 | that both the SIA (Standard Interconnect Agreement) and the PPC Agreement both provide
4 | for interest payable on determinations. Do you agree with that?

5 | A | I do. It is LIBOR +three eighths of one per cent

6 | Q | Yes. This contract provided for no per cent of interest to be payable.

7 | A | Indeed. We found both of those situations unsatisfactory.

8 | Q | But surely the WES/BES contract situation would be more unsatisfactory because there is
9 | no rate for interest provision.

10 | A | The decision would not be mine as to how to prioritise these contracts. I think my
11 | understanding was that in terms of immediate cash impact for the business the PPC contract
12 | and the SIA contract would have represented a bigger one. That is not to say that there
13 | would have been no upside to us from getting an interest provision changed in the way of
14 | BES contract. Indeed, as I have said, that was one of those we wished to tackle. However,
15 | it was not the priority because the others were simply more valuable to us and, as a small
16 | operator, we did not have the resource to tackle all of them at once, no.

17 | Q | Can I ask you to go to ----

18 | THE CHAIRMAN: When you say as a small operator you did not have the resource, I may have
19 | misunderstood you, I thought you said that you raised with the other operators and took the
20 | lead for them all?

21 | A | Well, we worked in concert with them but typically in an operator of our size, I was the
22 | legal resource. If I was on holiday nobody else would look at these. My boss would be the
23 | one looking at the strategic direction of it. Typically that would be the same in some of the
24 | other operators, so we did not have massive teams of lawyers and economists and so on. It
25 | would be probably Mr. Scott, Mr. Sweet and myself working on this from a THUS
26 | perspective. I know in others, for example, Global Crossing there was one individual
27 | looking at it. So, yes, we got together as a group but you are talking about companies who
28 | have got one or two people, perhaps three, looking at it, so it is not a massive operation.

29 | Q | Yes. You might, perhaps naively, think that a point like this, namely the interest rates being
30 | low or zero, you do not need to do a great deal of work to go to BT and say, "Look, this just
31 | is not right".

32 | A | You do not need a great deal of effort to raise the matter but you then need to become
33 | involved in very protracted in depth discussions of economic theory. I recall some very,
34 | very detailed discussions with Mr. Flett as to whether or not interest should be payable, at

1 what rate, and discussions about working capital rates, and so on, which frankly were
2 beyond me as a humble lawyer. I left it to Mr. Scott and Mr. Sweet really to deal with the
3 finer points of economic theory and what interest rates should be applicable.

4 MR. READ: Can I try and explore this with you a bit, because you are saying that in 2007/2008
5 THUS were prioritising other contracts, the SIA and the PPC.

6 A In relation to engaging with BT head-on to discuss the particular provisions, yes, we
7 discussed the PPC contract and quickly became involved, as I say, in some very technical
8 and in depth discussions.

9 Q Does it follow from that that you were not engaging in the 2007 WES contract review?

10 A No.

11 Q Sorry, you were or you were not?

12 A It does not follow from that that we were not engaged in the WES contract review.

13 Q So you were engaged in the WES contract review, someone at THUS is taking the points
14 that they believed to be important to THUS? Is that right?

15 A That would be my understanding.

16 Q I wonder if you can go to CW1-3 at Tab 21. This, I hope, is the spreadsheet ----

17 A Illegible spreadsheet, yes.

18 Q -- yes, that we have looked at, and this is the spreadsheet, do you accept, that relates to the
19 BES contract review process?

20 A It is not immediately apparent from this. There is no header, but it looks like it is an industry
21 contract negotiation tracker, yes. It relates to WES and BES. I cannot say 2007 or
22 otherwise from this. I am not saying I am contesting it.

23 Q Looking at your statement, if I can find the right paragraph, para.56.

24 A First statement, Tab 12?

25 Q Yes. So you are accepting, because you are exhibiting it, that this is the tracker for that
26 contract negotiation?

27 A Yes, yes.

28 Q If we go back to the spreadsheet and we look at Clause 2.2 to begin with, do you see that?

29 A "Commencement/termination"?

30 Q Yes, and we see that there are, under the "Detail", which is the fourth column in from the
31 left, we see THUS putting in a comment and below it we see another one putting THUS into
32 the comment. Do you see those?

33 A Yes.

34 Q If we go down to Clause 2.4B we see THUS putting in a comment.

1 A Yes.

2 Q And if you go on to Clause 2.11A we again see THUS putting in a comment. Yes? I can
3 keep doing this throughout the whole of the document, but when we come to Clause 12.3 --
4 Do you have that? We have no comment from THUS.

5 A Yes, I think that can be explained in that the way that the normal course of these
6 negotiations is concerned is that if another party, if we were all engaged in a contract
7 negotiation and another party has already made the point, you do not simply repeat the point
8 because all that happens is that the spreadsheet quickly becomes larger and larger and
9 becomes unmanageable. So if, for example, Easynet have made the point then we would
10 not repeat the point. We would not labour it if somebody else has already made that point.
11 You do not have to repeat everything.

12 Q Even though you felt it was such an important point in 2007/2008?

13 A If the point is already under discussion, my saying, "I agree with them and I also want to
14 raise that", does not really add anything. That is just not the way it works.

15 MR. READ: Sir, would that be a convenient moment?

16 THE CHAIRMAN: Yes. Mr. Dods, I am sure you are familiar but you are in the course of your
17 evidence, although it is uppermost in your mind, you cannot discuss it with anyone until
18 your evidence is concluded. Shall we say 5 past 2?

19 (Adjourned for a short time)

20 MR. READ: Mr. Dods, can I take you back to the end of the 2004/05 WES contract negotiations.
21 You said in your evidence before the short adjournment that, in fact, Ali Brewis was the one
22 who was effectively taking the lead on the negotiations for the CPs?

23 A Yes, she was taking on the co-ordination role. It was always more efficient, or is always
24 more efficient, if one party takes the point of co-ordinating arrangements with BT. That's
25 not to suggest that she was the only one speaking.

26 Q No, but she would have been on top of all the points that were involved, would she not,
27 because she is the one who is collating them, she is sending them, she is the person to whom
28 reference is being on the points?

29 A Not necessarily, no, I think whoever was responsible for raising the point would be referred
30 to. They wouldn't refer to Ali Brewis as the lead CP representative and ask her to address
31 all the CPs' point. They would address whoever had raised the point.

32 Q It is fair to say that Ali Brewis - you are not suggesting that she would not have noticed that
33 clause 12.3 had been included in the contract?

34 A I have no idea what she would or would not have noticed, no.

1 Q Can you just take bundle B32, and go to tab 4B7.

2 A Yes.

3 Q Here is the WES industry forum on 10th March 2005 - do you see that?

4 A Yes, this is the overarching body, yes.

5 Q Item 3 is a specific item, "Contracts update, industry lead Ali Brewis"?

6 A Yes.

7 Q It says:

8 "Ali explained that 'a lot of progress' has been made on the issue list. This table

9 can be found on the WES Industry Forum website."

10 You would not disagree with that, that it was placed on the website and available for

11 whoever?

12 A It says so here.

13 Q Then:

14 "Issues have either been solved / will be discussed further with OFCOM / BT / or

15 put on hold (with a watching brief). A final issue list will be collated to ensure all

16 remaining issues are captured appropriately. This final issue list will form part a

17 basis for the 5 month review."

18 So she is suggesting that actually there has been a lot of progress made on resolving the

19 issues, does she not?

20 A She does, yes.

21 Q She is one who has taken the lead on this, and she is the one who is saying, "Anything

22 outstanding can be put on the remaining issues that are to be captured appropriately and the

23 basis of the next five month review" - yes?

24 A I think you're rather over-exaggerating the role that anyone who is collating these things

25 has. It's not to suggest that all responsibility sits with them. That's what it says in that note,

26 yes.

27 Q Just turn to p.2, and look at the top of the page:

28 "Ali explained that due to the detail, she is only able to present a summary at this

29 meeting. If anyone from Industry would like more detail she is happy to be

30 contacted."

31 It is a bit more than just collating things, is it not, she was actually taking a positive lead?

32 A Well, she would be available to be contacted and she could look to the issues list, yes. What

33 I'm trying to suggest is that she's not the one who's speaking of every single operator who's

34 in the review - in the negotiation. It would be up to each CP to make their point. I've

1 performed this role myself in a number of negotiations. I would never presume to speak for
2 other CPs on points that they've raised. I'm happy to give summaries, and so on, as to
3 what's been discussed, but I would never presume to speak for a CP, and I presume Ali was
4 doing the same thing. It's a widely recognised way of proceeding.

5 Q And we see that, following from that, there is to be a "no go/go" conference to take place on
6 Thursday, 17th March. So again, people could, if they wanted to, could they not, raise issues
7 if they felt they had a particular issue with anything?

8 A I think they'd been told not to raise issues by BT in fairness, but Mr. Cox described earlier
9 that they could have raised an issue although they've been told not to.

10 Q We see, if we look further down that paragraph:

11 "This debate led to a discussion on publications/notifications and a revised
12 reference offer -

13 AP/THUS raised that they had still issues. It was agreed that Ali Brewis would
14 contact Gail from Thus to clarify issues further."

15 So there is Ali Brewis actually talking to Thus about the issues?

16 A Yes.

17 Q And yet your evidence is that nobody on the Thus side had picked up on the clause 12.3 at
18 that point?

19 A Sorry, are you suggesting that because we hadn't picked up 12.3 we had no issues? I don't
20 understand the question.

21 Q What I am suggesting to you, Mr. Dods, is that whatever may or may not be the position of
22 your understanding at the time, the rest of industry, and in particular Ali Brewis, were quite
23 content about the way that clause 12.3 had been introduced?

24 A I have no idea whether anyone else was content. I can only say nobody picked it up. It
25 wasn't raised as an issue. That's all I can tell you, that it was not raised as an issue, I didn't
26 spot it, nobody else appears to have spotted it.

27 Q Of course, the reason you cannot tell is ----

28 THE CHAIRMAN: When you say nobody else appears to have spotted it, you have explained in
29 some detail that you made an error and how you made the error. You do not know, do you,
30 whether people spotted it or not?

31 A That's true. In fairness, it wasn't picked up by anyone.

32 Q They may not have raised it, but whether they did not spot it you would not know, would
33 you?

34 A True. I can't say one way or the other whether it was agreed or not agreed on this or not.

1 MR. READ: Just look a little bit further in that bundle at tab 4B9. We see that here is Louise
2 Sargent from Openreach sending out a sheet dealing with any new issues or issues not
3 captured, which follows on from the WES industry forum we have just been looking at, and
4 we see that from email on the next page, on 5th April 2005.

5 A That's correct.

6 Q If we look to tab B4 B10, we see the attached sheet?

7 A Yes.

8 Q One of which is put down there, as we know from the third page, "The interest rate in clause
9 12 and whether this proves to be workable". So it was actually on an issues list, was it not?

10 A I think, in fairness, I read that as being the interest rate as between BT and CPs on any late
11 payment. So it's the point that Mr. Cox made about trying to get asymmetry as between the
12 parties, rather than the second part.

13 Q The point is, Mr. Dods, that as far as you were concerned, you had no knowledge at all
14 about clause 12.3 at that point in time for all the reasons you have been explaining this
15 morning. What I am suggesting to you is that this was something that was positively on the
16 watch list thereafter, clause 12, and yet still you did not pick up the fact that there was a
17 clause 12.3?

18 A Well, your interpretation that you're read into that, I'm reading into it a different way.

19 Q Clause 12.3 is dealing with interest rates, is it not?

20 A There are two parts to clause 12. This sheet just says "the interest rate in clause 12", and
21 there was no interest rate in the second part of clause 12, so I read that as being the "interest
22 rate".

23 Q There is an interest rate attached to the 1996 Act in clause 12.2, is there not?

24 A Yes.

25 Q And there is an interest rate attached to the 1996 Act in the first sentence of clause 12.3?

26 A Yes.

27 Q So anyone who has to consider this particular point about the interest rate under clause 12
28 will have to necessarily take into account clause 12.3?

29 A Yes, as I did.

30 Q In 2007, you say?

31 A It was on the watch list after this, yes, we had to take account of it, yes.

32 Q You say you only first spotted this in 2007. Why did you not spot it in 2005?

33 A I can't recall when we spotted it. I said that by 2007 we had become aware of this as an
34 issue across BT's contracts.

1 THE CHAIRMAN: I think we have spent quite a lot of time on this.

2 MR. READ: Yes, I am going to move on.

3 THE CHAIRMAN: Can I, before you move on, ask you this. Going back to the WES industry
4 forum minutes at 4B7, a couple of tabs before, the entry "Contracts update, Ali Brewis"
5 "Ali explained that 'a lot of progress' has been made on the issue list. This table
6 can be found on the WES Industry Forum website. Issues have either been solved
7 / will be discussed further with OFCOM / BT / or put on hold ..."

8 Can you just help me: what sort of contract issues, because this is about the contracts, I
9 think, and it is the WES contract, were being discussed with Ofcom?

10 A I think the sort of issues that would be put on hold for further discussion.

11 Q I think that is an alternative.

12 A That would be the items on which we would not have reached agreement, and those are
13 ones which, when you're negotiating with BT in the UK, you tend to run into commercial
14 policy, and which, when you are negotiating with BT outwith the UK, you don't run into
15 those issues because there's more give and take.

16 Q What does it mean about "discussing further with Ofcom on the WES contract"?

17 A I can't say what was meant by whoever drafted this. It's Louise Tinson, I don't know what
18 she had in mind at that stage. As I say, the WES Industry Forum was mainly for operational
19 people or commercial people, rather than legal people, so it maybe that they are
20 misunderstanding what role there might have been or what scope there might have been for
21 discussion with Ofcom. I can't say. I don't think there was any ongoing discussion with
22 Ofcom. It might have been that there was to be further discussion with BT and perhaps are
23 referring to the fact that Mr. Nasralla was attending some meetings and had an oversight, I
24 don't know. It's conjecture on my part.

25 Q You cannot help with what is meant by that, other than, as it were, conjecture?

26 A Correct.

27 MR. READ: I just want to ask you one question further about the issues log, which you can find
28 at 4B6.

29 A Yes.

30 Q If one just takes one other instance out of this issues log, and can I just ask you to look at
31 7.1 in the issues log, you can see it is said there that the clause is unacceptable, BT decides
32 when its workforce undertakes work, and perhaps in order to get a better handle on it it
33 might be sensible if you just took bundle E ----

34 A I don't memorise all of BT's contract terms. I have it now.

1 Q If you go to tab 17, which is actually the final version of the contract showing tracked
2 changes ----

3 A Clause 7.1, you said?

4 Q Yes, clause 7.1. One sees that the end result of clause 7.1 is that it is deleted - do you see
5 that, p.7?

6 A Yes, it's the old 7.1, not the blue one.

7 Q Not the blue one, yes. If we just follow it through on the events log we see that someone at
8 Cable & Wireless is objecting that the clause is unacceptable. Then BT set out a very long
9 answer to it?

10 A Yes.

11 Q Industry responses are awaiting information from Louise.

12 "BT agreed to clarify what is included in 'enhanced care' ..."

13 and that is because there is a variation to clause 7.1 being suggested. Then, looking at the
14 summary of industry responses on the second column in from the left:

15 "BT have confirmed that 'Enhanced care includes repairing a fault 24/7. Please
16 make reference to this in the contract."

17 Clarifying the abortive charges, and then we see, "BT agrees, please see deleted clause 7.1".
18 Do you see that?

19 A I do, yes.

20 Q Is that not exactly what you expect in any contract negotiation whereby one party raises
21 something, another party may object to it, there is discussion and then finally one party
22 gives ground, and in this case BT?

23 A I don't think I've ever suggested anything otherwise. I think the essence of my evidence is
24 that I've got a lot of experience of negotiating with BT in a regulated context, and I've got a
25 lot of experience of negotiating with BT in a non-regulated context. In a regulated context
26 on the large significant issues, around issues like limitation and exclusion of liability, and so
27 on, there is very little ground given BT, whereas in the non-regulated context there is the
28 normal type of commercial negotiation which Mr. Read is alluding to.

29 Q It is right, is it not, it is correct – and of course this is not a normal negotiation, because BT
30 is bound by SMP obligations to provide terms that are fair and reasonable?

31 A Yes.

32 Q And also, it is obliged not to discriminate between different CPs.

33 A That is correct.

34 Q So therefore it has to conduct a multi-party negotiation in order to achieve a final contract

1 that is fair and reasonable to comply with its obligation HH1.2.

2 A Yes.

3 Q What we are seeing here is just such a process?

4 A I accept that they have made a number of concessions on points. I don't think I've ever
5 suggested that no ground was ever given. But on the key issues it wasn't such an amenable
6 position.

7 Q You say:

8 "Whilst CPs typically seek to negotiate on such clauses with BT as far as possible,
9 they do so in the knowledge that the type of issues identified in the above list are
10 unlikely to see any agreement being reached ..."

11 A Yes, that's typically my experience. I've had conversations with clients as to whether there
12 is any point engaging with BT in these negotiation because there is so little hope of
13 achieving change, so yes, that's my experience.

14 Q Were you here when Mr. Cox was explaining in the witness box about how acutely aware
15 they are about the CPs being able to take disputes to Ofcom?

16 A I was.

17 Q It is fair to say, is it not, that it is not CPs actually taking the disputes to Ofcom; it is the
18 threat of someone doing that that is relevant to BT's approach?

19 A I can't say what was uppermost in Mr. Cox's mind, unfortunately.

20 Q You see, you have suggested that THUS was a relatively small outfit, given the number of
21 people in the negotiations department.

22 A Yes.

23 Q But just looking at THUS, if we can just list through the disputes that you must have taken
24 when you were at THUS, you know about the WES 10 rentals dispute in May 2007?

25 A Yes.

26 Q THUS put that dispute forward, did it not? It also put forward a dispute in 2006 about
27 payment terms?

28 A Yes.

29 Q It has put through a number of other disputes to Ofcom against BT over various BT items.

30 A I'm not denying that THUS and indeed other CPs have taken disputes to Ofcom. I know
31 that it is a very small number in comparison with the number that we discussed that we
32 might have taken. So it was an exception rather than the rule that we raised disputes with
33 Ofcom – because of the time, the expense and just the resource involved. I'm not denying
34 there were disputes, no.

1 Q Sir, I am conscious of the time. No doubt, if need be the number of disputes can be taken
2 from Ofcom's website if it proves relevant.

3 THE CHAIRMAN: Yes. We have Mr. Dods' evidence that they did take disputes where they
4 thought carefully about when to do so because it took a lot of time and was quite intensive
5 to have to do that.

6 MR. READ: But, for example, it is much less resource-intensive than taking a dispute to
7 commercial litigation.

8 A I've not experienced taking disputes to commercial litigation. I know that we wouldn't take
9 a dispute over a single contract term, for example. If we had, then I would have spent my
10 life involved in disputes and frankly I haven't.

11 Q The PPC payment terms dispute in 2006 (which is separate, sir, to the PPC dispute that we
12 have been talking about in this case; there was another one that actually took place) that was
13 about a contract term, was it not, about BT's payment terms that you said were effectively
14 imposing too heavy a burden on the CPs?

15 A I believe so. It's not one I was directly involved with at all. My point was, following from
16 my previous answer, that I spent a lot of time negotiating contracts with BT and it was very
17 very rare that those discussions would lead to me taking a dispute.

18 Q Thank you, Mr. Dods. Would you just like to wait there.

19 MS ROSE: There is no re-examination.

20 PROFESSOR MAYER: Could I just raise a couple of points. First of all, I would just like to
21 refer back to para.53 of your statement in which you say that you prefer to prioritise PPC
22 contract discussions ahead of the WES contracts. Could you just tell us a little bit about
23 what was the response to those discussions that you had about that?

24 A On the question of differential interest rates?

25 Q Yes.

26 A It was a very protracted discussion, there was a lot of very in-depth economic theory being
27 discussed to the extent that, frankly, I as a humble lawyer was not able to follow most of it,
28 but my boss, Mr. Sweet and Mr. Scott were engaged much more fully in the nitty gritty of
29 the economic analysis. But the upshot was that there was no need for a deterrent effect as
30 against BT. That was justifying the lower interest rate, or the non interest rate in the case of
31 WES and BES. Whereas there was a need to deter what was seen as misbehaviour or
32 wickedness, if you like, on the part of CPs by paying bills late. That was repeated to me by
33 a number of officers of BT.

34 Q So that was the basic outcome of that. Did that kind of affect your views about the merits of

1 pursuing the WES case?

2 A I couldn't say, I wasn't really involved in the decision as to whether or not to pursue the
3 WES case. I couldn't comment on that.

4 Q Fine, thank you. I would just like to understand whether the issue about the symmetric
5 nature of the omission of interest rates was a point that was raised with you. Was that a case
6 that was put to you?

7 A Symmetric rate?

8 Q In relation to the non-payment of interest.

9 A Yes, I can't recall at what stage, but I certainly discussed it because it is hard to envisage a
10 circumstance in which the clause could be applied in favour of CPs because only BT is
11 subject to SMP obligations and therefore it's very hard to envisage a circumstance in which
12 Ofcom might order a retrospective adjustment against a CP. So, although as Mr. Cox
13 described, he viewed it as a symmetric clause, I think that's in an academic sense only. In
14 the real world I would struggle to envisage a scenario where it could operate in favour of a
15 CP.

16 Q So the case was put to you, but you just did not find it compelling?

17 A Yes. We discussed it over a number of years. It is hard to recall exactly where that has
18 been put, but sitting here today I find it very hard to envisage that, as I struggled to envisage
19 it when it was first raised with me.

20 Q OK. Thank you very much.

21 MR. HARRISON: Perhaps you can help me with this. If there is a price increase that is disputed
22 and a price increase goes back and a decision is held off on price increases and Ofcom
23 decide that the price increase can go back, does interest get charged on that for any delay?
24 For example, if BT decide to increase their prices and there is an appeal against the prices
25 and challenged, basically as I understand it the ring is held for a period of time while that is
26 examined. If it then is agreed that the price increase applies and goes back, would interest
27 be charged on the fact that the price increase went back to the date that it was first applied
28 for?

29 A No, I don't think it would. I don't think so, but there's no retrospective adjustment then; you
30 just keep paying the higher price is my understanding of it.

31 PROFESSOR MAYER: I think what is being put is that BT's notifies a price change, you object,
32 it gets referred to Ofcom because it is disputed. Therefore, they cannot charge the higher
33 price until Ofcom has determined it.

34 A I'm not sure what rule would apply in that case, sir. If that is the case, then --

1 Q If that were the case, then if Ofcom ruled in BT's favour, in which case you would have to
2 pay the price going back to the time of the notification, but this clause would preclude BT
3 then charging interest?

4 A I can see the argument. I am not aware.

5 Q Therefore that would work in the CPs favour.

6 A I'm not aware of it ever having happened. That's the point I was trying to make. I am aware
7 of examples where the clause has favoured BT; I'm not aware of any examples where the
8 type of scenario that's been described has actually arisen and the matter has been
9 considered.

10 THE CHAIRMAN: You would not necessarily know in 2005 what might happen over the next
11 five years.

12 A I'm saying today I'm not aware of it ever having happened.

13 Q Is there anything arising out of that?

14 MS ROSE: I just have one question. You were asked about para.53 and your discussions with
15 BT about the interest rates under the PPC contract and the SIA. You said the upshot was
16 that BT said that differential was justified because of the issue about deterrents. Did BT
17 agree to change the interest rates in those contracts as a result of those discussions?

18 A Did they agree to change them to?

19 Q To the rates you were asking for?

20 A No, we had discussions, as I said, principally with Angus Flett who was in a director's
21 position, I think, at that time and there was prolonged correspondence, I think some of
22 which has been produced. The end result was that there was no change. I again raised it in
23 a fresh contract negotiation which was for the Master Services agreement with BT, and that
24 is when it was explained to me that actually the justification was that there was a deterrent
25 needed to deter bad behaviour by CPs which BT had experience of (they claimed), whereas
26 any overcharging, albeit it would be over a prolonged period and for more significant sums,
27 did not require a deterrent effect. That is the context of those discussions, but there was no
28 change, no.

29 Q Thank you.

30 MR. READ: Sir, can I just get a point of clarification and see if the witness can answer this.

31 Angus Flett, whom you referred to, he is BT Wholesale, is that right?

32 A I couldn't say which part of BT he was with.

33 THE CHAIRMAN: Thank you very much, Mr. Dods. You are released.

34 Witness withdrew

1 MS. ROSE: Sir, the next witness is Mr. Lane.

2 Mr. BARNABY WILLIAM ROY LANE, Sworn

3 Examined by Ms. ROSE

4 Q Mr. Lane, can you please take up bundle CW1-2 and I would like you to turn almost to the
5 back of that bundle, where there is a tab with the letter "C" on it. Do you see there a
6 statement with your name on it?

7 A Yes, I do.

8 Q If you go to p.3 is that your signature?

9 A Yes, it is.

10 Q Do you adopt that as your evidence?

11 A Yes, I do.

12 Q If you could also now take up core bundle C and go to tab14, I think we see there the same
13 document, this time an unsigned version?

14 A Yes.

15 MS. ROSE: If you could wait there, please.

16 Cross-examined by Mr. READ

17 Q Good afternoon, Mr. Lane. Could I ask you to be given two bundles, the first is BT 32, and
18 the second is CW1-3. I just want you to look at para. 4 of your statement, which is in that E
19 bundle. Are you looking at E or one of the others? It does not matter which you have?

20 A Yes, I am looking at para. 4 of my statement.

21 Q Yes, so long as you have it in one file or another. I should have said core bundle C for the
22 reference. You say:

23 "During my employment with MCI I was involved in the 2004/5 negotiations on
24 the original contract for WES services, though I may not have attended every
25 meeting. Whilst I have not had an opportunity to review my documents from the
26 time, Mr Dods' description of the negotiations is consistent with my recollection,
27 and is certainly typical of the way in which BT conducted negotiations on its
28 industry contracts at the time."

29 Can I just explore this with you? Can you take the BT32 bundle first? Can I ask you to go
30 within that bundle to tab 4.B5. Do you have it? You can see it is an email from Ali Brewis
31 to various addressees forwarding an attached summary of the industry view of the BT
32 response. Do you have that?

33 A Yes, I do.

34 Q If we look at the addressee list, we do not see your name on it at all, do we?

1 A That's right.

2 Q We see Chris Munn instead for MCI?

3 A Indeed, yes.

4 Q Perhaps we should do this in sequence, I am sorry, I am going to have to keep moving you
5 between the two bundles ----

6 THE CHAIRMAN: Who was Chris Munn? At the time what was his role?

7 A Chris Munn was my colleague. He was involved in the front line negotiating team. I do not
8 recall his precise job title, but he was in the part of the business that was responsible for
9 negotiating the products that we buy from BT amongst other operators.

10 Q Did he report to you?

11 A No, he did not. I was responsible for UK regulatory affairs as one part of my role at the
12 time, and in that capacity I was responsible for assisting various colleagues around the
13 company, one of whom was him especially in relation to negotiations with other operators,
14 particularly ones which were regulated.

15 Q So who led the negotiations?

16 A It was Chris Munn.

17 Q He would report to whom?

18 A He reported, if I remember correctly - he was part of the team which I think was called
19 "Network Optimisation and Development" , and he reported ultimately - I don't know if he
20 was his direct line manager - Vito Morawetz - who may or may not have been there actually
21 at the time.

22 MR. READ: Could you then take the other bundle, CW1-3? I am sorry, the way the chronology
23 of these things are you have to split between the bundles. Can I ask you to look at tab 7?
24 You can see that this is an email from Nick Cox of BT to Ali Brewis and various other
25 people, including Chris Munn, but not you?

26 A That is correct.

27 Q If we then go on to the next tab, E8 - again, Ali Brewis to industry sending updated response
28 from industry on the WES contract, and it is sent to various people, including Chris Munn,
29 but not you?

30 A That appears to be correct, yes.

31 Q If we go back slightly to tab 6, we see an email from Carlton Daniel to various people,
32 including Chris Munn, but not you?

33 A Correct.

34 Q And that includes the contract?

1 A Correct.

2 Q If we perhaps look at another email in this bundle at tab 10 we can see that this is an email
3 from Carlton Daniel, 16th March 2005 to various people, including Chris Munn, but not
4 you?

5 A Correct.

6 Q Again, if we perhaps go back to the first bundle, BT32, tab 4.B9?

7 A Yes.

8 Q We see Louise Sargent to a whole host of people, including Chris Munn but not you?

9 A That is correct.

10 THE CHAIRMAN: It also goes to somebody called - is it Yew Lee?

11 A Yes, Yew Lee was one of my other colleagues who worked with Chris Munn, and I may or
12 may not recall correctly but I think that they were in the same team.

13 Q But not in your team?

14 A No.

15 MR. READ: You see, I could take you through meeting notes and the various other things in the
16 bundles that we have, and your name does not appear on any one of them as far as I can see.
17 It is right, is it not, that now you look at these documents the reality is that you had very,
18 very little part in this 2004/05 negotiation over the WES contract?

19 A I wouldn't quite put it like that. The WES and BES services was very important to MCI at
20 the time. We were acutely interested in the outcome of the dispute that led to the
21 Determination and the obligation for BT to provide it. As the regulatory affairs team we
22 played a part in that dispute and it was very much central to our role at the time to ensure
23 that the outcome was in accordance with what the dispute said BT had to provide to
24 industry, including the company I was employed with at the time. So I do not agree that I
25 had very little involvement. In fact, Chris Munn and I had frequent discussions about it and
26 I would say that I provided him with support and our strategy was to assist the front line
27 negotiating team in helping them to understand areas which may lie outside their expertise.
28 So, whilst it is true that I was not part of the front line negotiating team I would certainly not
29 agree with the statement that I had very little involvement in the process.

30 Q You had no face to face or email discussion with BT?

31 A That is correct.

32 THE CHAIRMAN: When you say, in para. 4 of your statement, if you would just look at that
33 Under "WES contract negotiations":
34 "During my employment with MCI I was involved in the 2004/5 negotiations on

1 the original contract for WES services, though I may not have attended every
2 meeting."

3 And you say you have read Mr. Dods' statement and you go through the various meetings,
4 which meeting did you attend?

5 A Well, in fact, at the time when I was preparing this statement I do not recall if I did or did
6 not attend any meeting. I think, if I recall correctly, that I did not attend any of the meetings.

7 Q That is not quite the impression that sentence might give. Do you see that?

8 A Yes, indeed, I apologise if it has given the wrong impression but it was intended to reflect
9 the fact that I am not sure if I did or did not physically attend any of the meetings.

10 Q And now, having thought further about it, as best you remember you did not?

11 A I think, if my memory serves me correctly, given that it was eight years ago, then I think I
12 did not attend any of the meetings.

13 MR. READ: It is right, is it not, that when you were at MCI WorldCom - I think that was its full
14 name, was it not, MCI WorldCom?

15 A Actually the company was named "MCI" at that particular point in time.

16 Q Sorry, my fault. But, in any event, at that time while you were there MCI took some
17 disputes to Ofcom did it not? If you do not recollect then say you do not recollect?

18 A No, I do recollect I was just racking my brains. Yes, it was involved in some disputes, yes,
19 and in fact at least one it brought itself, yes.

20 Q Thank you. If you just wait there you may be asked some more questions.

21 Re-examined by Ms. ROSE

22 MS. ROSE: So what exactly was your role in relation to the 2004/2005 negotiation?

23 A My role was to provide back-up and support to the negotiating team. My role was to ensure
24 that key aspects of the company policy were reflected in the negotiating process and two
25 aspects that were particularly important, I should say three aspects that were particularly
26 important, were as follows: The first one was to simply to get the product out of the door.
27 That was the first and most urgent requirement given that we felt at the time that we were
28 suffering a competitive disadvantage due to the lack of a wholesale equivalent product that
29 could enable us to compete in the market. Our most urgent requirement was just simply to
30 get a working product. I was involved in assisting the negotiating team in trying to achieve
31 that as quickly as possible. The second aspect was to ensure that key issues which were
32 very important to the company were reflected in the contract, and the particularly important
33 ones that I was personally involved in ensuring were reflected were, number (1), service
34 level agreements because, given that we are serving the business-to-business market and

1 also we had had issues with, for example, delivery lead times with BT at the time, it was
2 extremely important for us to get the right service level agreements in there. In order to do
3 that our main objective was to try and ensure that the service level agreements were at least
4 as good as those that were included in the PPC contract, at least as, so that is the second
5 thing that I was involved in trying to ensure. The third particularly sensitive issue that we
6 were dealing with at the time was credit vetting clauses. So, for example, these were
7 clauses in the contracts that would require us to go through a credit vetting process under
8 certain circumstances, if we were to buy any product which involved a time lag between
9 receiving a product and settling the invoice. We have at the time, given that this was the
10 pan-European part of a global organisation, suffered substantially through our suppliers
11 insisting on credit vetting clauses which were, in our view, overly onerous and it was key
12 for us to ensure that such clauses were not included in this contract.

13 Q So did that role involve you looking at any drafts of the contract?

14 A Yes, it did. Absolutely. I did look at the contract several times and I had conversations with
15 my colleague, Chris Munn, about the negotiations both formally and also informally.

16 Q Do you recall if you ever saw what is now Clause 12.3?

17 A I certainly do not recall seeing it, and, in fact, I am reasonably certain that I did not see it.

18 Q Why do you say that?

19 A I am quite sure that if I had seen it then it would have been the sort of thing that would have
20 raised a concern. I did mention that there were two kind of red flag issues that I was
21 looking for when I was reviewing the contract with Chris Munn. One of them was SLAs
22 and the other one was credit vetting, but given that it was an issue relating to a financial
23 matter it would have been something that would at least, I am sure, have attracted my
24 attention.

25 MS. ROSE: Thank you. I have no further questions.

26 THE CHAIRMAN: Could you look in CW1-3, which I think you have in front of you, at Tab 10.
27 It has got a blue sticker on the outside of it. At Tab 10 there is the email from Carlton
28 Daniel, do you see that, of 16th March.

29 A Yes, I do, Sir.

30 Q It goes to Chris Munn. It says: "Dear All. [Following] our contracts sub-group meeting on
31 9 March" - that Chris Munn appended - "and the WES industry forum meeting the
32 following day, I attach: 1) the WES contract". So there is a contract being sent to Chris
33 Munn. Do you expect, from the way you have just answered Ms. Rose's questions, that he
34 would have shown it to you? Is that how you understood how things were working?

1 A That was certainly how I understood things to work at the time. Whether or not I actually
2 did, in relation - I see that the date was 16th March 2005 - whether I actually did review that
3 version of the contract is not something I do specifically recall, although I think it is
4 reasonable to expect that I might have given that I did review several versions that he gave
5 me, leaving it mostly to his discretion about whether or not it needed my attention.

6 Q Is she a lawyer - Chris Munn?

7 A No, he was not a lawyer. At least as far as I recall, he was not a lawyer.

8 Q If one looks at the enclosed contract, which starts on the next sheet, we see it is 14 pages
9 and it is dated in March, and we go to p.11 of 14, there is the Clause 12.3.

10 A Yes, Sir.

11 Q Can you help me, you say you are reasonably certain you did not see it but you would have
12 expected Chris Munn to show you the draft that is being sent to him by BT?

13 A Yes.

14 Q Here it is.

15 A Yes, indeed. What I meant to say, Sir, was that I would normally have expected him to
16 show me a material revision to the contract if, in his judgement, it needed my attention.
17 What I can quite specifically say, and definitively say, is that Clause 12.3 did not reach my
18 attention. Quite the reason for that, whether it was because I did not review this version of
19 the contract or for any other reason, I am quite sure that if this had been brought to my
20 attention it would have been something that I would have highlighted.

21 Q So, as I understand it, you were relying on Chris Munn ----

22 A Yes, I was, Sir.

23 Q -- to bring to your attention anything that he thought was important?

24 A Indeed, that was how it worked.

25 Q Forgive me if I misunderstood it, are you a lawyer, Mr. Lane?

26 A No, Sir, I am not.

27 Q Was there a lawyer who reviewed the contracts?

28 A Indeed, yes, we did have a legal team. I do not recall whether this contract was sent to the
29 legal team to review. I imagine that it would have been. I would imagine that they would
30 have done so from the point of view of ensuring that there were no uncovered risks in there
31 and it would not necessarily have had a focus on the product *per se*.

32 Q Would it be fair to think that, just as you have explained you relied on Chris Munn for the
33 reason way you were structured, to bring to your attention anything that he thought was
34 significant, you were similarly relying on the lawyers to bring to your attention anything

1 that they thought you ought to have a hard look at?

2 A Yes, indeed. I should say that my focus was specifically a regulatory focus, to ensure that
3 the nature of the product that was released was compliant with the direction. So I agree with
4 that statement, Sir, yes.

5 THE CHAIRMAN: Ms. Rose, anything arising out of that? Thank you very much, Mr. Lane.

6 (The witness withdrew)

7 MS. HIRSCH: The next witness is Mr. Morawetz.

8 Mr. VITO MORAWETZ, Affirmed

9 Examined by Ms. ROSE

10 MS. ROSE: Please can we have Volume CW1-2. Mr. Morawetz, if you take that bundle up and
11 go right to the back of it to Tab D, do you see a statement there with your name on?

12 A Yes.

13 Q On the second page of that statement, is that your signature?

14 A Yes, it is.

15 Q Do you adopt that as your evidence?

16 A Yes, I do.

17 Q Now could you please take up Bundle CW2? Can you go to Tab E. We see a second
18 statement with your name on.

19 A Yes.

20 Q Then at p.6 is that your signature?

21 A Yes.

22 Q Do you adopt that as your evidence?

23 A Yes, I do.

24 Q Now if you can take up Core Bundle C, if you go to Tabs 15 and 16, are those copies of the
25 same statements that we have just looked at?

26 THE CHAIRMAN: I think we know they are.

27 MS. ROSE: Self-evidently.

28 A Yes, they are.

29 THE CHAIRMAN: I do not think we are asking Mr. Morawetz to do a line by line check.

30 A Thank you.

31 THE CHAIRMAN: Yes, Ms. Lee.

32 Cross-examined by Ms. LEE

33 Q Good afternoon, Mr. Morawetz.

34 A Good afternoon.

1 Q I am going to be asking you some questions on behalf of BT and they are questions relating
2 to your second statement, which is at bundle C tab 16. Do you have that? Could you turn
3 to para.9, please. You explain there that Virgin's primary need as regard Openreach inputs
4 is for WES in order to provide local access to customers to whom it is not economical to
5 build out to, and you also explain that the number of BES circuits that you purchase is
6 relatively limited in comparison with WES.

7 A That's right.

8 Q Moving on to para.18.4 of your statement, you refer there to purchases of BES specifically,
9 and you note the decline of BES purchases by Virgin from Openreach over the period in this
10 dispute?

11 A That's right.

12 Q There is some confidential information there. I am not going to ask you about that.
13 Similarly, the exhibit to your statement sets out details of WES and BES purchases, but
14 again just note that it is there. Virgin is also a wholesale competitor of Openreach, is it not?

15 A That's correct.

16 Q Were you in the Tribunal yesterday when Mr. Jones was giving his evidence?

17 A Yes, I was.

18 Q He was asked some question about the competitiveness of Openreach. In para.15 of your
19 statement you provide some information about that, and in particular you mention there who
20 notable competitors of Virgin are, so BT Wholesale, Cable & Wireless, Colt, TalkTalk and
21 so on, yes? You also in para.18.1 of your statement comment on Virgin's wholesale
22 activities, and particularly in the last sentence of para.18.1 we see again some information
23 which is confidential. I do not need to ask you about it but it is in relation to the market
24 share of Virgin at the wholesale level?

25 A Yes. Sorry, this market share for Virgin in the Ethernet market is obtained from accounts
26 from the Ofcom research related to the leased line market review. So that includes Virgin
27 Media's market share across the wholesale and the retail business.

28 Q Yes. Your statement refers to the fact that in relation to customers who would be interested
29 in Ethernet products you may supply either on-net (which basically means Virgin itself
30 building out and providing the service to the customer) or off-net, in which case you
31 purchase the product from a company such as Openreach?

32 A Yes.

33 Q In para.12 of your statement we can see there that the decision that Virgin faces is whether
34 or not to build itself or whether to purchase a product. You set out there the factors that will

1 be relevant to taking that decision. In effect, it is right is it not, that the question that you
2 ask is really which solution will be the most cost effective for Virgin?

3 A Essentially, yes.

4 Q In order to make that decision you look at the projected costs, obviously, of each potential
5 route, that is right?

6 A That's correct.

7 Q With regard to purchase, you take into account the charges that you are going to have to
8 pay, the charges that Openreach will charge for the Ethernet circuit, that is right?

9 A Yes.

10 Q Those are rental, connection, and where relevant, mainlink?

11 A Yes.

12 Q You also project forward, do you not, in relation to the likely length of the circuit that your
13 customer is going to need, and work out how many rentals in effect you think you are going
14 to be likely to need over that projected period?

15 A Yes, the length of the customer contract terms, yes.

16 Q So the exercise you undertake is a fairly sophisticated, whole life costing exercise when you
17 are making a decision to purchase, is that right?

18 A Yes.

19 Q We see that, for instance, from the last sentence of para.13 where you are talking about your
20 ability to estimate rental costs in the longer term. So in terms of weighing up the financial
21 cost to you as a whole in order to obtain a circuit from Openreach, you assess that in
22 aggregate, as we have just discussed, by looking at all the charges that you are going to face
23 – connections and rentals?

24 A It depends on the situation we're in. So if we are at the start of the contract, obviously we'll
25 take into account the connection and the rental charge. If we are discussing with a customer
26 potentially a renewal of the contract, so they want to extend or renew the contract that was
27 already existing, our main focus would be the rental. We will take into consideration what
28 the connection charge is, but primarily for competitive analysis purposes in order for us to
29 gauge what potential competitors that might be using Openreach inputs will have to pay to
30 displace Virgin Media.

31 Q Yes, taking that in stage, you obviously said at the outset that you take a decision based on
32 the aggregate charges. If you are making your first decision to purchase then you look at
33 the cost as a whole, going forward?

34 A Yes.

1 Q If your customer is minimum term, presumably your contract with your customer is dictated
2 by their needs and what they would like in terms of the duration?

3 A Correct.

4 Q At that stage you have costed that out and worked out what the different costs of purchase
5 or self-build would be. You would not, unless something changed would you, revisit that
6 question in year 2, for example? It is only if the customer has a different need or something
7 extraneous occurs that you would reassess the various factors going to the cost?

8 A In most cases we will not reassess unless there is, you know, an upgrade or a change in the
9 service to be done. However, we might be looking, not necessarily in conjunction with a
10 customer renewal, to the cost base that we experience across all the estate and, for example,
11 decide to rearrange some circuits in order to shorten mainlink distance.

12 Q Yes, that is a sort of optimisation of your network approach?

13 A Yes.

14 Q I see. But in both of those cases – you mentioned upgrade and you mentioned the ability to
15 optimise your network and presumably reduce the cost for your ultimate customer –
16 something (certainly in the case of an upgrade), presumably the customer's needs, have
17 changed because they now need more capacity than they had originally?

18 A Yes.

19 Q So your whole life costing exercise no longer is suitable and you look again to see what the
20 best solution for the customer would be?

21 A Yes.

22 Q But at that stage, Mr. Morawetz, are you not then looking forward, again a whole life
23 costing for the new solution because you are looking forward to see what not only the cost
24 of the rentals would be, but also the cost of the upgrade, the new connection. Is that right?

25 A The upgrade is a different charge compared to the new connection, so it's a different service,
26 if you like. So we look at the cost of the upgrade. In some instances, if the upgrade is
27 particularly significant, we might actually revisit the decision to buy services from a third
28 party rather than self-providing.

29 Q Just looking at para.18.5 of your statement where you refer to upgrades, you say there that
30 there has been a fairly low percentage of upgrades and you refer to the factors that are taken
31 into account: charges, costs of changing customer solution, and often a lengthy customer
32 liaison required to modify a circuit. So you say: "Consequently, upgrading a circuit can
33 often be an expensive process" and then you also say that you need to understand the input
34 costs for connection and rental at that stage. So you referring, are you, there to a

1 connection?

2 A Yes.

3 Q The charge that you would pay in relation to an upgrade?

4 A That's what it's called in the BT pricelist, but actually it is a different charge.

5 Q But the point I would like to make, Mr. Morawetz, is that at that stage you are not
6 comparing just the rental with the rental under the new circuit; you are comparing the rental
7 under the old circuit with the connection charge and the rental under the new circuit, or the
8 upgrade charge and the rental under the new circuit. Would you agree?

9 A Yes, however, the decision for the upgrade is not a decision that Virgin Media takes; it is a
10 customer requirement. So I wouldn't suggest an upgrade unless the customer requires that
11 upgrade. So in a normal course of business, when the contract gets extended and the
12 customer says I would like to continue for another three years or whatever, I will not take
13 into consideration the connection charge.

14 Q In relation to the other point that you made to me in an earlier answer about optimisation of
15 the network, again, how would that work? Would that involve self-build, or perhaps
16 connecting from a different point? What do you have in mind in relation to optimisation?

17 A It could involve different types of activity. It could involve self-build, although I have to
18 say that is fairly rare that we move a circuit that we provided off net to on-net. It could be
19 changing the service that we buy from a supplier, or change of supplier. So for example, it
20 could be moving a circuit from a WES product to a EAD product (successor product of
21 WES), or could be just changing the point of connection at the BT exchange, to reduce the
22 mainlink. So they are all different combinations, so the optimisation activities that we carry
23 out.

24 Q Apart from the first option, the self-build option, which you say is rare, and presumably that
25 is because of cost, is it?

26 A Yes.

27 Q It is because it is so expensive?

28 A Yes. Actually, primarily it is because of customer disruption. If we don't have that
29 connection at that place there is a dig involved and the customer may want to avoid doing
30 that.

31 Q Apart from that option, all the other options involve either a connection charge or an
32 upgrade charge. Is that right?

33 A They involve either a connection charge or a rearrangement charge, which is half of the
34 connection charge, in cases in which we only change the termination point at the exchange.

1 Q Of course, when you are considering that as an option as compared with staying with the
2 status quo, you look at the combined costs of that change – the upgrade charge, the future
3 rentals and so on, and compare that with your existing price?

4 A Yes.

5 Q Thank you. I was going to ask just a small point in relation to para.14 of your statement.
6 PROFESSOR MAYER: Just before we leave that, the optimisation, you talked about switching
7 from WES product to an EAD product. Would you be able to consider changing supplier,
8 moving from Openreach to another supplier?

9 A Yes.

10 Q If you move to another supplier, then you would have to pay a connection charge for that
11 new supplier?

12 A Generally speaking, yes.

13 Q That could be mentioned as being triggered by upgrades.

14 A Yes.

15 Q If the Openreach rental was increased and, although it is an ongoing contract you can
16 terminate I think on 90 days' notice or something, before the increase takes effect, could an
17 increase in rental lead you to consider potentially changing supplier?

18 A Yes, obviously we are always trying to minimise our costs. If there is an increase in rental
19 we will look at alternatives. In particular, you see, our alternative, they might have a deeper
20 presence in BT's network and therefore will not need to pay main link charges. If we have a
21 service where we connect with a BT exchange and another supplier can connect the same
22 circuit at a nearer exchange to the customer, we will buy the last bit, the local access tail on
23 a re-sale basis from that supplier, and an interconnect service, if the cost of the interconnect
24 is lower than the charge that we pay today, and the rental that we would look at to take that
25 decision would be both the main link rental and the local end rental.

26 MS. LEE: Just in relation to that point, in the case of these Ethernet services the cost of the
27 circuit, the rentals and the ongoing rentals did not increase during the period of this dispute,
28 did they, they fell?

29 A You say "fell"?

30 Q They fell. BT's prices for the circuits fell. They were regulated, with the exception of WES
31 10, it would be fair to say that it is a case on its own, and they fell over the period? Is that
32 something you know?

33 A Yes, I do, yes.

34 Q I am going to ask you a very quick point on para.14 of your statement, if you could have a

1 look at that, and it is the last sentence where you say:

2 "If the circuit in question is off-net (for example provided by Openreach) we will
3 primarily look at the ongoing cost of rental, since our pricing flexibility will be
4 constrained by that input cost. The higher the rental cost, the more likely we
5 would be to consider an alternative ..."

6 The reason that you say "primarily" is because you are really talking about longer term
7 circuits - is that right - things that you expect to last for a long time and therefore the rental
8 charge is a significant factor in what you are considering?

9 A Yes, the analysis that we make is a relatively simple cost comparison between extending the
10 service on the existing basis or changing something on it on a discounted cash basis, and
11 depending on how the charges are structured we will need to have a customer - we will need
12 to be assured that the customer will stay with us for at least a period that sufficient to be in a
13 break-even position on that calculation.

14 Q My point about that primarily was that does not mean that you are ignoring the connection
15 charge, you are weighing up the whole of the cost, and I think you agreed with me earlier
16 that when you are making a decision to build or to purchase a new solution later on you
17 look at connection and rental hook up. It is not that you are ignoring the connection charge?

18 A Absolutely not.

19 Q I think it is a theme of your statement that you say that you need to know clearly what these
20 aggregated charges that BT is offering to you are in order that you can make the decisions
21 that we have been talking about. That obviously makes sense. Can I ask you this: the
22 proposal, or one of the main issues in this case is about a proposal to aggregate connections
23 and rental costs and allocations at the level of cost orientation compliance - I am sure you
24 know that that is the issue?

25 A Yes.

26 Q That does not affect the clarity of the charges. It is not going to change retrospectively the
27 charges that you have been charged, it does not change the information that you have about
28 connections and rentals. It is at a second layer, is it not? It is a compliance issue?

29 A It is a second layer, yes, but my opinion is that if those charges individually, because we
30 look at them individually, as you pointed out, we have different scenarios where connection
31 or upgrades or re-grades take a different importance in our decision and a different role in
32 our decision, if those were not basically reflecting the cost of provision for Openreach we
33 may take a different decision. The level of the charges individually is actually important for
34 us to take that decision. So there is an issue of transparency, but also there's an issue of

1 whether those charges are reflected across the provision for Openreach.

2 Q Yes, I follow you that it is clear that you need to know what the charges are in order to
3 know how to price or in order to calculate the relative merits of buying or self-fill, but does
4 it matter for your purposes, or why does it matter for your purposes, that those particular
5 costs are split in a particular way, that they reflect an allocation one way or the other? That
6 does not seem relevant to any of the decisions that you are having to make.

7 A We take physically the prices as inputs and, working in a very competitive market, we
8 expect those inputs to be provided on an equivalent basis, and the cost of provision of those
9 inputs to be reflected in the price. Otherwise there will be a distortion in our decision. We
10 may take the wrong decision based on information that does not reflect the costs provision.
11 To make an example, as you pointed out, we compete directly with Openreach as well. If
12 we were to take a decision based on the retail price, and that would be the only information
13 that we have about the cost of the services, or those relative components of the service, but
14 Openreach clearly had a full view of the costs provision of connection versus the cost of
15 provision of rental, and clearly Openreach would have better information compared to us
16 about what the optimal solution would be.

17 Q But all of the solutions involve, when you are charging, an aggregation of connection and
18 rental. You have agreed with me that you have to look at the position in the round to see
19 what the cost of your input is going to be and what the charges to your customer are going
20 to be?

21 A I look at the position in the round. Depending on what we're trying to do, whether it's a new
22 customer, whether it's an extension of existing customers, whether it's an upgrade, whether
23 it's a change in the network, each of those components would be taken into consideration.
24 In certain instances, like in a new provision, all of them; in other instances, like in an
25 extension of the contract it would be only the rental; in the case of a change of connection it
26 would be rental and shift, a reconnection to another BT exchange. So all these scenarios are
27 discrete scenarios in my mind, and each of those I will look at different components,
28 different charges.

29 Q We discussed the new purchase and we also discussed the upgrade or the optimisation and
30 in relation to all of those I think we agreed that there is a connection charge and a rental
31 charge and you take the costs in the round because that is what you are projecting as being
32 the likely cost of the solution that you are achieving at that stage.

33 A That is not what I said. In the case of rental, actually I don't look at the connection charge at
34 all.

1 Q I was going to come back and say that your second point was that if you continue the
2 contract you say you look only at rental.

3 A Yes.

4 MS. ROSE: I think it is also not fair to say that in the upgrade he accepts that there is a
5 connection charge. I think his evidence was that there is an upgrade charge which is a
6 different price from the connection charge.

7 MS. LEE: I think we discussed that it is referred to as a connection charge in the industry. That
8 is Mr. Morawetz's answer, I think.

9 MS. ROSE: It may be a connection charge but it is not the connection charge.

10 THE CHAIRMAN: It is not the same connection charge.

11 A It's a different connection charge.

12 Q It is a form of connection charge.

13 MS. LEE: In the case of simply continuing the contract, there is no new decision to take there, is
14 there, because your contract with your customer rolls over. It is only if the customer wants
15 to renegotiate, and in fact do something different that you are even comparing the new
16 solutions with the existing solution?

17 A Yes, there is actually instances so far of continuation of the contract. One is that the
18 contract rolls over, so the customer is happy with the service, doesn't want to change
19 anything.

20 Q There is no decision to take?

21 A There's no decision to take. You've got other sales to the customer. In other instances the
22 customer says, "I came to the end of my term and I put this contract out to tender again",
23 and we know that we are in a relatively strong position because we're already providing the
24 service. We know that our cost to continue to provide the service is only the rental, and we
25 know that the cost for potential competitors to provide the service instead of Virgin Media
26 will be rental and connection. That gives us information of what the competitive market
27 price should be that would enable us to retain their custom in a situation in which that
28 service is put out to tender again. So again, we look at the rental as our ongoing cost of
29 providing the service, but we look also at the connection because that gives us an indication
30 of what do we need to do at the pricing level in order to retain that service.

31 Q And you have already paid a connection in relation to your existing service?

32 A Yes, but I look at the connection because I know that the majority of competitors, they may
33 want to win that contract and, unlike Virgin that is already the incumbent in that particular
34 service, will have to incur the connection charge, while Virgin if they win a renewal of that

1 agreement will not need to incur any connection charge.

2 Q Can I ask you para.18.2 of your statement. You referred there to circuits for which
3 connections are purchased separately to rentals.

4 A Yes.

5 Q You deal in para.18.2 with the issue of the migrations from LES to WES. I think you would
6 agree the connection charge was paid in relation to the original contract, but that was then
7 migrated. So before migration there has been a connection charge that has been paid?

8 A Yes.

9 Q That is outside the dispute period?

10 A That's right, and for a different product as well.

11 Q In relation to decreases of BT's charges, because Virgin is a wholesaler, it may take
12 objection to decreases by BT - is that correct? If prices fall then it affects your wholesale
13 supply to your own customers and the prices at which ----

14 A Yes, it's a very competitive market, and, if you like, we are constrained in terms of pricing
15 by the pricing of our competitors, and that is driven primarily by the cost of Openreach
16 inputs, and if the cost of those inputs goes down our constraint will become more rigid, yes.

17 Q In November 2008 Virgin complained about the fact that BT had decreased its prices for
18 these Ethernet services without giving a full 90 day notice period?

19 A That's right.

20 Q Do you recall that?

21 A Yes.

22 Q Thank you, I think those are my questions, Mr. Morawetz.

23 A Thank you.

24 MS. ROSE: I have no re-examination.

25 PROFESSOR MAYER: I would like to just pursue two areas. I understand that you were saying
26 that you take account of connection charges and rentals. Do you believe that the balance
27 between the two is a matter of indifference? If we think about it in present value terms of
28 an average customer, would you be pretty indifferent between a change in the connection
29 charge and the rental?

30 A Generally speaking, I describe an NPV calculation that we make in respect of a decision, for
31 example, between self-provision and purchasing services from BT. If we self-provide the
32 great majority of our outlay would be upfront. We will need to dig the streets, we have to
33 buy equipment, we need do a quite a lot of work on the customer side and the great majority
34 of those costs will be upfront. The ongoing costs will be relatively small. So it will be a

1 very front-loaded cost of delivery on a self-provision basis.

2 The relative level of connection and rental influences that decision because if the BT
3 connection charge is very high, from a cash flow perspective, we will be in an equivalent
4 position to self-provision more rapidly, and therefore we may decide to self-provide even
5 for contract for a relatively short term. However, if the connection was low, if the rental
6 was fairly balanced we probably would be in that position only when we are assured of a
7 relatively long tenure of the customer.

8 PROFESSOR MAYER: That is interesting, so you are saying it might affect your self-providing
9 or purchasing decision?

10 A Yes.

11 Q Which comes on to my second question, and that is you are in an interesting position where
12 you are essentially both like an upstream provider and a downstream purchaser?

13 A That's right, yes.

14 Q So on balance do you prefer higher prices or lower prices?

15 A That is generally very difficult to say, because it is clearly a very hypothetical scenario. On
16 the one hand if higher prices were set by Openreach and we have a high proportion of my
17 services which are self-provided and therefore are not impacted by that increase, if you like
18 that raises the level of market price and therefore you need the extra margin.
19 On the other hand, that factor could be offset by the fact that I had won less contracts than I
20 did in the original scenario. Say, for example, if I can go after a contract where 50 per cent
21 of the circuits are self-provided and 50 per cent are procured by BT, with higher BT prices I
22 could only afford to win contracts where 70 per cent of the circuits are provided, 30 per cent
23 are bought from BT.

24 The other thing, if prices were lower maybe I would have bought more BT circuits, and
25 therefore I would have reached a bigger scale in specific exchange areas, which would have
26 enabled me to install equipment in more BT exchanges and pay less in cost. It is very
27 difficult to say off the cuff whether it would be better or worse.

28 Q But you have probably given a bit of thought to that internally as to whether or not you
29 would actually prefer higher or lower prices, and I am just wondering whether or not you
30 have come to any on-balance view on that?

31 A I think we actually have come to an on-balance view. You are right in saying we keep this
32 issue under review, and it really depends on where we see the demand coming from and
33 customer requirements being. If you asked me this question maybe two or three years ago
34 maybe on balance it could have been we prefer higher prices. If you ask me this question

1 today we have larger customers, having say tens of connections, or hundreds of connections
2 or thousands of connections, so a relatively strong component of BT services in the later
3 year or so, then they fall and higher BT prices could be quite detrimental. So I say you
4 really have to ask me on the day when there is a set position.

5 Q But it would be fair to say there is a balance, it is not clear cut?

6 A It is not clear cut.

7 Q One way or the other?

8 A Absolutely.

9 Q Thank you very much.

10 THE CHAIRMAN: Anything arising out of that? Thank you, Mr. Morawetz, you are released.

11 (The witness withdrew)

12 THE CHAIRMAN: I think we will take a short break and come back in 10 minutes.

13 (Short break)

14 THE CHAIRMAN: Yes, Ms. Rose.

15 MS. ROSE: Sir, the next witness is Mr. Scott.

16 Mr. COLIN SCOTT, Sworn

17 Examined by Ms. ROSE

18 MS. ROSE: Mr. Scott, can you please take up Bundle CW2 and CW3? If you go in CW2, first of
19 all, to Tab C, do you see there a witness statement with your name on it?

20 A Yes.

21 Q Is that your signature on p.9?

22 A Yes.

23 Q Do you adopt that as your evidence?

24 A I do.

25 Q If you go now to Bundle CW3, Tab C, the last tab at the back of the bundle, that is a second
26 witness statement with your name on it.

27 A Yes.

28 Q Again your signature at p.5?

29 A Yes.

30 Q Do you adopt that as your evidence?

31 A I do.

32 Q How if you take up Core Bundle C, we see the same statements at Tab 17 and 18 of that
33 bundle. If you would like to wait there, please.

34 Cross-examined by Mr. READ

1 MR. READ: Mr. Scott, good afternoon.

2 A Good afternoon.

3 Q Can I ask you, first of all, are you a lawyer by background or what is your professional
4 background?

5 A I am an economist.

6 Q If you would like to keep your voice up.

7 A Sure.

8 Q I have got an apology because I am afraid that we are going to have to, because of the way
9 the bundles were originally put together, dart around between several volumes and I
10 apologies for that. I will try and take you through the bundles as best I can. Can I ask you
11 to look at your first statement? I think the easiest place to look at it is in Core Bundle C,
12 Tab 17. Have you got it?

13 A I do.

14 Q Could you go to para.13, because there you make the complaint that BT has a poor track
15 record in meeting its publication deadlines for producing its annual regulatory output and
16 you then have a table setting out the dates when BT's regulatory financial statements were
17 actually published. Can I ask you, in respect of the years 2000 to 2003, because that
18 predates all the Communications Act; it predates the regulatory framework that was brought
19 in under what is called the CRF in this case. Do you know what actually is the regulatory
20 requirement for BT to have produced the accounts for those years -- and I am just asking
21 about the years to 2003?

22 A As I recall at the time, in 2004, 2003 the regime changed. The deadline stayed the same but
23 it is not something I am 100% certain of.

24 Q All right. Could I ask you then to look at 2004, because you criticise BT for having
25 published its RFS on 17th August. Yes?

26 A Yes.

27 Q If you say "yes" for the transcript.

28 A Yes.

29 Q Could I ask you first to take Bundle BT11? I am terribly sorry. Just hang on to that one and
30 put it to one side. It is actually BT10 I need, but keep that one out because we will be
31 coming to that. I will go in order. If you go to Tab 28.

32 THE CHAIRMAN: BT10?

33 MR. READ: It should be BT10, yes, Sir. I hope it is.

34 THE CHAIRMAN: It stops at 26.

1 MR. READ: I am sorry, my fault. It is Tab 26. I am sorry, I have misread the reference. I do not
2 think we have actually seen this before but this is what imposes the new regulatory financial
3 reporting obligations on BT. You agree with that, do you, or have you considered this
4 before?

5 A Yes.

6 Q Because we have not looked at it before perhaps I can just ask you to go to p.33 and that
7 contains Annex 2 which is "Notification to BT" about setting SMP service conditions in
8 relation to regulatory accounting. Then Schedule 1 on p.36 shows the markets on which it
9 is imposed, and then at Schedule 2, which is on p.43, there are further conditions imposed
10 on BT. At p.48 we see the various conditions that are all set out, which go on a long way to
11 OA34 on p.56. Within those conditions there is an ability for Ofcom to impose directions.
12 If we go to p.80 we see the directions that are imposed on BT. You see all that?

13 A Yes.

14 Q If you go back to the first page of all of this, we see that the dates of this final accounting
15 separation and cost accounting statement is 22nd July 2004. So is it really a criticism of BT
16 that they did not get their regulatory financial statements published until 17th August?

17 A In that particular year that was Ofcom implementing the European framework into UK
18 legislation and there was an awful lot of work to do in terms of setting up regulatory regime,
19 so in that particular year, given that the statement was not out until July, it would seem
20 reasonable that BT would not get its accounts out quite on time. Although, having said that,
21 they would obviously be working on producing them quarterly.

22 Q But until they know the final statement of what they have got to do, they cannot finalise
23 them at all, can they? It is impossible for them to finalise it until they know what they are
24 supposed to be doing?

25 A Yes.

26 Q If you could put that folder to one side just for a moment. I will come back to that one so
27 leave that one out. Can I ask you then to look at 2005 in your table in para.13, because you
28 make the complaint there that they were even later, on 2nd September. Do you see that?

29 A Yes.

30 Q I wonder if you can take the bundle that I originally asked you to get out, which I hope you
31 should still have out, which is BT11, and if you go to Tab 28 we can see that the
32 consultation on proposed changes to BT's financial regulatory framework took place on
33 23rd June. Do you see that?

34 A Yes.

1 Q So that is the consultation, not the final statement. While we have got this bundle open, if
2 you look on the next tab, Tab 27, we see the consultation - and again it is the consultation
3 and not the statement - for 2006 ----

4 THE CHAIRMAN: Tab 29?

5 MR. READ: I am sorry, Sir. I think it must be an eyesight thing. Tab 29, BT11 Tab 29, we see
6 the consultation for 3rd May 2006, a consultation. We can see that this one at Tab 29 is
7 actually quite a widespread consultation because it actually says "Regulatory financial
8 reporting obligations on BT - taking a fresh view". I think if one looks, for example, at
9 para.1.12 one sees that the consultant document includes proposals for BT to change its
10 regulatory financial reporting obligations. So for those two years we now know what the
11 dates of the consultation were, 23rd June 2005 and 3rd May ----

12 A Can I say that the consultations are quite different, so one is what Ofcom would regard as a
13 "business as usual" consultation, so that's the tab 28 which would include in year changes,
14 so the one issued on 23rd June Ofcom would expect changes to be made in the next set of
15 regulatory financial statements. The tab 29 is a policy document which relates to changes to
16 the regulatory financial reporting regime from a policy perspective, so Ofcom would not
17 expect BT to make changes to the subsequent year.

18 Q You say that, but if you just look at tab 28, for example, p.27 (which is the one that you say
19 was not a consultation on changes) section 5: "Proposals affecting Direction 3" and then it
20 sets out various proposals affecting Direction 3. At p.32 we see section 6 "Proposals
21 affecting Direction 4" and those mimic the directions that we looked at in the regulatory
22 financial obligations document of 22nd July 2004. So it is a bit more, is it not?

23 A Those directions would apply in the subsequent year. Given that BT in that year produced
24 its accounts on 7th September, the final statement wasn't out before then.

25 Q OK, let us look at that, shall we? Let us take 2005. Take BT15 tab 43. I am sorry, sir, my
26 referencing seems to have gone slightly out, but it is BT15 tab 43. This is the final
27 statement of notification, is it not, in respect of the consultation we have just looked at?

28 A No, it's the first consultation we looked at, which is the "business as usual" consultation.
29 This is the 2005 consultation. The 2006 consultation was the policy consultation. This is
30 the business as usual consultation then final statement.

31 Q We will come back to that in a moment.

32 THE CHAIRMAN: There is no issue about that. This is in August 2005, and it is the final
33 statement on what you showed you at BT11 tab 28. It cannot be on tab 29 – that was only a
34 consultation in 2006.

1 A Yes, sorry, sir.

2 MR. READ: Sorry, sir, I think there was a misunderstanding as to what year we were talking
3 about.

4 THE CHAIRMAN: We are talking about 2005 at the moment.

5 MR. READ: But there is a bigger point which is that Mr. Scott I think is suggesting that there
6 was a difference in the framework within which Ofcom were issuing the consultation in the
7 statement for 2006 as opposed to 2005. Is that what you were saying?

8 A Ofcom conducts policy consultations about how to improve regulatory financial reporting
9 but it also conducts what it describes as business as usual consultations which will deal with
10 in year events to try to improve the next set of accounts.

11 Q I do not want to spend a long time on this, Mr. Scott, but where in the documents that I have
12 taken you to in 2005 does it say that it is a business as usual consultation?

13 A Just the title. It doesn't say business as usual anywhere; that's just a working term, but that's
14 typically what Ofcom do.

15 Q If we just look at the 2005, which you say is a lesser type of document than 2006, and look
16 at para.1.2 --

17 A Sorry, is this the final statement?

18 Q This is the final statement 2005 BT 15 tab 43. If we look at para.1.2:
19 "The changes fall into four categories: • the introduction of a significant new layer
20 of regulatory financial information provided to Ofcom by BT; • the enhancement
21 of certain aspects of the 2004 Statement as it relates to BT; • certain
22 "housekeeping" amendments to the 2004 Statement as it relates to BT; and • a
23 limited relaxation on the reporting and audit requirements ..."

24 So the wording it uses is a significant new layer of regulatory financial information, so it is
25 a bit more than just a business as usual type of report, is it not?

26 A It may be in that year they tried to combine both.

27 Q In 2005? This is 2005 not 2006. I will take you back if you want me to, but when we were
28 in BT A11 and we were looking at the consultations at tab 26, 28 and 29, you were drawing
29 a distinction between the two consultations.

30 A Yes.

31 Q What I am suggesting to you is there is not actually a significant difference, other than one
32 may have taken a fresher look to the whole issue than the other.

33 A One deals with housekeeping issues, and other things. The other one is a more policy-
34 focused document.

1 THE CHAIRMAN: I think the only point being put to you, Mr. Scott, is that the first bullet under
2 1.2 suggests that it is a bit more than just housekeeping?

3 A Yes, in that year.

4 Q You accept that.

5 A Yes.

6 Q This, which is the final statement, relates to (as we see from 1.1) the reporting period ended
7 31st March 2005, so that is the 2005 year. Is that right?

8 MR. HARRISON: If we look at the document on tab 28 and we look at the proposals affecting
9 Direction 3 and projection of Direction 4, if we look at those and if we turn to pages 27
10 which deals with Direction 3, the proposal for Direction 3, and then p.32 Direction 4, these
11 deal with, as I understand it, the regulatory framework and actually skip reading it if you
12 could. It looks to me as though a relaxation of the rules rather than adding to the rules. It
13 looked as though it was a simplification.

14 MS ROSE: Just for the Tribunal's note, if you look at the top of p.32 you can see there is a
15 helpful table where it says "Type of amendments" and they are either relaxation or
16 housekeeping. You see the same thing at p.27 in relation to Direction 3.

17 MR. READ: If we go back to para.1.2, Mr. Scott, in this document at tab 28 we see the
18 description of the summary of proposals falls into the same four categories that we saw
19 reflected in the statement, including the first bullet point, the introduction of a significant
20 new layer of regulatory financial information.

21 MS ROSE: I am sorry, I think this question is being put on a false basis, because if you read the
22 summary you will see, under the heading "A new layer of regulatory financial reporting"
23 that what it is talking about is the new layer of financial reporting that was introduced the
24 previous year as a result of the implementation of the RFS. It is talking about the way that
25 it is handling that. So these were adjustments to the handling of the significant new layer
26 that had been introduced the previous year. What they are saying is at 1.6 BT will supply a
27 complete set of financial data such that it will be analysed and re-created out of summary
28 costs and so on. So it was simply implementing what had been done the previous year.

29 MR. READ: It certainly was not implementing what was in the previous year. I do not want to
30 spend a huge amount of time on this because my point is really quite simple. I certainly do
31 not accept what Ms Rose has just said, that this was implementing what had happened in
32 2004. It was changing what had happened in 2004. The level at which it made those
33 change might be a matter of debate, but for these purposes I do not think we need to deal
34 with it.

1 Let me see if I can try to simplify it, Mr. Scott. Would you accept that for every year when
2 Ofcom conducts a review process, where it has a consultation about what changes it may
3 make to BT's regulatory financial statements? Would you agree that that consultation
4 process happens every year?

5 A Yes.

6 Q Every year after the consultation process, Ofcom issues a statement?

7 A Yes.

8 Q Which then gives the relevant directions. We can debate the extent of the relevant
9 directions, but even here there have been changes to the directions. You would agree with
10 all of that?

11 A Yes.

12 Q BT cannot, can it, sensibly prepare its regulatory financial statements until it knows what is
13 in the statement?

14 A BT can do a significant amount of preparatory work, and they have discussions with Ofcom
15 up until publication. It is true that they have to wait for the final statement before they can
16 publish, but you also have to consider why Ofcom consultation statements may be late.
17 Some of that may be a result of BT's actions.

18 Q You are rather cynical about BT's actions. Can I ask you one question, though, about the
19 RFS. I think you said earlier that the RFS were prepared quarterly?

20 A I think I heard in evidence, either yesterday or Tuesday.

21 Q You have no knowledge yourself?

22 A It's my understanding that it is a quarterly process. I think that was in --

23 Q That is your understanding, is it?

24 A That was my understanding before yesterday or the day before, and I think it was highlight
25 yesterday.

26 Q Mr. Dolling does not mention anything about that in his statement, does he?

27 A I think it is in the transcript.

28 THE CHAIRMAN: Sorry, are you saying that was your understanding before you came to this
29 hearing, or something you picked up in the course of the hearing?

30 A It was my understanding but I wasn't certain about it, and then I think it was in answer to a
31 question from the Tribunal itself that the issue of quarterly preparation was discussed.

32 MR. READ: I do not think that is what is on the transcript, but let us not debate that now. Just to
33 complete this, and I probably do not even need to take you to the document, -- we saw the
34 statement, the consultation for 2006 at 3rd May, but in fact the final statement was not

1 published until 16th August 2006. Do you want to see the document? Let me take you to
2 the document, then, just so the Tribunal knows the reference. If one goes to BT 12 tab 30
3 we see the statement being published on 16th August 2006. Do you have that?

4 A Yes.

5 Q We also see at the end, for example, the same type of changes being made. We can debate
6 the actual level of those changes. We do not need to debate that here. At p.42 you see a
7 notification of a modification to Direction 3, and at p.129 one sees notification of a
8 modification to Direction 4. When you put this table forward, you did not check any of this,
9 did you?

10 A All the table does is provide the dates of BT publication.

11 Q Yes, but you are making the point in para.13, are you not, that they are due on 31st July each
12 year, and that BT is always dilatory in producing them?

13 A Yes.

14 Q That cannot be true for the two years so far we have investigated.

15 A I accept there is an issue between Ofcom and BT about how the accounts are published in
16 time, but I think that's a matter for BT to address with Ofcom.

17 MS. ROSE: Sir, I am very sorry to rise, but this question is being put on a false basis in relation
18 to 2006 and the reason for that appears in BT11 tab 29 at p.4. This is the consultation for
19 2006, the one that was described by Mr. Scott as a policy consultation and you will recall
20 that Mr. Scott said that in a year where there was a policy consultation it was forward
21 looking, and if you look at para.1.16 it said:

22 "To inform the ongoing consultation process BT has advised Ofcom that it will
23 provide and publish the 2005/06 regulatory financial information in its proposed

24 THE CHAIRMAN: I do not think, frankly, this is a very productive debate. We appreciate there
25 is an implicit criticism made by Mr. Scott in his table over the relevant period, excluding
26 therefore 202, it was never later than mid-September as opposed to 31st July, whatever the
27 explanation and we really do not - and I speak for my colleagues as well as myself - regard
28 that as very significant for the issues in this case that we have to decide.

29 MR. READ: I am grateful for that indication, Sir.

30 THE CHAIRMAN: So I think exploring in great detail quite what date Ofcom issued its final
31 statement, its consultation, how much the change was and so on between the one and the
32 other, and how significant the change is I do not think you need take up ----

33 MR. READ: Sir, perhaps I can just make the point and then move on.

34 THE CHAIRMAN: We accept your point that there were changes made and they sometimes

1 came at a time that made it difficult or impossible for Ofcom to meet the deadline, but we
2 are not really concerned with whether anyone is to blame for it being several weeks late.

3 MR. READ: The suggestion that is being put forward and which Mr. Dolling has responded to in
4 some length is the suggestion that BT deliberately, in effect, bends the process in its favour,
5 and that is made quite clearly in Mr. Scott's statement, for example, at para. 19, because he
6 says there is a perception that BT delays and restates in order for it to serve its own
7 purposes, and Mr. Dolling, as you will appreciate from his statement, along with BT, is
8 rather upset about this allegation.

9 THE CHAIRMAN: I can see why he is, but I do not think it is an allegation that we feel it is
10 necessary to pursue in order to decide what we have to decide in this case in order to
11 determine it one way or the other, and we are not going, on what we have seen, to make any
12 kind of criticism of BT in that regard.

13 MR. READ: I am grateful for that indication, Sir, and it will make my cross-examination much
14 shorter as a result. (To the witness): Can I just ask you then to go back to BT 10. These
15 were the regulatory financial reporting obligations that were imposed, and then as we see
16 through the years they get changed by modifications and directions in the subsequent
17 statements.

18 Can I ask you then to look at p.23 and look at para. 4.11?

19 A Which tab number?

20 Q Tab 26, p.22, para.4.11. You can see there:

21 "Condition OA9 requires BT to ensure that accounting policies are applied
22 consistently within the same regulatory financial statements, and between
23 regulatory financial statements for the same financial year and from one year to the
24 next. It also requires BT to include prior year comparatives prepared on the same
25 basis as the current year in each regulatory financial statement."

26 Do you see that?

27 A Yes.

28 Q And if you want to actually look at OA9 it is at p.50. It is right, is it not, Mr. Scott, BT has
29 to re-state its accounts if the underlying figures for the year it is reporting on are different to
30 the way it is reported for the previous year. It has to re-state the previous year because that
31 is what is required?

32 A Yes, that is the condition, sir.

33 Q Sir, can you just bear with me for one moment, I will see if I can shorten the cross-
34 examination. (After a pause): Can I just then ask you to look briefly at your paragraph 20.

1 You list out five examples, or five instances, you say, where the commercial impact of the
2 restatements has been to the beneficial impact of BT or the detrimental impact on BT's
3 competitors - do you see that?

4 A Yes.

5 Q Each of those has been dealt with by Mr. Dolling. Do you accept what Mr. Dolling says in
6 his statement about those restatements and the need for them?

7 A You would have to be more precise.

8 Q If you go to Mr. Dolling's statement, if you have core bundle C open, tab 7, p.21. He sets
9 out in para. 101 to para. 138 a very detailed list of reasons why BT had to make those
10 restatements?

11 A I do not believe that BT had to make the restatements, or at least all of them.

12 Q It is right to say also, is it not, that out of those restatements are primarily occasioned in part
13 by the scrutiny with which BT's RFS has had under the PPC case and this Ethernet case?

14 A Certainly the motivation for BT exploring the first restatement on PPCs as a result of the
15 overcharging disputes raised by CPs. BT told Thus in 2007 that there was no issue with its
16 regulatory financial output, it was part of the discussions over the overcharge prior to it
17 going to Ofcom.

18 Q One of the reasons is because Ofcom itself, when it was carrying out both the Ethernet and
19 the PPC case, required BT or made adjustments to BT's RFS, as indeed we know in this
20 case, because sections 12 and 13 of the Decision go at great length on making various
21 adjustments. So there is quite a degree of scrutiny over BT's regulatory financial statements
22 in this case?

23 A On that particular issue, on PPCs because that was the first significant re-statement, there
24 was a great deal of scrutiny and it was seen at the time as a one-off event. It was very
25 significant. Ofcom took it very seriously and it was seen as a one-time incident not to be
26 repeated.

27 Q I think the battle lines between you and Mr. Dolling are clear and in light of what the
28 Tribunal has indicated earlier I do not propose to take that any further. Can I ask you about
29 the telecoms industry. It is right, is it not, that regulatory people and solicitors and lawyers,
30 etc, etc, move around quite a bit between the various telecoms companies?

31 A That's true. I'm based in Glasgow, so I like to stay where I am!

32 Q I do not think I am going to say anything! For example, Karen Wray, do you know Karen
33 Wray?

34 A I do know Karen, yes.

1 Q And she was at Cable & Wireless, head of their regulatory department, and moved to BT?
2 A That's right, yes.
3 Q Do you know Anne-Marie McDonagh, for example?
4 A I do.
5 Q She moved from BT to Virgin, I think it was, was it not?
6 A Yes.
7 Q So people do move around, and they understand what is involved, if I can put it like that.
8 So when you make the complaint that you do not have the resources to investigate, it is
9 dependent upon the resources you actually put into it, is it not, because Cable & Wireless is
10 a big company and if it wanted to it could put a lot more into it?
11 A Until October 2008 I worked for THUS, which was acquired and THUS, as Mr. Dods
12 highlighted, was not an organisation that was flush with resource. It was a company that
13 never managed to pay dividends. Resources were tight. Cable & Wireless was also a
14 business that struggled and was eventually acquired by Vodafone in July last year.
15 Q I think the worldwide revenue for Cable & Wireless before it was acquired by Vodafone
16 was about 2.8 billion, but you would not know?
17 A The business was purchased by Vodafone for 1 billion.
18 Q I am talking about the revenue, sorry, not the purchase price?
19 A Yes, the revenue, I guess, is quite different.
20 Q It is also right, is it not, that Cable & Wireless itself has put in a significant number of
21 disputes to Ofcom over the years?
22 A Yes.
23 Q Including, in fact, because it has actually turned up, I see, in one of the bundles, a
24 Competition Act dispute, NCCN/500, I think it was?
25 A Yes, in 2004.
26 Q So we can accept, can we, that the CPs are really quite sophisticated players when it comes
27 to knowing when to push a button or not?
28 A CPs face a significant number of challenges and they have to pick what issues they choose
29 with the limited resources they have.
30 Q Can I ask you one final question then, you will be glad to hear: if you look at para.14 of
31 your second statement, which you can find in tab 18, you are there discussing about the
32 award of interest not incentivising delay?
33 A Yes.
34 Q If you look at para.14 the broad dates are that you started negotiations with BT in May 2010

1 - that is right, is it not - and you referred the dispute on 17th November 2011?

2 A Yes.

3 Q Do you think that if you knew that you would not be paid interest for that period that it
4 would incentivise you to progress with the dispute?

5 A The matter was complicated by the fact that the *PPC* case was ongoing. I think in an ideal
6 world we would have submitted it sooner given so many issues overlapped.

7 Q I think the Tribunal decided the *PPC* case in March or April 2011.

8 A And then BT took it to the Court of Appeal.

9 Q Yes, but the Court of Appeal case was not heard until the following year, 2012, was it, so
10 that cannot have been a factor?

11 A So at that point we realised that there seemed to be a never ending stream of appeals so we
12 could not delay it any further.

13 Q So even if we take the period from the Tribunal decision in April 2011, it still took you six
14 or seven months before November 2011 putting this dispute in?

15 A As I said, we were consumed by the *PPC* case and it took us several months to put it in.

16 Q But if you had known that you were not going to be paid interest on it surely you would
17 have put the dispute in quicker just to make sure you stopped any chance of not having
18 interest?

19 A Interest did not factor. It was resources that determined when disputes were submitted.

20 MR. READ: Thank you, Mr. Scott.

21 THE CHAIRMAN: Any re-examination?

22 MS. ROSE: No, sir.

23 THE CHAIRMAN: Thank you, Mr. Scott. You are released.

24 (The witness withdrew)

25 MR. READ: Sir, Ms. Lee is going to take the next witness. I think it is going to be touch and go
26 whether we finish before 5 o'clock.

27 THE CHAIRMAN: I see that it is programmed that Mr. Parker will continue tomorrow. Certainly
28 we do not want to sit beyond 5.00. From what we have been told, we are not under any
29 threat tomorrow.

30 MR. READ: No, I think we will be comfortably finished by 4.30 and hopefully we will finish
31 quicker than that.

32 THE CHAIRMAN: Rather than having Mr. Parker having overnight, would it not be sensible
33 then to stop now, unless that causes great inconvenience? He may not finish anyway.

34 MS. ROSE: No, I would agree that it would be sensible for us to start tomorrow. I do not know

1 whether you want to start at 9.30 or 10.00?

2 THE CHAIRMAN: I do not know if you have had a chance to consider. We must finish at 4.30.

3 If you are confident we can do that starting at 10.00 we will start at 10.00. I think that is
4 really a matter for you, Mr. Read, and your team, is it not, with cross-examination?

5 MR. READ: I think to be on the safe side let us say 9.30. I think confidently that we will finish
6 before that but I would rather say 9.30 than having a risk of getting close to 4.30.

7 THE CHAIRMAN: If we finish earlier than 4.30 no one will complain, so let us start at 9.30
8 tomorrow.

9 (Adjourned until 9.30 am on Friday, 1st November 2013)

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