IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1302/3/3/19

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 November 2019

Before:

THE HONOURABLE MRS JUSTICE FALK
(Chairman)
EAMONN DORAN
SIMON HOLMES

(Sitting as a Tribunal in England and Wales)

BETWEEN:

VIRGIN MEDIA LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

_____

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

A P P E A R AN C E S

Mr Robert Palmer QC and Mr Stefan Kuppen (instructed by Ashurst LLP) appeared on behalf of the Appellant

Mr Javan Herberg QC and Mr Tom Coates (instructed by Ofcom) appeared on behalf of the Respondent

Tuesday, 19 November 2019

(10.30 am)

(Proceedings delayed)

(10.35 am)

CHAIRMAN: Good morning.

MR PALMER: Good morning, madam.

Opening submissions by MR PALMER

MR PALMER: Madam, in this matter I appear on behalf of The Appellant, Virgin Media, with Mr Stefan Kuppen, who sits to my right; Ofcom is represented Mr Javan Herberg QC and Mr Tom Coates beyond him.

You should have, I hope, two hearing bundles marked VM4 and three bundles of authorities marked VM5. I have also asked to have available in court, if necessary, although I hope it will not be, some of the original Notice of Appeal bundles VM1, VM2 and Ofcom's defence bundles, OF1 and OF2, and we have tried to include the documents we're actually going to refer to in the hearing bundles but it is just in case anything arises which needs to take us beyond that.

The way I propose to proceed is, first of all, just to introduce the facts re the underlying complaint which Ofcom considered in this case. Then turn to the legislative framework. Then look at the decision-making process that Ofcom undertook, starting with its notification and proceeding to consideration of Virgin Media's representations in respect of those leading to its Decision, which is the Decision under appeal, and then deal with each of the three grounds in turn.

We have an agreed timetable. I anticipate being today, Mr Herberg beginning

tomorrow morning.

The starting point, just to set the scene, is that the retail market for services such as broadband and telephone packages is highly competitive. Competitors, whether they be Virgin, BT, Sky, often compete for customers by offering discounted prices for bundles of services, including access to TV packages, and those attractive discounted prices are typically accompanied by terms and conditions which include an initial commitment period. This period can, consistently with applicable regulations, be anything up to 24 months in length.

Until 22 September 2016, Virgin typically offered discounted prices for 12 months, but accompanied by an initial commitment period of 18 months. After 12 months within that 18-month period, prices would revert to the undiscounted list price. For your note, that is at 3.12 of Ofcom's Decision.

But on that date, 22 September 2016, Virgin made changes to its pricing structure and the initial commitment period was reduced to 12 months, to match the period of discounted pricing. So after the end of that 12-month period, the list price would then apply but only on the basis of a 30-day rolling contract, terminable on 30 days' notice. Customers could either continue on that basis, or, of course, they could seek to sign up to a new discounted rate for another minimum fixed term, whether with Virgin or by switching to another provider, whatever was most attractive to them on the market at that time.

Under the terms of Virgin's contract, it remained open at all times, even in that initial commitment period, to terminate the contract, but, if they did, an early termination charge would be applicable. Again, in principle, there is no issue between the parties, that is perfectly legitimate; it is the applicability of early termination charge which gives effect to the commitment entered into by the

customer.

So the potential to charge an early termination charge, or an ETC, is inseparable from the notion of having an initial commitment period.

Now, the terms and conditions of Virgin's contract are most easily accessible in the Decision at paragraph 3.9. So that is in hearing bundle 1, tab 3. Paragraph 3.9. We have the full terms and conditions, if necessary, in the bundle, but the relevant ones are here. It is section M of the contract, paragraphs 9 through to 13, which provides, first of all, for the 30-day notice period, and the early termination period charge is here referred to as the early disconnection fee, it's the same thing, you see that at paragraph 11:

"If you ask us to end supply of services during the relevant minimum period you will have to pay an early disconnection fee as set out in M13.

Then at 13:

"You can find details of the early disconnection fee on the Virgin Media Website."

The address then followed:

"The early disconnection fee will not be more than the charges you would have paid for the services for the remainder of the minimum period less any costs we save, including the costs of no longer providing you with the services."

You have printouts of those rate cards which appeared on the website at annex 4 of the Decision, which is at page 137 of the bundle, where you see that Ofcom conveniently set out the various different red cards which would have been available on the website at the relevant time during the relevant period. There is the starting one, which began from 1 September 2016, so that is three weeks before the change in pricing structure and the reduction of the initial commitment period from 18 months to 12 months, but remained there until 20 March 2017. You can see that that red card included amongst the

descriptions of the various service tiers what are referred to as T-shirt sizes: medium, large, extra large, extra extra large and so forth. That is because at one point Virgin was marketing bundles with those descriptions. The marketing of its bundles later change and its broadband services became known as Vivid services, a new branding, and the complaint under general condition 9.2(j), against which there is no appeal, was that those descriptions continued to apply even after the Vivid branding had been introduced, leading one consumer to complain that it was unclear which package applied to them, leading to the change which you see over the page, which was made with effect from 20 March, which updated the broadband packages to the new branding, Superfast and Vivid, and included their rate cards at the rates then applied.

Then the third rate card is that which was introduced from 22 August 2017, which is the end of Ofcom's relevant period, that is the one which corrected the early termination charges to bring them to the rates which reflected the new 12-month initial commitment period rather than 18-month and the updated prices which were introduced in November 2016.

So Ofcom's complaint under GC 9.3 concerns the level of those charges which appear in the first two rate cards under certain of those contracts, not all of them. There is no complaint about the levels before that date, that is when introduced on 1 September. There is no suggestion that they did not properly reflect the 18-month commitment period which was then in force. The complaint is that when Virgin reduced that period to 12 months, thus relieving customers of a period of six months in which any ETC would be applied at all, the ETCs were not similarly updated on the rate card in line with the reduced period of commitment.

So that was the oversight, to fail to update those rates when that initial commitment period was reduced in a move that was hoped to benefit consumers and make the rates more attractive.

CHAIRMAN: Right. So the complaint relates to a period of exactly 11 months.

MR PALMER: Exactly 11 months, madam, yes.

Ofcom accepts that that change was not deliberate, it was due to an error. The reference for that is paragraph 5.38 of the Decision, it occurred because of an error. But it has given much prominence in its defence and skeleton argument to its conclusion that after that error was made there were opportunities, it says, for Virgin Media to spot and rectify that error earlier than when it was corrected.

Now, I will make submissions on that point later but can I just note at this point that that consideration is entirely irrelevant to the issue of construction that arises under ground one, that's the first point, and to the issue under ground two as to the arbitrariness and unfairness of Ofcom's procedure in setting a penalty. It is relevant only as one factor which was material to Ofcom's decision in setting the penalty and the proportionality of that penalty, which arises under ground three. So although that point has been given significant prominence by Ofcom, it is important to remember its context, which is ground three only.

CHAIRMAN: You say it is irrelevant to grounds one and two, do you?

MR PALMER: Yes. Because ground one is concerned with the construction of the general condition.

CHAIRMAN: It is ground three that is proportionality, is it?

MR PALMER: Ground three is proportionality. Obviously, the fact that they give such prominence to it was obviously one factor which they considered and they thought was serious which went into the mix of considerations which led

to the final setting of the penalty which is challenge under ground three. So I will come to it in that context.

So, 22 August 2017, as I said, was the date on which the new rate card was published. Again, there is no complaint about that third rate card. That is the end of the relevant period.

Subsequently, Virgin Media refunded customers the amount of the mistaken overcharge with interest and in the very small number of cases where a customer had moved and become untraceable, or the amount of overcharge was so small as to be trivial, Virgin has instead donated the amount in question to charity.

As at the date of Mr Tidswell's witness statement, which was January this year, 99.9 per cent of the overcharge had been paid back, or in a small number of cases paid back to charity, with Virgin keen to ensure that it cannot be said that it has benefitted from that overcharging at all.

The extent of the mistaken overcharge is measured by Ofcom in three ways. The easiest way to see that is at paragraph 3.37 of the Decision, which is page 91. So in terms of the amount of the overcharge, Virgin has told us that the total was 2.79 million. This breaks down as follows: 985,000 odd is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term. 413,000 odd is a total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT. And 1.39 million odd is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT and cost savings accruing to VM saved as a result of the early termination. That leads to an average overcharge of

£34. There is some further detail of the minority of customers overcharged by more than £50 and even fewer overcharged by more than one £100, and some observations there about the scale relative to the end retail prices for its services.

Ofcom, in short, has decided that those circumstances amounted to a breach of GC 9.3 and it imposed a penalty of [figure] in respect of the two breaches identified, GC 9.3 and 9.2(j) taken together. That was a reduction from the [figure] which it had originally proposed in its notification. But at that stage, at the time of the notification, a further independent breach of GC 9.3 was alleged, and that complaint was that where a customer terminated their contract in the initial commitment period and moved house to a new address on Virgin's network, in those circumstances they could choose whether to pay an ETC in respect of their cancelled contract at their original address or whether to enter into a new 12-month minimum contract at their new address and pay no ETC. That was initially said to be a breach of GC 9.3 and it was said to disincentivise switching regardless of any issue of overcharging. Obviously customers who did move house within the relevant period, if they paid the ETC, would have paid the higher ETC, so to that extent, but the basis of the complaint is completely independent of the overcharging and it was said at that time that these customers shouldn't be paying an ETC at all in those circumstances, so they were overpaying by 100 per cent.

But following consideration of Virgin's representations, where I've explained why this did not amount to a breach of GC 9.3, that complaint was not pursued at all. I will come back to the significance of that later on.

There are three grounds on which Virgin appeals against that Decision. The first ground is that GC 9.3 is not engaged at all by the overcharging issue. What

we say Ofcom has done is attempt to shoehorn the facts of this case into the narrow confines of GC 9.3 and on its proper construction that condition is no more apt to cover the mistaken overcharge, in this case, than it was to cover the home movers issue.

The second ground is that the penalty decision was arbitrary and unfair and inadequately reasoned. It was wholly untransparent. And that has not only prejudiced Virgin's ability to respond, but also the effectiveness of this appeal. The Tribunal will in due course find it is in the same position as Virgin Media has found itself, which is that the Ofcom stance deprives it of any effective basis to understand how Virgin's representations were taken into account in the calculation of the penalty or with what effect.

The third ground is that insofar as it can be gauged at all, on its own terms Ofcom's penalty decision is disproportionate and, further, it is inconsistent. We say that Ofcom has given insufficient credit for the points on which Virgin has succeeded and has reached a penalty out of proportion to the seriousness of any identified breach and the need for deterrents.

In particular, Ofcom has treated the identified contravention by Virgin as being substantially more serious than those breaches committed by EE on the comparison between the two decisions, which were published on the same day by Ofcom and concerned breaches of the same two conditions, 9.3 and 9.2(j), in respect of the same issue: the termination charges. Despite that, on his own evidence, the decision maker says he made no attempt to ensure consistency as between the two decisions. Up until Friday, Ofcom was contending that the penalties had been imposed at the same level when assessed as a proportion of turnover, which is Ofcom's key gauge for setting penalties, but now admits that EE's penalty was substantially lower on that

basis than Virgin's, and the reason that has happened is that no attempt at all has been made to stand back and assess the consistency of the two penalties side by side at the conclusion of the process.

We say that is straightforwardly unfair, inconsistent and disproportionate.

So that is all by way of brief introduction to the case. I am going to turn, if I may now, to the legislative framework, and the place to start is in the authorities bundle, volume 1 at tab 3. Tab 3 is what is known as the Authorisation Directive. What you have here is the current version, as it was amended in November 2009. If you turn to Article 2, which is on page 8, this is the Directive, as the Tribunal may know, which moved telecoms system, the regulation of telecoms across the EU from any former system of licensing and introduced a general authorisation. A general authorisation, as you can see, defined at Article 2, paragraph 2. It means:

"A legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services in accordance with this Directive."

So that is what the general authorisation is. Then at Article 3, paragraph 1:

"Ensures the freedom to provide those services, subject to the conditions set out in this Directive.

"2. The provision of electronic communications networks or the provision of such services may, and without prejudice to the specific obligations referred to in Article 6(2), only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the

authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7."

So that swept away the previous licensing systems, where you had to apply and get a licence before you could offer these services and created a system of general authorisation, subject to the conditions laid down, and if we turn to Article 6, over the page, which is headed "Conditions attached to the general authorisation", we're not concerned with radio frequencies:

"The general authorisation for the provision of electronic communications networks or services... may be subject only to the conditions listed in the Annex. Such conditions shall not be non-discriminatory, proportionate and transparent."

That is 6.1. Then 6.3:

"The general authorisation shall only contain conditions which are specific for that sector and are set out in Part A of the Annex and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation."

So that dual requirement, specific for that sector, and not duplicated, and of course, as I emphasised earlier the definition of general authorisation itself emphasised the need to lay down sector-specific obligations.

I will come to the annex in a moment, but en passant please take Article 10, which is "Compliance with the conditions of the general authorisation".

"National regulatory authorities [Ofcom in the UK obviously] shall monitor and supervise compliance with the conditions of the general authorisation.

2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation... it shall notify the undertaking of those findings and give the undertaking the opportunity to

state its view, within a reasonable time limit.

3. The relevant authority shall have the power to require the cessation of the breach... either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance."

Then at paragraph 7:

"Undertakings shall have the right to appeal against measures taken under this Article in accordance with the procedure referred to in Article 4 of the Framework Directive," to which we will come in just one moment.

Then we have seen references to the conditions set out in Part A of the annex. That is at page 18 of the Directive. You can see at the top of the annex, the first paragraph:

"The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations."

That is Part A. Part A follows, headed "Conditions which may be attached to a general authorisation" and at paragraph 8 it includes:

"Consumer protection rules specific to the electronic communications sector, including conditions in conformity with the Universal Service Directive.

Again, we will be coming to that in just one moment.

Can we, just for completeness, turn the page, the final page of the Directive, which we're not directly concerned with but just to see where it finds its place:

Part C include conditions which may be attached to rights for use for numbers and, paragraph 3, number portability requirements and conformity with the Universal Service Directive.

We will find both those conditions together when we get to Article 30 of the Universal Service Directive. Number portability meaning, obviously, if you switch provider, you can keep your existing phone number, that can travel

with you when you decide to switch.

Before we leave this Directive, it is helpful to go back to the recitals to see the purposes of those provisions which I have just shown you, and at page 4, you will see recital (15), which again emphasises and makes clear that:

"The conditions, which may be attached to the general authorisation... should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law."

That would obviously include implementing Article 30 of the Universal Services Directive.

And recital (18):

"The general authorisation should only contain conditions which are specific to the electronic communications sector. It should not be made subject to conditions which are already applicable by virtue of other existing national law which is not specific to the electronic communications sector."

Then lastly at (27), it is the first sentence:

"The penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement."

Hence, the requirement of proportionality in Article 10."

The next Directive at the next tab, which is tab 4, that is the Framework Directive, again one of the suite of directives which are all introduced together as part of what is known as the Common Regulatory Framework, all of them cross-refer to each other, and you will recall in Article 10 of the Authorisation Directive there was the cross-reference to Article 4 of this Directive, which you will find at page 17, which is headed "Right of Appeal. It requires that:

"Member States shall ensure that effective mechanisms exist at national level under

which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively."

Then this:

"Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism."

We will come to what has been interpreted to mean later as well.

That is the provision on right of appeal and obviously applies to appeals such as the present one, as made clear under Article 10 of the Authorisation Directive.

The next tab is the Universal Service Directive, which the Tribunal will recall the cross-reference in the annex to the Authorisation Directive. Again, introduced on the same day, but again also amended like the other two Directives in 2009. The relevant provision of this Directive is Article 30, which is on page 32, but this whole Article 30 was substituted in for the old Article 30 by the amending Directive of 2009. So before we look at the terms of this new Article 30 from 2009, it is helpful to turn to the following tab, tab 6, which is the amending Directive, to understand what this new Article 30 was intended to achieve. That is recital (47) at tab 6 on page 17.

CHAIRMAN: Recital sorry?

MR PALMER: (47).

CHAIRMAN: (47).

MR PALMER: Which says:

"In order to take full advantage of the competitive environment, consumers should be

able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges .... This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts. Number portability is a key facilitator of consumer choice and effective competition in competition markets for electronic communications and should be implemented with the minimum delay."

It goes on to make further provision about the timing of switching of number of portability.

So that is the recital explaining the introduction of the new Article 30. So if we can turn back to that in the previous tab, page 32. In this context, it is necessary to look at the whole of Article 30, remembering that it deals with number portability as well. The reason for that is in a moment we will be looking at one of the authorities which deals with Article 30. So this is the current Article 30 emphasised at this moment, "Facilitating change of provider", paragraph 1 is that:

"Member States shall ensure that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s) independently of the undertaking providing the service in accordance with the provisions of Part C of Annex 1."

In other words, that is what is then referred to as number portability: if they switch provider, they can retain their number, that must be ensured.

Then at paragraph 2:

"National regulatory authorities shall ensure that pricing between operators and/or service providers related to the provision of number portability is

cost-oriented, and that direct charges to subscribers, if any, do not act as a disincentive for subscribers against changing service provider."

The Tribunal will note there the language: do not act as a disincentive. We will consider one of the authorities on this in a moment but straightaway the Tribunal will note that the Directive clearly contemplates a direct charge to subscribers. It might be thought from a strictly economic point of view that any charge at all would act as a disincentive to subscribers. The typical demand curve: introduce a price, increase a price, you would expect demand for a certain services to drop off or disincentivise people from adopting it. But here is a provision which explicitly allows a direct charge. You will see that charge must be related to the costs of the service providers incurred in providing that service despite the fact that any charge, and indeed the higher the charge would, from a purely economic perspective, be expected to disincentivise subscribers. That is the language used.

Then we can move straight to paragraph 5:

"Member States shall ensure that contracts concluded between consumers and undertakings providing electronic communication services do not mandate an initial commitment period that exceeds 24 months."

So that is the limit on what is a reasonable initial commitment period.

Paragraph 6:

"Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider."

Again, I just emphasise the similarity of that language: do not act as a disincentive, which is common to paragraph 2 and paragraph 6.

Can I ask you now to take out volume 3 of the authorities bundle and turn to tab 42.

This is the case of Polska Telefonia, which we'll have seen discussed in the skeleton arguments. I am going to spend some time with it, because I say it reveals a crucial difference between the approaches adopted by Ofcom and that which Virgin says Ofcom should have adopted in its Decision. So you will note first of all the date of the judgment is 1 July 2010. If you turn to paragraph 1 of the judgment, you will see that this is a reference for a preliminary ruling concerning the interpretation of Article 30, paragraph 2, of the Universal Service Directive, but this is a reference to the earlier version of the USD and of Article 30 before the amendment. So I will need to show you in a moment what Article 30 used to look like before that amendment came in.

Paragraph 2, you can see it was made in the course of proceedings between Polska Telefonia, PTC, you can see the main telephone provider in Poland, and the equivalent of Ofcom in Poland, the President of the Office for Electronic Communications, the President of the UKE. It concerns a decision by which the President imposed a fine of 100,000 Polish zlotys, I assume, which equated to that amount of euros.

Over the page is the extracts from the original USD, referring first of all to recital 40. It is helpful to look at the first few lines of that:

"Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing the service."

Then Article 30 is set out at paragraph 4. It starts again in paragraph 1 by introducing an obligation to ensure that number portability is available and all subscribers of services, including mobile services, who so request can retain their number(s) independently of the undertaking providing the service, and

that applies in the case of geographic numbers as well as non-geographic numbers, but does not apply to porting of numbers between fixed and mobile networks.

So that is the equivalent of the current paragraph 1, which is requiring number portability to be available as a service.

Then the old paragraph 2:

"[NRAs] shall ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities."

It is the same wording: do not act as a disincentive. As a whole, the paragraph is more condense, but it is the same two obligation is in substance, which is cost orientation for pricing for interconnection, that is between service providers who incur those costs must calculate prices for the provision of the service on the basis of which it is cost oriented. The second obligation being that direct charges to subscribes, if any, do not act as a disincentive to port your number.

So that is the legislation.

Over the page is the national Polish legislation. We only need for this purpose the paragraph at the top on the page facing us on the right, paragraph 3 of Article 71 of the law on telecommunications in Poland stated that:

"Where the assigned number is ported upon a change of operator, the previous service provider may charge the subscriber a one-off fee set out in its list of tariffs, the amount of which shall not act as a disincentive to exercise of this right by subscribers."

That is how the Polish legislature sought to implement that obligation.

Then you have over the page the main proceedings, the facts and the question referred for preliminary ruling. At paragraph 9 you see that the basis for the

fine imposed was that it constituted an infringement of the provision I have just read you, Article 71.3:

" ... since such an amount dissuaded [Polska Telefonia] subscribers from making use of their right to port a number."

So that was the basis of the complaint.

That was appealed. At paragraph 11, you can see the Court of Appeal in Warsaw annulled the decision, holding that:

" ... the amount of the one-off fee relating to porting a number could not be calculated without taking account of the costs incurred by the operator in providing that facility."

And the Supreme Court on appeal from that decided to make the reference. If you turn to paragraph 13 to see how the Court of Justice phrases that question, it says:

" ... asks whether Article 30(2) of the Universal Service Directive is to be interpreted as obliging the NRA to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive."

That was the question put to the Court of Justice. We see what it made of it over the page. Firstly, at paragraph 15 to 17 it rehearses the importance of number portability and ensuring effective competition and consumers' freedom of choice.

Then at 18:

"With a view to achieving those aims, the European Union legislature provided, in Article 30(2) ... that the NRAs are to ensure that pricing for interconnection related to the provision is cost oriented and that direct charges to subscribers,

if any, do not act as a disincentive for the use of these facilities."

At 19:

"In addition, it should be noted that Article 30(2) requires the NRAs to ensure that the operators set the prices on the basis of their costs and that the prices do not dissuade subscribers."

Just pausing there. That language, do not dissuade subscribers, is here used as a substitute for the words: do not act as a disincentive. That becomes clearer as we go on as to why the Court of Justice uses that language of not dissuading.

Paragraph 20:

"Once it is established that prices are fixed on the basis of costs, that provision confers a certain discretion on the NRAs to assess the situation and define the method which appears to them to be the most suitable to make portability fully effective, in a manner which ensures that subscribers [again] are not dissuaded from making use of that facility."

Paragraph 21:

"In that regard, it follows from the Court's case law, Article 30(2) ... does not preclude the NRAs from fixing in advance and on the basis of an abstract model of the costs maximum prices which may be charged by the donor operator to the recipient operator as set-up costs, provided that the prices are fixed on the basis of the costs in such a way that subscribers are not dissuaded from making use of the facility of portability."

Again that language, that reflecting what had been decided in Mobistar, where such a maximum charge had in fact been fixed.

22:

"It follows from the foregoing that the costs for interconnection incurred by an

operator and the amount of the direct charge to the subscriber are in principle connected. That connection makes it possible to reach a compromise between the interests of subscribers and those of the operators."

24:

"It should also be pointed out, as the Advocate General has noted in points 52, 53 and 55 of his Opinion, that the method chosen by the NRA to assess whether the direct charge has a dissuasive effect must be consistent with the principles governing the pricing for interconnection and serve to ensure the objectivity, full effectiveness and transparency of that pricing."

And 25, an important conclusion:

"It is therefore clear from the scheme of the Universal Service Directive that the NRA has the task, using an objective and reliable method, of determining both the costs incurred by operators in providing the number portability service and the level of the direct charge beyond which subscribers are liable not to use that service."

I emphasise those words: "the level of the direct charge beyond which subscribers are liable not to use that service".

Again, that is the interpretation of the obligation to ensure that any charges, if there are any charges, do not act as a disincentive for the use of these facilities. It is not concerned here with marginal decisions identifying consumers on the borderline of those who may or who are just in that position of price sensitivity where, whatever the charges, they are borderline as they may or may not make use of the number portability.

Obviously, as you move that price point, the precise numbers of consumers who may fall into that area of price sensitivity may change and you may get different consumers who decide to or not. That cannot be what is being

referred to here. It is a broader brush approach: the level of the direct charge beyond which subscribers are liable not to use that service. That requires much more general judgment. It cannot, obviously, mean in practice a charge beyond which nobody would use that service. It cannot, obviously, mean that everybody would use that service. It requires a judgement as to the level beyond which subscribers are liable not to use that service.

26:

"Following that examination, the NRA must oppose, if necessary, the application of a direct charge which, although in line with those costs, would, in light of all the information at the disposal of the NRA, be a disincentive to the consumer."

Again, those words "be a consumer" used interchangeably with "dissuasion" and "the direct charge beyond which the subscribers are liable not to use that service".

At 27:

"Consequently, in that event, the NRA may be led to take the view that the amount of the direct charge which may be claimed from the subscriber must be less than that which would arise from a determination made on the basis solely of the costs, evaluated in accordance with an objective and reliable method, which the operators have to incur to ensure number portability."

Then you get the overall conclusion in 28, which is reflected in the operative part at the end:

"Having regard to all of the foregoing, the answer to the question referred is that Article 30(2) ... is to be interpreted as obliging the NRA to take account of the cost incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, it retains

the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility."

So it requires that level of objective assessment.

Now, my learned friend says this authority is only authority for the proposition that an objective and reliable method must be used by the NRA when assessing the costs incurred by operators and the level of the direct charge beyond which subscribers are liable not to use that service. And I certainly accept it is authority for that proposition. But I do not accept it is only authority for that proposition. This authority is an important authority as to the proper understanding, in either version of the Directive, of the words "do not act as a disincentive", because it is inconsistent with any view that the mere fact that a charge increasing will deter some or may deter some subscribers from making use of the service and is inconsistent with the view that that in itself creates a disincentive engaging the prohibition. Instead, the level of the direct charge must be such as to be judged to be beyond which subscribers are liable not to use that service. Here in the context of number portability specifically but equally the same word, the same approach in Article 30(6), which in that context means just switching.

Just before we leave this authority, there was a reference to the Advocate General, you will recall, at paragraph 24 of the judgment, as he had made some points about the method chosen to assess whether the direct charge has a dissuasive effect. That needed to be consistent with the assessment of the costs of interconnection. You have the Advocate General's -- you should have, I hope you have -- just behind -- I have something missed in my bundle

-- but at 42A, with luck, the Advocate General's opinion. You are shaking your head. Do you have a Royal Mail judgment?

CHAIRMAN: No, I don't.

MR PALMER: It has been put in the wrong place. So you've got the wrong authority behind the wrong tab there. (Pause).

CHAIRMAN: Yes, it is in 37A.

MR PALMER: 37A. Do you want to switch them back around? It might be more convenient to have the Advocate General's opinion right next to the judgment, to have Royal Mail.

CHAIRMAN: Should Royal Mail go back at 37A?

MR PALMER: I believe so. Yes, thank you. (Pause). Right, thank you for that. Hopefully now 42A is the Advocate General's opinion. The reference in the judgment was to paragraphs 52, 53 and 55 of that opinion, which, for context, begins most naturally at 51 in fact, which is just:

"An examination of these measures enables us to identify the pricing principles that form a basis for the telecommunications legislation and, in particular, pricing for interconnection.

"52. These principles are the following."

I think we only need here the first one:

" - pricing must be based on objective criteria and must be founded on the principle of cost-orientation ... that principle requires operators to derive interconnection pricing from actual costs."

There is more explanation of that. Other points, you can see at a glance, relate to transparency, non-discrimination and effectiveness and effective appeal.

Then at 53:

"Compliance with these criteria, although required principally of operators, also

places as many restrictions on the exercise of the discretion conferred on the NRAs. Thus, I would point out that in Mobistar ... the Court expressly stated that, although the NRAs have a certain discretion to define the method which appears to them to be the most suitable for fixing the maximum amount of the price for interconnection, that method must nevertheless ensure that portability is fully effective and that users and operators are afforded effective legal protection."

Then at 55:

"The method which NRAs must now define for assessing whether the direct charge acts as a disincentive has to be consistent with the pricing principles which I have just set out. It must serve to ensure not only the well-being of the consumer but also the development of healthy competition in the market."

So that all goes to that objective foundation for the assessment of costs and hence prices to which the court referred, but does not add or change anything to what the court said about, effectively, what would or would not act as a disincentive.

You can put away that bundle now and take authorities bundle 1 up again. So that completes a review of the European legislation and I just want now to show you how that has been implemented in the UK. It is authorities bundle 1, tab 1, which is the Communications Act, and within that section III, headed "General Duties of Ofcom", starting at subsection (1):

"It shall be the principal duty of OFCOM, in carrying out their functions ..."

And there are two principle duties there you can read. Then subsection (3):

"In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

"(a)the principles under which regulatory activities should be transparent,

accountable, proportionate, consistent and targeted only at cases in which action is needed ..."

Of course I emphasise there transparent, proportionate, consistent.

And (b):

"Any other principles appearing to OFCOM to represent the best regulatory practice."

If we then turn on to section 45, which is at page 60 of these extracts, a few pages on, which is the power of Ofcom to set conditions. Subsection (1) is:

" ... the power to set conditions under this section binding the persons to whom they are applied ...

"(2)A condition set by OFCOM under this section must be either—

"(a)a general condition ...", is what we are concerned with here.

Subsection (3):

"A general condition is a condition which contains only provisions authorised or required by one or more of sections 51 ..."

We can turn to section 51 in a moment but, as we pass it, section 47 is the test for setting or modifying conditions, and they can only do so, we see, if they are satisfied that the condition or the modification satisfies the test in subsection (2):

"That test is that the condition or modification is—

...

"(c)proportionate to what the condition or modification is intended to achieve; and

"(d)in relation to what it is intended to achieve, transparent."

Then section 51, "Matters to which general conditions may relate":

"Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs—

"(a)conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services ...

"(2)The power under subsection (1)(a) to set conditions for protecting the interests of the end-users of public electronic communications services includes power to set conditions for that purpose which—

...

"(h)ensure that conditions and procedures for the termination of a contract do not act as a disincentive to an end-user changing communications provider."

That is obviously reflecting the language of Article 30(6).

Now, may I just point out at this stage that this is the power an Ofcom, it is not the condition itself, it is the power on Ofcom to set a condition for that purpose, which is the purpose identified in the Directive. Obviously the obligation on a Member State in implementing a Directive is to ensure that the objective is achieved but it is for the national authorities to implement legislation which will achieve that objective, and to do so, as we know in 47, in a way which is transparent in relation to what that condition is intended to achieve. That will be of some importance when we get to the legal certainty point later on, that is the statutory basis for it.

You then get to the section 96A, which is just a couple of pages on in these extracts. 96A is the notification of contravention of conditions. Subsection (1):

"Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition ... set under section 45, they may give that person a notification under this section.

"(2)A notification under this section is one which—

"(a)sets out the determination made by OFCOM;

"(b)specifies the condition and contravention in respect of which that determination

has been made;

"(c)specifies the period during which the person notified has an opportunity to make representations;

"(d)specifies the steps that OFCOM think should be taken by the person in order to—

"(i)comply with the condition;

"(ii)remedy the consequences of the contravention;

"(e)specifies any penalty which OFCOM are minded to impose in accordance with section 96B ..."

So it is a provision of penalty, a penalty must be identified, and that is the one which Ofcom are minded to impose.

Then subsection (3):

"A notification under this section—

"(a)may be given in respect of more than one contravention ..."

So you can have multiple contraventions in one notification, which is obviously convenient.

Then at 96B, penalties for contravention of conditions:

"(1)This section applies where a person is given a notification under section 96A which specifies a proposed penalty.

"(2)Where the notification relates to more than one contravention [we know it's permissible], a separate penalty may be specified in respect of each contravention."

So it is obviously convenient to have a single notification in respect of multiple contraventions. But this section provides then you can have separate penalties specified in respect of each contravention.

CHAIRMAN: Yes, you may have.

MR PALMER: You may have. So the first point is you can. In this case, Ofcom

say: that's a discretion we have, we made a decision not to do that, but to have a single cumulative penalty reflecting everything.

When we get to ground 2, I will be making submissions about that. The short point now is this discretion has to be exercised in accordance with the duty of fairness. It is not open to Ofcom to exercise its discretion here in any manner which is unfair. That is a broad and I hope uncontroversial proposition.

CHAIRMAN: When you say fairly there, do you mean in a judicial review sense or in some other sense?

MR PALMER: In a substantive sense. They must act fairly. That has a procedural element but also a substantive element. I will come to the reasons for unfairness in due course. But there is the discretion relied upon.

Then 96C is enforcement of notification under 96A, which applies where a person has been given a notification, they have had the opportunity to make representations and that period has expired. Ofcom may give the person a decision, referred to as a confirmation decision, confirming the imposition of requirements on the person. Subsection (3), they must at this point now be satisfied that a person has in one or more of the respects notified been in contravention of a condition specified. So, whereas notification may be made on the grounds that there is reasonable grounds for believing that a person is contravening, obviously it is only confirmed if they have now made a confirmation decision that they are satisfied that the person has been in contravention, reasonable belief is not enough. Then a confirmation decision must include reasons at (b). And (d):

"may require the person to pay—

"(i)the penalty specified in the notification under section 96A, or

"(ii)such lesser penalty as OFCOM consider appropriate in the light of the person's

representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and

"may specify the period within which the penalty is to be paid."

So any penalty which is the "minded to" penalty specified in 96A notification becomes the cap for the limit on with what penalty can then be imposed. That is where the fairness of identifying separate penalties may come in. Again, I will develop that later. But you can see straightaway that since no separate penalty was specified in respect of the home movers allegation in this case, and that disappeared from view when we got to the confirmation decision, Ofcom still applied the same maximum as had been specified as it had been minded to impose when it thought that Virgin was guilty of that contravention. Whereas had it imposed separate penalty in the first place, its penalties powers would be limited to a lower number straightaway.

Then the amount of penalty, section 97, because that is where you find the limit not exceeding 10 per cent of turnover of the person's relevant business for the relevant period and it must be the amount that Ofcom determined to be appropriate and proportionate to the contravention in respect of which it has imposed.

CHAIRMAN: Do these provisions reflect any specific provisions, in your opinion, or you did not take us to anything specific?

MR PALMER: Yes, they do, they do. I took you to the power in Article 10.

CHAIRMAN: Yes.

MR PALMER: To impose a penalty and the obligations that that be proportionate and so forth.

CHAIRMAN: Right. But that was the extent of it, was it?

MR PALMER: The provisions about notification and the maximum there, they don't.

That is the way in which the UK has implemented the proposals in order to be fair. Obviously, it is required that there be a period to make representations and for those representations to be considered. You find those requirements in European law. So this is spanning out the steps to make that effective and make that happen and to ensure a fair process. It is obviously more detailed because it is implementing a Directive, it's seeking to provide the actual basis for achieving the objectives set in the Directives.

CHAIRMAN: Okay. So there is the specific requirement of proportionality in Article 10.

MR PALMER: And there is transparency as well, of course.

CHAIRMAN: Yes.

MR PALMER: Then over the page we get to the appeals section. I will come back to that, if I may, and turn on through to section 392, which is the last but one page, which is where you find the duty of Ofcom to prepare and publish a statement containing guidelines that they propose to follow in determining the amount of penalties imposed by them under provisions contained in this Act, or any other Act apart from the Competition Act. At subsection (6):

"It shall be the duty of OFCOM, in determining the amount of any penalty to be imposed by them under this Act or any other enactment ... to have regard to the guidelines contained in the statement for the time being in force under this section."

So that's a duty to have regard to. The guidelines don't limit the process, or the basis of reasoning which Ofcom must follow, but it must have regard to them in determining the amount of penalty.

So pursuant to those powers --

CHAIRMAN: I do not know if this is a convenient moment to stop but the

transcribers asked for a break mid-morning.

MR PALMER: Yes, it certainly would be.

(11.50 am)

(A short break)

(12.00 pm)

MR PALMER: Madam, before I proceed further, as in almost every case before this Tribunal, there is a confidentiality ring to protect various confidential information and, as in almost every case which appears before this Tribunal, there is inevitably some unintentional reference to confidential material on the way. I did mention a figure, which was the original proposed penalty at the notification stage, and I am reminded that that is in fact a confidential figure. So could I ask for a direction that when the transcript is produced that that figure be removed and that the figure I mentioned not be reported.

CHAIRMAN: Is that objected to?

MR HERBERG: It's not objected to. There is one dispute, a slightly tiresome dispute as to whether something else is confidential or not but I thought that rather than waste time on it at the outset, we could deal with that if and when it arises.

CHAIRMAN: Yes, I wondered when that was going to come up.

MR HERBERG: I thought it might be sensible to leave that until it arises.

MR PALMER: I have taken the same approach, madam.

CHAIRMAN: Yes, okay.

MR PALMER: I'm very grateful. The next reference is to the general conditions which Ofcom has in fact imposed pursuant to those powers under section 45 which I showed you before the short break. They are in authorities bundle 3, tab 46. (Pause). So at tab 46 there is an extract from the general conditions,

and I ask you to look at the cover page, and definitions. We get to Part 2, which contains the general conditions, page 18 the bottom right-hand corner is general condition 9, which is headed "Requirement to offer contracts with minimum terms". That reference is not to initial commitment periods, that says in terms this is terms and conditions. You see at 9.1:

"Communications Providers shall, in offering to provide, or providing, connection ... offer to enter into a contract ... which complies with the following paragraphs."

And then 9.2:

"Any contract concluded after 25 May 2011 ... shall specify at least the following minimum requirements in a clear, comprehensive and easily accessible form."

Then there is a list of terms which must be included in that contract. And over the page, you get to (j), which is the duration of the contract and the conditions for renewal and termination of services and of the contract concluding, and at (iii) any charges due on termination of the contract, including any cost recovery in respect of terminal equipment. That is 9.2(j), one contravention was found. Then at 9.3, familiar no doubt already:

"Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider."

But the condition goes on:

"In particular, but without limiting the extent of this paragraph ..."

There is then a specific provision relating to what are referred to as automatic renewable contracts or ARCs, or arcs, making specific provision that you can't just have contracts which roll over to a further period of commitment unless the consumer provides express consent.

So here is a good example of a specific application of Article 30(6) being

implemented in a way which is legally certain and clear.

At 9.4:

"Communication Providers shall not include a term in any contract with a Consumer ... preventing the Consumer from terminating the contract before the end of the agreed contractual period without compensating the Communications Provider for so doing, unless such compensation relates to no more than the initial commitment period (being the period of ... no more than 24 months)."

That is when you find that maximum 24-month period being implemented.

So the page also included general condition 11. We're not concerned with 11 on this appeal but some of the penalty precedents which Ofcom relied upon were precedents of contraventions under 11, so it is helpful to see what. It is includes metering and billing. The main obligations under 11.1:

"The Communications Providers shall not render any Bill to an End-User in respect of the provision of any ... Communications Services unless every amount stated in that Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question."

So just pausing there to note the contrast between general condition 11 and 9.3, you have here an express and specific requirement as to accuracy. Every amount billed must represent and not exceed "the true extent of services actually provided". So a legally certain provision. It is followed by the detail as to how that is met and evidenced, that it has been met. I will not go through the rest of 11, you can see it, it is about the retention of records and having an approved system. All spelt out in detail to ensure that the bill does not exceed the true extent of the sums which are properly due under the contract for the services provided. So Ofcom's case on GC 9.3, turning back to that, is that that general part, that first sentence of 9.3, includes a requirement that not

only must any early termination charge relate to the initial contract period which in fact is provided for by GC 9.4 but that the amount billed to the consumer must represent and not materially exceed that amount for which the contract provides so as not to create a material disincentive to switching above and beyond what it regards as the authorised disincentive to switching, which is the true ETC. That is what they want to read into that provision and make it do.

So those are the conditions. If I can briefly turn back to the Communications Act and tab 1 of volume 1 of the authorities. I said I will come back to the appeal provisions, if I can take those very very quickly. Section 192, which is page 250.

MR HOLMES: Which tab?

MR PALMER: Bundle 1, tab 1.

MR HOLMES: Thank you.

MR PALMER: Section 192 applies to subsection (1)(a), a decision by Ofcom under this Part, such as us, and then subsection (2), a person affected by the decision to which the section applies may appeal to the Tribunal, and then turning straight on to section 194A, which applies to an appeal against a decision referred to in section 192(1)(a), that is us:

"The Tribunal must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review."

And following that:

" ... may dismiss the appeal or quash the whole or part of the decision to which it relates; and

" ... where it does [the latter], remit the matter back to the decision-maker with

a direction to reconsider ..." with which the decision-maker must comply.

So those are the statutory provisions. There is law on the reference to applying the principles as would be applied by a court on an application for judicial review. This is a new appeal standard brought in by the Digital Economy Act 2017. Previously the Act provided that the appeal was one "on the merits". But, as is common ground, whatever appeal standard appears here, it must be read as implementing Article 4 of the Framework Directive, which requires the Tribunal hearing an appeal, the court, the Tribunal, the body, hearing the appeal to take due account of the merits. Hence there being law on what that means.

My learned friend suggests that that is all rather arid in the context of this debate. He says we don't challenge the merits. That is not right in some key respects. Because as part of my submission, the Tribunal will be invited to review, amongst other things, the merits of Ofcom's conclusion that the effect on switching rates was "material" in this case and the merits of its conclusion that the penalty was proportionate, having regard to the merits of the case, and both exercises fall well within the scope of the exercise required by Article 4 of the Framework Directive. The law I will briefly show you. It is quite well travelled territory. But it is authorities bundle 2, tab 19. It says T-Mobile v Ofcom in the Court of Appeal, which you will see from the headnote for the context, it concerned the exercise of Ofcom's function to licence the use of the electromagnetic spectrum to mobile phone providers and on the hearing of a preliminary issue to this Tribunal, the Tribunal held that some of the decisions which had been made were not subject to an appeal, they did not fall within section 192 and therefore could only be challenged by way of judicial review, so by another route to the High Court, and it also held this was

not contrary to Article 4, it would go by way of application for judicial review. The claimants appealed against that decision.

If you turn on to paragraph 12 onwards of Lord Justice Jacobs judgment, where he explained that an application for judicial review could be fully compliant with Article 4 of the Framework Directive. You can see at 14 it was common ground that Article 4 confers on effective parties a directly applicable right of appeal.

At 15:

"But, and this lies at the heart of this case, it is not now suggested that the UK is in breach of article 4. For it is now common ground (it was not below) that if the route of challenge to the award must be by way of judicial review rather than appeal to the CAT, such a route would be an 'effective appeal mechanism' within the meaning of article 4.

"16. Although, as I say, this point is now common ground, it is to appropriate to spell out in more detail why I think Lord Pannick [who was for 02] was right so to concede."

And reviews the jurisdiction, basis of the judicial relief jurisdiction, they go on to 18, paragraph 18, the limits on jurisdiction, not set by legislation but "by the inherent jurisdiction of the court, themselves governed by the rules of precedent. Traditionally those limits indeed confined the courts to considering things like procedural unfairness or Wednesbury unreasonableness ... various forms of error of law. Judicial review did not allow an attack purely on the merits of the impugned decision. And that is still broadly so ..."

Then at a 19:

"It was Lord Pannick's initial submission that judicial review would not comply with article 4 [essentially for that reason]. The submission was that the

emphasised passage showed that a judicial review could not duly 'take into account' the merits ... as required by article 4. But as matters developed during the course of argument he rightly and fairly accepted that the common law in the area of judicial is adaptable so that the rules as to judicial review jurisdiction are flexible enough to accommodate whatever standard is required by article 4."

And:

" ... Miss Dinah Rose QC for Ofcom rightly, firmly and forcefully went on to demonstrate that [that concession] was correctly made, and that the judicial review standard of review can and does mould itself to any requirement imposed by other rules of law."

Just in paragraph 22, under the cited text:

"She [that is Miss Rose] said, correctly in my opinion, that this demonstrated an obligation on a national court to adapt its procedures as far as possible to ensure Community rights are protected. In setting the limits of what can be taken into account it follows that the judicial review court will itself conform to the requirements of article 4."

If we could then skip to the conclusion at 29, after reviewing the adaptations that judicial review made to deal with human rights, Human Rights Act, 29:

"Accordingly I think there can be no doubt that just as judicial review was adapted because the Human Rights Act 1998 so required, so it can and must be adapted to comply with EU law and in particular article 4 of the Directive. If the CAT did not exist judicial review would have to and could do the job. The CAT's existence does not mean that judicial review is incapable of doing it.

"30. I would add this: it seems to me to be evident that whether the 'appeal' went to the CAT or by way of judicial review, the same standard for success would

have to be shown."

So, of course, the standard of appeal to the CAT at that stage was an appeal, as I said, on the merits.

What does that mean though is 31:

" ... it is inconceivable that article 4, in requiring an appeal which can duly take into account the merits, requires member states to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong."

So it was certainly not starting as if we were making the decision completely afresh or reviewing the decision as an appeal body that that jurisdiction, in order to comply with Article 4, extends to looking to the merits to see if the regulator has got something material wrong which would not be the case on an application of traditional judicial review principles but that is required under Article 4.

Just two more authorities which I can take more quickly. There is tab 22 which is BT v Ofcom. This decision is referred to in the skeletons as 08 numbers preliminary issues, because it concerned a preliminary issue in a challenge, concerned 08 numbers, and these names are given because there are so many authorities which are called BT v Ofcom, so cannot tell one apart from the other, and can see from the headnote what it was about. BT pronounced it was to levy charges on mobile network operators for connecting certain telephone calls on its network. When they originated from a non-BT network, that gave rise to a dispute which Ofcom adjudicated in favour of the mobile network operators and BT appealed against that.

This preliminary issue, as you can see from just below G, two lines down from G on

that headnote, was that:

"BT produced two expert economic reports and two statements, which is new evidence, and Ofcom objected to the admissibility of that new evidence on the grounds that the appellant should not be entitled to adduce fresh evidence before the Tribunal save in exceptional circumstances."

That gave rise to some consideration of what the function of the Tribunal was in an appeal under section 19(2) and just two paragraphs to show you. One is paragraph 14. Which follows from the citation of Article 4, that the Framework Directive and the preceding paragraph and there is the final sentence:

"In the United Kingdom, CAT has the dual characteristics of having the appropriate expertise to ensure that the merits of the case are fully taken into account when hearing an appeal and of being judicial in character."

Then paragraph 60, please, where Lord Justice Toulson explained, as he then was, that the task of the Appeal Body referred to in Article 4 is to consider whether the decision of the National Regulatory Authority is right on the merits of the case and two sentences on:

"Expression, merits of the case is not synonymous with the merits of the decision of the National Regulatory Authority. The omission from Article 4 of the words limiting material appeal which the Appeal Body may consider is unsurprising. When an Appeal Body is given responsibility for considering the merits of the case, it is not typically limited to considering the material which is available at the moment when the decision was made."

Of course, that would be the classic approach on an application appeal on judicial review when you are looking back at the decision and the basis upon which the decision was made and so forth. So that Rule as to admissibility of new material, as the court held this material was admissible, was decided by

reference to the nature of the job which the Appeal Body has to do, which is to look at the merits of the case, not simply of the decision.

Then lastly in the same litigation in 08, the case reached the Supreme Court and that is at tab 32. No longer on the preliminary issue now, but on the actual merits of the dispute and whether or not the CAT had got it right on the substance. There is just one reminder from Lord Sumption at paragraph 13 as to what Article 4 requires. It should be a right of appeal. This is not just a right of judicial review, the appeal must ensure that the merits of the case are duly taken into account.

So the result is, we say, that despite the change in the appeal standard in the Act, the Article 4 case is not a change in substance at least for so long as the UK remains subject to EU law.

My learned friend relies heavily on the case called Hutchison, the decision of Mr Justice Green, as he then was, in the Administrative Court. I shall not go to it now but apply if necessary on it, which I note is in authorities 3, tab 37. We say that is a very different case which was not, as we are, here concerned only with past conduct, but with a challenge to various complicated and necessary uncertain predictions which Ofcom had to make in the context of a spectrum auction again, and in those circumstances the extent to which any court could interfere on the merits was necessarily much more limited because it was not in the same position as the expert regulator, making educated predictions, as to what would happen in the future and that necessarily has an impact for the degree or intensity of review and that, we say, is not our case here.

So that is on the law. We then come to the section 96(a), notification on contravention, which is in hearing bundle 1, tab 10. For reason of time, and

for the obvious reason that things have moved on since the notification, I am going to take this quite quickly because, if I may, I will also invite you to look back at some of these paragraphs in due course, rather than take time reading them now, but they provide an important context for what follows.

Within the notification, if you turn to bundle page 328 which is Chapter 4, section 4 of the notification, contraventions of GC9.3 and 9.2J. We see at paragraph 4.2 it says:

"We have identified the following five failings which give rise individually and cumulatively to a breach of GC 9.3."

The first three all relate to the overcharging point, but it is they are just separated according to the same division which I showed you earlier on this morning about whether they are great in charges or less VAT or less VAT and costs. So in substance the same complaint of overcharging the same source.

Then the next complaint at (iv) was the moving house complaint. At (v) there was an additional complaint that VM failed to take action to ensure that those conditions and procedures for contract termination did not act as a disincentive. That in effect, we see later, has amounted to a procedural obligation that VM should have done more in respect of all the above breaches to ensure they did not happen. We will see what happened to that in due course as well.

Then at 4.5, provisional findings under GC 9.3. Before setting out the substance of our provisional findings, we explain how we have interpreted and applied GC 9.3 in this case and what follows is 4.6 through to 4.14.

Can I ask you to read that section in due course. Just by way of overview; the approach they adopt was based on the view that the carve out, as it is called, or they call here, the proviso in General Condition 9.3, without prejudice to

any initial commitment period, had to be approached on the basis of a principle of proportionality and then at 4.12 and 4.13, what I referred to as the procedural obligation about what they should have done to ensure that there was not a contravention and at 4.14 an explicit statement that:

"In order to establish a breach, it is not necessary to establish that VM's customers were prevented or deterred from changing provider as a result of procedures for termination."

In this case, however, there is evidence to suggest that this was the result for some customers, as we note below. But, in fact, there was no evidence that followed of any impact of ETC over recovery specifically. The only identified evidence, which is referred to here, relates to the home movers complaint. So no requirement of impact and no evidence of impact.

Then within Chapter 5, which begins at page 344 beginning, "the proposed penalty" that shows you a bit more about how they approached this issue of harm, they say at 5.2:

"All of these contraventions [that is overcharging home movers and 9.2J] caused actual or potential harm to consumers. We do not have the information to quantify exactly how many customers who were in fixed term contracts with VM during the relevant period were subject to a requirement to pay unduly high ETC under their contract. However, our illustrative calculations suggests that more than [then a confidential figure] may have been subject to an ETC which may have acted as a disincentive to switch during the relevant period."

So that was the extent. So to be clear, that confidential figure, as highlighted, was the total number of customers Ofcom judged at this time. In fact in the Decision it is reduced to a different figure, but this was their figure at the time, the total number of customers who were on contracts, who could have

been overcharged had they wished to switch during the relevant period. So, in other words, it is the relevant pool of customers which should have been used as the starting point for any assessment and it is not any measure of customers in fact harmed in any way, is that the vast majority of those customers would not have had any intention of switching at all. So it is just the identification of the relevant pool of those who are on contracts which could have been affected.

But notwithstanding that at 5.17, page 346, B, it said:

"In addition to customers who were actually overcharged, there would have been a substantially larger group of customers on fixed term contracts who would have been subject to an ETC that was set at a level we believe contravened GC 9.3 but were not charged this because they remained in their contact for the duration of the initial commitment period. We don't have the information to determine the size of this group. Data suggests by VM that number of customers that had an ETC raised, represents less than 1 per cent of the total number of subscribers in an initial commitment period. By way of illustration, the potential magnitude of this group of affected customers, we identify 55 per cent of packages to be analysed, had ETCs for the set above subscription price less VAT, and if we were to assume that same percentage of all customers on fixed term contracts were subject to ETCs, that were set at levels which we believe contravened 9.3, this suggests that over that number of its customers were potentially disincentivised from switching."

Again, put in those terms "potential disincentive". Then at 5.19, it is the same point again so you can read it. Then the final sentence:

"Given the numbers of customers potentially affected, we consider there was significant scope for such harm to have arisen."

So that is how it approached that issue of impact on actual switching. So its complaint was obviously some customers who had in fact switched were charged and did pay the ETCs which were too high, as compared to what the contract should have been. The second point was this may have disincentivised people from switching, but that level of disincentive from actually switching was dealt with at that very high level basis, on the basis of potential disincentive and significant scope for harm.

So just going back to the previous section, 4.26. You see the provisional findings which were notified and the further first three, with that now familiar group of ETCs being higher than various levels. (4) on page 335 of the bundle was the net home move customers, note to abandon(?) obviously. Then (5) on the procedural point where you find in the notification the discussion of what happened, in particular, in relation to members of the pricing and acquisition strategy team who realised that ETCs of some packages were set at a level above the subscription price. So at this stage that whole saga, if I can put just over those ensuing pages, was dealt with as a contravention. As you may have noticed from the actual Decision, this only appears in the penalty section. In other words, it is indicated to be an aggravating feature of the case, not the separate basis of contravention. That is where it ends up, but at this point it was here and this procedural breach was not pursued as a separate contravention.

In response to that notification you had, Virgin filed written representations which are at tab 11. I shall not go through those now, a note as to where they were. That was accompanied by a report which you have at tab 12 which was an economic analysis produced by Charles Rivers Associates, or CRA, on behalf of Virgin, which you can see from the cover page considered the impact of

ETC over recovery on customers switching. At page 500 of the bundle, you have a convenient executive summary. The report is highlighted yellow in its entirety because of its confidentiality. So that will limit what I can say to you apart from point you to relevant paragraphs.

You will also see that there are tracked changes in red on page 500 and, indeed, throughout the document. That is not because it is a draft, it is a second edition. This simply highlights clearly what the changes made in the second edition were because after this was submitted to Ofcom, Ofcom reviewed it, as you will see broadly accepted it. They did identify one error. So CRA went back to that error, corrected for it. So the tracked changes relate to that. So that you have reliable figures which in essence Ofcom then accepted. So I will not take time over it now since I cannot read it.

CHAIRMAN: So, sorry, just to be clear. What we are looking at is the updated version.

MR PALMER: That is right.

CHAIRMAN: Is that correct?

MR PALMER: That is right. Thank you, I am reminded it says "updated" on 496 with the date. It is on the cover page. So this is the version which was essentially accepted as reliable by Ofcom. You will find the executive summary a helpful introduction. I will ask you to read that in due course. Then there is from page 521 a particular section of the report which you will find helpful in due course. The foot of page 521 there is a heading, section 343, "impact of ETC over recovery on switching". Could I ask you to read that section in due course. The conclusions appear from 81 onwards. You can see -- I want to avoid any figures -- at paragraph 81 it shows that for customers and months during the relevant period in which they faced over

recovery average predicted switching rate is equal to, and then a number, a percentage. It also shows that if those customers had faced ETCs that eliminated over-recovery, their average predicted switching rate would have equalled another number. Very easy to do. There is the number. The difference in these values also reported in the table is that number and then this is the percentage of the original, the switching rate in the period. (Pause). That is the figure and, indeed, that percentage which is now to some extent relied upon by Ofcom, in fact it is one tenth, I can say. That isn't confidential. 10 per cent of one tenth appears in the non-confidential version of the Decision as demonstrating materiality. So Ofcom's accepted that figure and has decided that it is material, but it is important to read on in this report because the authors of this report conclude that in fact the over recovery had negligible harm on any consumers that did not switch when they otherwise might have. That conclusion is at 88. It is important to see intervening text between 81 and 88.

So at 82:

"There is a number of customers [three lines down] who were within their minimum contract period in an average month."

Then they had to be on one of the packages affected by ETC recovery. You can see the percentage of those customers who faced ETC over recovery, as in they were on a package affected by it.

As such we estimated, we estimate that, and there is a number of customers who were affected per month by ETC over recovery. The economic analysis indicates that of these customers facing over recovery an additional, then that percentage is from the previous paragraph. That number would have been expected to switch provider had they not faced VM's over recovery.

"The argument described for an average month applies equally to each of the 12 months indicating that the total number of in contract VM customers expected to delay their switching from VM during the relevant period due to ETC over recovery totals..."

You can see that sum, just timings it by 12 to produce that revised number which is essentially accepted by Ofcom. That is where you find it.

"This is less than that percentage of the average number of VM consumers, the customers within the minimum contract period of their fixed term contracts during the relevant period. We consider next these customers in greater detail."

So that number of customers were expected not to switch due to ETC over recovery. What would they have done in its absence? In particular, can we predict how much earlier they would have switched from VM? At 85 through to 87 we have reasoning and assessment of that point. So if you go to 87, notes of ETC's fall each month, for customers facing over recovery in the relevant period. So it is calculated by reference to a figure which is then related to the number of months that the customer has left in the minimum period.

"For each customer in which they faced over recovery, we are able to calculate the ratio of over recovery to reduction in their total ETC in that month. It is equal to an average and that number across those customers a month. This indicates that ETC over recovery would only have delayed a customer that would have been chosen to switch but for the over recovery by an average of and then that number of days. It is on that basis, based on these results, we conclude that VM and ETC over recovery had negligible harm."

In other words, it did not deter switching full stop. For that limited number of customers it delayed the switching on average by that length of time. That is

a feature which gets lost in Ofcom's Decision and gets lost in their assessment of materiality. So that was the evidence that Virgin supplied on that issue, filling a gap in the notification to assess the materiality on switching levels.

It is against that background I turn to ground one. By going through this background, I have tried to foreshadow a lot of what I am going to say. In the discussion, which is in bundle 1 of the hearing bundle, the same bundle, tab 3, Ofcom outlined the basis of its contravention in section 3. You can see a heading "Ofcom's decision" on page 91. After rehearsing all the facts, this is the scale of the overcharge. 3.39:

"Ofcom's decision that the evidence set out above establishes that during the relevant period, VM set and charged ETCs which were higher than the amounts that its customers had agreed to pay under their fixed term contracts. VM agreed one retail price but treated them as if they were paying another higher price if they wanted to leave and this led to the ETCs being higher than they would have been if they had been calculated by reference to the correct price and in accordance with terms and conditions."

Now, just pausing there. That becomes the key fact in Ofcom's analysis that they are in the (inaudible) charge, ETCs, which were higher than the amounts customers had agreed to pay under the contract. 3.40:

"The scale of overcharging was material."

That relates to the number of customers affected and overcharged. Just to emphasise that, those are those customers who by definition were not deterred from switching, who did switch and who paid the ETC.

Now, there are immediate problems, we say, with Ofcom's approach. The first is this turns on the existence of condition M13. Had the contract simply referred to

the ETC cards, if you terminate early you will pay the rate shown on the ETC cards, then there would be no basis for this analysis. It would fall away entirely. The objection rests on the inclusion of a contractual term designed to protect customers M13.

The second key point is that Ofcom's approach does not turn on any evidence or analysis of conditions or procedures acting as a disincentive, to use the words of the General Condition, in Article 30 of the USD. It relies first and foremost on the number of consumers actually overcharged who were not deterred from switching by definition. So even assuming GC 9.3 applied with full force to the ETCs -- which we don't accept for reasons we will come to -- the number of switchers provides no evidence of disincentive effect.

The third immediate problem is the reference in GC 9.3 to conditions or procedures because the relevant condition here, condition M13, is endorsed by Ofcom. That treats the word "procedure" in GC 9.3 as relating to the mistaken failure to update the ETCs on the occasion of the price changes and thereafter to correct the rate cards. We say that is a stretch of language to call that a procedure, analogous to a condition.

Fourthly, this ignores the fact that the condition makes no provision as to what the actual level of ETCs should be, talking about the General Condition 9.3 here. It does not even make any provision about what contractual arrangements to allow early termination, whether that is required or not.

Now, going back to this Decision, Virgin's representations were then summarised in the ensuing paragraph and then you get Ofcom's response to those representations.

If we turn in the page to 3.50 -- which follows from Ofcom's explanation of what it considers the purpose of the condition to be -- at 3.50 you get the point which

is the subject of ground 1A, as we have called it. So you will note that is where I am, I am on ground 1A and it is 3.50 through to 3.52. If you look at the last words of 3.50, again you see:

"The approach of Ofcom is to identify that the CP is entitled to charge the customer an ETC under its conditions for termination which apply during the initial commitment period, but [this is the material point for Ofcom] this is not what happened in this case."

You see that explained at 3.51, they got charged more than M13 would have allowed. At 3.52:

"Accordingly, the ETCs do not fall within the carve out as VM has contended since they exceeded the sums which should have been payable. If they had been set in accordance with VM's terms for contact termination applicable during the period, then the ETCs made switching more expensive for its customers than they were entitled to expect and are therefore subject to and in this case in breach of GC 9.3."

So it is the fact that they were higher than contractually provided for and, in particular, we have an objective fact that they were higher than provided for under the proper application of M13, but that is then turned into more expensive for customers than they were entitled to expect.

Now, of course if one puts it there and says, well they are entitled to expect that the terms and conditions of their contract will be applied correctly, no disagreement from anybody about that, but if it is, as it becomes in due course, an assertion that customers would have expected a particular ETC rate to be applied to them, in other words that they had in mind a number, but if that number was exceeded you might then be put off. If it is expecting that specific sense, we say there, is absolutely no evidential basis for that at all.

The basis upon which ETCs were calculated, you see at 3.33, which requires the deduction of various costs and savings of which a consumer would have no knowledge, you could not reasonably have been expected to. To the extent that they formed any expectation of an actual number, they would have taken it from the rate card which was available on the Internet if they had looked.

So, of course, the proposition that in the generality they are entitled to expect the terms and conditions would be applied correctly, I have no dispute with, of course, but it is the leap from that to say therefore subject to and in breach of, that requires a leap from that contractual overcharging to those higher overcharges acting as a disincentive.

So the objections that we have to this approach are threefold. Can I take to hand for speed my skeleton argument which you may have separately from paragraph 32.

The first point we make is this carve out without prejudice to any initial commitment period recognise that those ETCs can be applied but doesn't regulate what conditions are then applied in respect of an ETC incurred in lieu of honouring that initial commitment period and the consumer wishes to terminate their contract only, early rather. So that the linchpin of Ofcom's approach in response to that, you can see from their defence, which is in the same bundle as we have open at tab 5, paragraph 29. So it is absolutely essential to Ofcom's analysis.

So at paragraph 29 they cite our notice of appeal and say:

"However, it was self-evident that a customer wishing to switch but faced with an ETC higher than that she had agreed and expected to pay was subject to a disincentive against switching."

Just unpack that. Again, it assumes that she is expecting to pay a particular figure. It is being presented faced with a higher ETC and that necessarily self-evidently is a disincentive against switching. You have the same point again in 29.1, the final sentence:

"In any event, Ofcom did reach the conclusion correct and obvious conclusion that an ETC, which is higher than that which the customer has agreed to and is anticipating, acts as a disincentive against switching."

That gives rise to two problems. The first is that it makes the mistake of assuming that the words "act as a disincentive" will be fulfilled merely by the fact that the charge is higher. In other words, it takes as a typical economist demand curve, going a bit further along the curve with a higher price, that must lead to a falloff in demand for that switching service. It is obvious, it is self-evident. Any economist would tell you so, but that is not the approach adopted in Polska, it is completely inconsistent with it. An affects approach is required, as explained in Polska and not enough to say it is higher, ergo it disincentivises. So saying ETCs were higher than customers were entitled to expect must be based on an objective analysis. That is the starting point. Of course, on the table here, objective analysis, we worked out what the prices were and what they should have been, but that is not an objective analysis of whether ETCs as set in fact had the dissuasive effect required to engage GC 9.3.

Going back to my skeleton argument, paragraphs 42 to 43, where you have that point which I read through, just for your note, that is where we get to. That Ofcom's response to this is completely fanciful and illegitimate. Because their response is, well it is still higher than they had a right to expect or did expect or as they put it in the defence is anticipating. There is no evidence at all

about consumers' expectations as to actual charges and it could not have been -- any such expectation could not have been conditioned by broad terms of M13. You cannot possibly have expected to calculate the correct figures for themselves.

The third difficulty with this, it is in my skeleton paragraphs 44 to 45, under the heading "that GC 9.3 does not apply to a failure to follow a condition or procedure". It is the point I foreshadowed earlier. GC 9.3 is aimed to prevent conditions and procedures which disincentivise switching. So Ofcom are required to say, well this was a procedure. Whereas, in fact, what it was was a mistaken failure to follow its conditions and procedures.

CHAIRMAN: Is not saying, "we will charge whatever is on the website", a procedure or involve a procedure? Because if someone wants to switch, the procedure is to look at what is on the website and that gets charged.

MR PALMER: That is where they get the information as to what they will be charged to then ring up and say --

CHAIRMAN: But is also what, presumably, Virgin Media actually did.

MR PALMER: Those were the charges that they applied, subject to one of the GC 9.2J points about them not quite keeping up with the new rates.

CHAIRMAN: Put that point to one side.

MR PALMER: In other words, yes.

CHAIRMAN: If I were a customer and I called Virgin Media and I want to switch, I would be told "that is the price you have got to pay".

MR PALMER: That is what you would be doing. What Virgin Media would be doing in saying that would be failing to follow their own procedure, which is to calculate rates which reflect paragraph clause M13. That is that point. That is an additional point.

The key point -- which I emphasise if that point does not find favour with the Tribunal -- is those points about the lack of any anticipation or expectation as to a concrete number and, thus, the lack of any information that the mere differential -- I can only emphasise -- in itself had dissuasive effect, and that is the fundamental problem with Ofcom's reliance on that mere fact of overcharging as necessarily or self-evidently engaging and breaching GC 9.3. There is a further point on that but it is a convenient point to break.

CHAIRMAN: Thank you. So 2.00.

(1.02 pm)

(The short break)

(2.00 pm)

MR PALMER: Madam, members of the Tribunal, in response to our ground 1A, Mr Herberg replies, for example at paragraph 6.1 of his skeleton argument for your note but in several places, that our contention that GC 9.3 does not regulate the level of ETCs at all cannot be right. He says if it were, a CP would be entitled to charge ETCs at a penal level so as to deter switching and defeat competition. That's the submission.

CHAIRMAN: Sorry, which paragraph is that?

MR PALMER: That's 6.1 of Mr Herberg's skeleton argument. The point appears several times in the skeleton argument, but that's a convenient place, that's where it first appears. We say that that's simply wrong and irrelevant. For your note, it also appears at paragraphs 36 and 43. The first problem is that it ignores entirely the fact that, in Ofcom's own view, Virgin is prohibited from doing that under entirely separate provisions of national legislation, which apply to Virgin, along, indeed, with all other consumer-facing businesses, under the Consumer Rights Act. You will have the Consumer Rights Act in

bundle 1 of the authorities. I'll very briefly just show you where the provisions are. It's bundle 1, tab 2A. Section 61 is on the second page of the extract. It tells that you this Part applies to consumer contracts, that's subsections (1) and (3). Then section 62 is the requirement for contract terms and notices to be fair, unfair terms not being binding on the consumer.

The definition of a term being unfair is at subsection (4): if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, and that to be determined taking into account matters in subsection (5). And then section 63, at the bottom of that page:

"Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this part."

We'll look at that schedule in just a moment. 64 creates an exclusion, which we see at subsection (1). Ofcom's position is that doesn't apply here. That relates either to the main subject matter of the contract or the assessment of the appropriateness of the price payable under the contract by comparison with the goods or services supplied under it. In other words, you can't renegotiate the price you pay for services that you purchase by reference to unfair terms.

So how is this applied in the current context? You need authorities bundle 3, tab 53, right at the back. In fact, could I start at 54. I'll start at tab 54. This is the guidance which predates the Consumer Rights Act, and so applies only to contracts made before it. That's not our case. But in many respects Ofcom maintain this guidance in force with several additions and amendments to it, which I'll show you in a moment. But you can see the introduction, what it's doing, and paragraph 3 is providing sector-specific guidance as to the application of the predecessor regulations to the Consumer Rights Act. Then

it says it includes there the minimum contract periods and notice periods. And if you turn on within this document to page 11, you can see it addresses itself first of all to there being minimum contract periods, 58, and 59, when terminated levying an ETC. 60, some CPs seek to charge ETCs comprising the total remaining monthly payments under the contract, others take a variety of different price points to charge. You can see that there, different approaches being taken by different CPs. And then over the page, Ofcom's guidance on this begins. If you go to the top of page 13, "Terms relating to ETCs are non-exempt", and it explains why by reference to the Supreme Court's decision in the OFT Bank Charges case. That's why it puts termination charges in a different category to the price paid for receiving the services.

Then the fairness test for ETCs is over the page at 14. You can see straightaway at 74:

"We consider it likely to be unfair if a CP sought to recover in an ETC a sum that would put it in a better position than if the consumer had performed his contractual obligations (and no more). This is the position the ordinary law would seek to put the CP in (by entitling it to damages for breach of contract), if the contract did not contain the term providing for the ETC and the consumer ended the contract early."

Put another way, it is unlikely to be fair if the ETC is more than the CP could recover in damages following a breach.

76:

"In effect, the supplier would receive a disproportionately high sum ..."

Notice the language of proportionality in this context:

" ... for not having to provide services under the contract and the consumer would

have to pay such a sum for not receiving them. The consumer would be paying a disproportionately high sum for failing to adhere to the fixed term of his contract.

"77. In our view, such a term would fall within paragraph 1(e) of Schedule 2 to the [then] Regulations ...", which is an example of an unfair term being one which requires "any customer who fails to fulfil his obligation to pay a disproportionately high sum in compensation."

That, they say, wold fulfil the definition of an unfair term.

78:

"Accordingly, in setting ETCs, we consider a CP must make a reasonable pre-estimate of the position it would have been in had the consumer done what the contract obliged him to do (and no more) (ie the losses it incurs because the contract is not performed ...). All we consider the CP may fairly recover in an ETC is a sum that reflects that position. That involves the CP making a reasonable pre-estimate of:

"the costs if saves ...

"the losses caused ...

"and deducting those from the fixed ... payments outstanding on termination."

At paragraph 80 you have guidance as to an ETC which is likely to be fair, in particular 80.3, 80.2, first of all:

" ... it is never greater than the amount of the ... contract retail payments remaining due ..."

80.3:

" ... it also takes account of any costs ... including any VAT ... variable costs ... savings ... costs of shared network elements ... reflects any ability of the CP to reduce (mitigate) its loss by 'reselling' the service to a new consumer ..."

That's in a house moving situation, someone else moves in, you can resell to them. And:

" ... makes allowance for the CP's accelerated receipt of any sums."

So you have that detailed guidance. Then came the CRA 2015, and in response to that at tab 53, Ofcom updated its guidance, you can see that from the introduction in the first page, there's a brief update. It refers back at paragraph 3 to the previous November 2010 guidance, that's the guidance I've just taken you to, referring to the fact it covers ETCs. And over the page at paragraph 5:

"The CRA is in similar terms ... It contains the same fairness test [perhaps because of influence in EU law, which hasn't changed in the meantime], a similar (though not identical) exemption from that test in relation to certain aspects of certain key terms, and a 'grey-list' of terms that may be unfair .... [which is] substantially the same as that in the [predecessor regulations], but with the addition of three new terms."

And you see at the bottom of that page, paragraph 9, I didn't take you to the schedule, but you have the two relevant provision here. Paragraphs 5 and 6 is the schedule. The new one is paragraph 5:

"A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied."

As is the position on termination. Then 6 is the same as the one which applied before, although it's perhaps more apt to cover the penalty clause in respect of a breach of contract with a new paragraph, this paragraph, 5, which is not confined to breach.

Then you have specific updated guidance on ETCs, over the page, from paragraph 17 through to 22, I won't take time over it now, but it duplicates the CMA's guidance in the first three paragraphs. We have that in the next tab, so I won't take time over it now. Paragraph 21, we say, is broadly similar to that which we had before, so we are likely to continue to adopt a similar position in respect of ETCs to that set out on paras 77 to 84 of our earlier guidance. Then, in summary, over the page, it is a reasonable pre-estimate of what is now a familiar approach.

And then in the final tab in this bundle we have the CMA's unfair contract terms guidance, which is guidance on the same unfair term provisions in the CRA, and within that, at page 89, I'll just give you the extract, it sets out that test again from the schedule in the box on page 89, and then the guidance which follows, disproportionate termination fees, 5.15.2, 3 and 5.

So all of that is there. So the submission from Ofcom that if we were right about GC 9.3, that would mean that the CP would be entitled to charge ETCs at a penal level is simply wrong, and it's a classic symptom of precisely the problem which underlies this, which is seeking to bend GC 9.3 into a provision which regulates the level of ETC charges when there is in fact other national legislation that does that, and indeed the EU, when it legislated the Universal Services Directive, and Article 30 in particular, was also legislating against the background, because all this legislation, the predecessor regs and the CRA, implements the Consumer Contracts Directive, which is a 1993 Directive, still in force, you have it in the bundle, I needn't go to it, but for your note it's authorities bundle 1, tab 6A.

None of this legislation is specific to the electronic communications sector, it applies to all consumer-facing businesses. And that, of course, takes Ofcom to the

position where they argue: ah, yes, well, of course we're not objecting to the terms, we recognise that M13 reflects this provision of fairness, it's there to create fair ETCs --

CHAIRMAN: Well indeed the contractual terms precisely reflects this, doesn't it?

MR PALMER: It does.

CHAIRMAN: In terms of the less VAT and less cost savings?

MR PALMER: It's intended to do so because Virgin, obviously, subject to this legislation, it must have prices which do that.

CHAIRMAN: Yes.

MR PALMER: Now, it's not required to be inserted, to have that, you would have to have terms -- you would have to have charges which did in fact reflect the substance of that requirement.

CHAIRMAN: Yes. When you say it's not required to be inserted, if the charges in fact under the terms of the contract, if the charges in fact exceeded that amount, they would be regarded as unfair.

MR PALMER: As unfair.

CHAIRMAN: As I understand it.

MR PALMER: Because they exceeded those levels, yes.

They say: the difficulty here for you, Virgin Media, is we're not any longer concentrating on the terms of your conditions of your contract, which we accept M13 does that job, we're concentrating on the fact that you have mistakenly applied that. But there's nothing specific to the electronic communications sector in that point. An example, take gym membership, another fixed term contracts people regularly enter into as consumers, minimum terms of 12 months and so forth, if they were charged an incorrectly calculated ETC, to get out of their gym membership contract, precisely the

same considerations would apply in that case, there's nothing specific about electronic communication services which requires this risk of incorrect sums being calculated under what was intended to be a fair and lawful term.

CHAIRMAN: But I'm not aware of an EU rule that says that there mustn't be a disincentive to switching gym membership.

MR PALMER: No, that's right, I don't think there is such a rule, but still the position is that the terms must be fair and must be applied fairly. The question is what happens if they're not.

CHAIRMAN: Correct. Are you postulating a situation where the actual terms of the gym membership impose an early termination charge that exceeds the actual losses, is that --

MR PALMER: Well, no, that would be an unfair term, so that would be unenforceable by the gym. No, I was postulating a situation the same as here, where the terms are intended to reflect a fair charge, a miscalculation goes into creating their table of what to charge people, if they leave early, and what remedies are enforceable then. The answer is, as in this case, someone who is overcharged is entitled to get their money back, because they've paid more than they're liable to pay under the terms of their contract.

CHAIRMAN: So the remedy is breach of contract?

MR PALMER: Yes. That doesn't mean that they actually have to go off to County Court and file a small claim, they might.

CHAIRMAN: Depends on the gym.

MR PALMER: I defer to madam's experience of gyms, I certainly have none. I suppose it becomes more plausible the more I think about it. But any reputable business which acknowledges it has made a mistake and is faced with a customer saying "you have charged me too much money" would refund

that money. But if they have stuck their heels in and said: yes, we know we made a mistake, no we can't defend the amount that we did charge you, we intended to charge you less but we're going to keep your money, well, there would an application for summary judgment pretty quickly. But the reality is that if you make that mistake, there are remedies in law available, they do not depend in any way on the sector in which that situation arises.

So that takes me on neatly into ground 1B, which I've anticipated largely, which is the point that this approach duplicates provisions which are not specific to the electronic communications sector, and that's at my skeleton argument, paragraphs 47 and 49 in particular.

And Ofcom responds to that by saying: well, look, we're not applying a fairness test here, we are concentrating on whether or not these charges created a disincentive. But that's wrong, simply, because Ofcom's whole analysis is premised upon fairness considerations. I'd just like to make that good. First of all, it's easy to see from the Decision, first of all, hearing bundle 1, tab 3, the Decision at paragraph 3.19. It's 3.19 of the Decision. Under the heading "Assessment of VM's ETCs under GC 9.3":

"For the purposes of assessing VM's ETCs ... we have considered them against three thresholds."

And then those thresholds, which are by now familiar. And then 3.20:

"An ETC above the monthly subscription price would mean that the customer was paying more to leave the contract than if they had continued to receive communication services from VM under their contract. An ETC above the second threshold - the monthly subscription price less VAT - would be lower than the amount the customer would have to pay if they remained in contract."

That is good:

"However, VM would be better off than if it had continued to provide the services under the contract because it does not pay VAT on ETCs that it receives. It would also benefit from other cost savings that accrue to it as a result of termination. In both cases, the ETC would be more than the customer would have expected to pay under VM's terms and conditions.

"3.21. An ETC above the last (and lowest) threshold would still be higher than the customer would expect to pay ... [given the terms of M13]."

So notice there in 3.30 the emphasis on VM being better off than if it had continued to provide the services under all of those thresholds. That has nothing, of course, to do with disincentivise effects for the customer, that is precisely reflecting the fairness test set out by Ofcom and the CMA in that guidance, where a measure of disproportionality would be if someone was better off from an ETC than they would be if the contract had continued. It is precisely reflecting that approach and that test.

And look at the comparator in 3.21. It's all compared under to the position under clause M13, which is, as you observed, madam, precisely encapsulating the test of fairness. It explains why the whole focus of this Decision, all the way through to 3.40, is on overcharge of customers who were not in fact disincentivised from switching. If you go through to 3.40, again:

"As shown by [everything that went before], the scale of the overcharging ... was material in terms of the numbers of customers affected ..."

And that is borne of the approach adopted in the notification. You will remember I took to you that passage.

CHAIRMAN: Yes, just pausing there, you're equating disincentivise to dissuade?

MR PALMER: I am, yes, on my case.

CHAIRMAN: Yes.

MR PALMER: Ofcom is taking a different approach.

CHAIRMAN: No, I meant you.

MR PALMER: Yes. So what Ofcom has done throughout here is essentially looked at the unfairness of the fact that Virgin Media is getting more than it would have done in net revenue under an ETC than it would had the contract continued. And you will remember I took you in the notification to that section where Ofcom expressly said: this is now we have interpreted and applied GC 9.3, I'll ask you to read that section letter, but you'll recall I drew attention to that, it was all based on a proportionality approach.

MR HOLMES: Sorry, which section?

MR PALMER: In the notification, I'll give you the reference again, I'll ask you to read it in due course, but for your note it is paragraphs 4.5 onwards through to 4.14, where they interpreted what they called the proviso, that's without prejudice to any initial commitment period, and said that must be interpreted proportionately.

MR HOLMES: And does that provision find its reflection in the actual Decision which is being challenged?

MR PALMER: I'm just coming to that now. I say yes. My learned friend says no. I'm going to take you to exactly that now.

If you go to Decision 3.54, it says this:

"The methodology we adopted in the Section 96A Notification for assessing VM's ETCs is similar to the principle set out in Ofcom's guidance on unfair terms in contracts for communication services. However, we used the methodology to identify ETCs which act as a disincentive to switch, not to consider whether they are fair (which is a different test)."

Just pausing there, this is virtually acknowledging that the methodology is "similar to

the principles set out" in Ofcom's guidance on unfair terms. I say no relevant dissimilarity is identified, they are materially identical, you'll recall that stage, setting out the guidance to deduct VAT, deduct costs, et cetera et cetera, precisely the approach which is being objected to here, the failure to do that. So it is using that methodology. And they say to identify ETCs which act as a disincentive to switch, but that material analysis doesn't identify a disincentive to switch, what it does is calculate the extent of the overcharge paid by those who did switch. That's what they've done.

So the methodology which was applied was not designed for any purpose of identifying disincentives to switch, but identifying a proportionate and fair balance between consumer and business as to what a fair level of ETC would be. That's the methodology.

MR DORAN: The next paragraph begins "In any event".

MR PALMER: Yes, it does, it goes on. Now, it's now said by my learned friend, effectively in their skeleton argument for the first time, that that simply wasn't applied at all. I can take from that that they no longer rely on it. But the first point to understand is that is exactly where it was borne from, and when you look at the analysis which in substance precedes this, it is impossible to distinguish that from the methodology that they in fact adopted. They have simply worked out that Virgin Media charged more than it would have done had it deducted costs, VAT, et cetera, in order to reach a fair outcome. And then they equate that with it being a disincentive.

CHAIRMAN: Is there another way of approaching this, which is to say that there's obviously a carve-out in the legislation and Directive for early termination charges?

MR PALMER: Yes.

CHAIRMAN: And it doesn't express what that carve-out is?

MR PALMER: No.

CHAIRMAN: But certainly one way of determining what that carve-out should be is to say: well, essentially the carve-out is for a fair charge?

MR PALMER: Well, that is the approach which Ofcom took in its notification, but now expressly abandon. If you read that methodology --

CHAIRMAN: Okay, we'll hear what they have to say, I'm still trying to understand, I haven't got that far yet, I'm trying to understand the Decision.

MR PALMER: My answer would be no, it is not open, because it is a carve-out, it's literally defining the area which is not regulated at all by GC 9.3 in our implementation of Article 30(6), it doesn't purport to regulate the fairness or quantum of those charges. Why not? Because the EU is legislating in the knowledge that that is already regulated by consumer law, it's regulating in the knowledge of the 1993 Directive, and also against the background that the only conditions which can be imposed on the general authorisation are those which are, firstly, strictly necessary and, secondly, those which are specific to the sector, and not those which are simply a function of national legislation applicable to everybody, and that is precisely what does control the level of ETCs.

So this is duplicating the effect of the CRA, but applying it, now, not to the contract terms but to the mistaken application of payment terms. So that's the point now, sir, your point 3.55, where now you get the point, again, it comes down to what I say is the core and essential point in Ofcom's reasoning, which is VM's customers faced charges higher than they were entitled to expect, you have heard what I have said about this. But this point doesn't assist Ofcom in the way that it considers. So even the Consumer Rights Act doesn't apply to

the mistaken application of contractual terms, and that is because, as I've indicated, remedies already exist in contract and restitutionary law to entitle customers who have been overcharged under the terms of a contract to be repaid. There's nothing sector specific about the need for regulatory requirements about that. In my submission, it's clearly not the intended effect of GC 9.3, which wholly understandably says nothing about the mistaken application of conditions or procedures. It is out of scope because it's not necessary for the electronic communications sector in particular.

Now, Ofcom next make the point at paragraph 50.2 of their skeleton argument that a person may be quoted an ETC which is in fact an overcharge and may decide not to switch because that quote is higher than expected. They say in those circumstances they have no claim in breach of contract, because they haven't paid the ETC, they have decided not to switch. That doesn't mean there would be no remedy in contract asserted.

CHAIRMAN: Sorry, 50.2?

MR PALMER: 50.2, yes. That doesn't mean that there would be no remedy in contract. There is obviously an implied term in any of these contracts that if you ring up and ask "What will my ETC be?", that you'll be quoted the correct figure, not an incorrectly inflated one. It must be an obvious term. So if someone were to suffer loss as a result, paying at least one month subscription, they would be entitled to do so. Now, realistically, you may say, either in this situation or in any other, they may not in fact do that, but that's not the issue, again you take it back to a gym membership, it would be the same position. That problem is not one which is sector specific.

Ofcom's next answer, that Article 30(6) USD is copied out by GC 9.3 doesn't add anything. They say: look, we've implemented it properly, we've copied it out,

they literally use those words. Again, they've put no flesh on the bone at all. And then you get next, in the Decision, to paragraphs 3.56 to 3.57, where Ofcom reasons backwards, we say, from the desirability in its view of having enforcement powers over individuals enforcing contracts in the normal way. They make the point at 3.57 that going off to court to claim damages for breach of contract, or restitution for unjust enrichment, would not be in the best interests of customers, legal action is time consuming, complex, expensive. In their view it would be desirable to have a quick route round there where a regulator can simply make it all happen and indeed impose a penal sum by way of penalty on the company which made the mistake. Well, they may think that is desirable, but their view of the desirability of having that does not condition the scope of GC 9.3, and does not introduce a sector-specific concern, bearing in mind at all times that the conditions which may be imposed under the Authorisation Directive must be sector specific and must be strictly necessary.

That's ground 1B.

Ground 1C is very much an alternative ground, because it proceeds on the premise that if all that were wrong, so if it were permissible in principle to introduce a condition under Article 30(6) of the USD, then Ofcom would still have failed to do that simply by copying it out, it would be required to implement that Article, if it had the breadth for which they contend, to spell out that obligation.

At paragraph 66 of my skeleton argument we set out the relevant tests and legal principles. They appear there. The principles are tersely stated in the Court of Justice's case law that you have, for example at Heinrich, the principle of legal certainty requires that community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals

must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly. We also say that is all the more so, if more were needed, in relation to a penal provision as a domestic law of interpretation, in the event of ambiguity, construe it in favour of the person who would be penalised. But the governing principle is one of legal certainty set out in those terms.

We say, contrary to the Decision at 3.60, none of the matters set out here are in fact self-evident. They say: we didn't need to do more, because it's just obvious. We say there is nothing obvious about this, and that statement of it being obvious all proceeds from the premise that any mistaken overcharge per se acts as an economic disincentive, regardless of any actual effect, or the materiality of that effect, or the actual disincentives created.

So Ofcom is explaining this approach that they set out here for the first time after the contravention has taken place and indeed after it has abandoned the approach adopted in the notification. So a different rationale being explained for the first time in the Decision. It is not apparent, we say, from the condition, not apparent from the notification, even, which adopts an entirely different approach, now abandoned.

CHAIRMAN: Just clarify for me again exactly what you say is not spelt out in the notification.

MR PALMER: The claim that any mistaken overcharge over and above that for which the contract provides will in itself be taken as a disincentive to switch, and amounting to a breach of GC 9.3.

CHAIRMAN: The notification does say, and identify, the customers overcharged and by how much, doesn't it?

MR PALMER: Yes, it does do that, but then it explains how it has interpreted and

applied GC 9.3, from paragraph 4.5 onwards, and it's how it then applies that test, and you'll see a completely different approach, because it has to go from there to explaining how overcharges levied on customers who did switch is evidence of disincentivise effect.

CHAIRMAN: Okay, and this is what's picked up in 3.54 of the Decision, isn't it, which then talks about "This is the methodology we adopted"?

MR PALMER: That's right. Ofcom try to answer this point in their skeleton argument at paragraph 55. We say that the two point it makes there are entirely forced. They say the first thing is it follows from recital 47 of the USD, which makes it clear that Article 30(6) is intended to cover obstacles to switching, including charges. That doesn't cover the point that these are ETCs which are, on the face of it, carved out of Article 30(6). The point they have to get to is to say even though ETCs are permissible, even though an ETC of, say, £100 may be entirely legitimate, if your contract provides for £100, and you charge £130, that is illegitimate and that is a disincentive. It is fundamentally unclear and certainly does not arise from recital 47. Then it says:

"Moreover, Ofcom made it clear in its decision introducing GC 9.3 that it could apply to ETCs."

My learned friend will take you to that if he wants to rely on it, but what we say about it is that all that appears there is a bare, unreasoned passing reference to ETCs which do not explain anything of the relevance of GC 9.3 in relation to ETCs or how they operate. Certainly nothing to support the claim that although GC 9.3 does not regulate the level of ETCs, although you can charge any ETCs you like subject to the requirements of fairness under national legislation, even if you've taken a generous approach to ETCs, the

moment that you charge over what you've provided for, even though that might be under what you could have provided for, you're creating an impermissible disincentive. And that is the situation for Virgin Media, because Virgin Media capped its charges, it had a maximum ETC. So thus even when in the case that per month charges might have exceeded ETCs, if there was sufficiently long on the contract remaining, then they were nonetheless charged a lower capped price, so there was no overcharge. It's one of the reasons why the percentage of customers actually affected is much lower, I took you to the percentage earlier, it's because a lot of them didn't in fact pay an overcharge because of the operation of the cap, but imagine if VM had not --

CHAIRMAN: Sorry, which cap?

MR PALMER: A cap on -- as a matter of its contract, it applies a cap to the -- sorry, as a matter of its practice, it applies a cap to the ETCs it will charge to a customer.

CHAIRMAN: You're talking about a cap -- are there two different caps here? There's a cap in the actual terms and conditions, if it had applied them correctly, which is the monthly subscription price less VAT, less cost savings. I think you're talking about a different cap?

MR PALMER: A different cap.

CHAIRMAN: It's a subtlety that had escaped me. Are you talking about a cap in the rate card?

MR PALMER: What Virgin does is it applies an absolute level of £240.

CHAIRMAN: Oh, I see, that cap, yes.

MR PALMER: Taking the monthly rate times the number of months remaining on the contract, if that comes out at more than £240, Virgin will reduce it to £240

and charge that. There's no obligation for them to do that, none at all.

CHAIRMAN: But that's not the subject of these proceedings.

MR PALMER: No, it's not, but it illustrates my point about this construction of this approach. Even if you are charging a particular ETC under the terms of your contract, in circumstances where you could permissibly compatibly with regulation charge a much higher ETC, Ofcom will find that there is a disincentive effect on switching if you mistakenly go over the charge which you have actually decided to charge. Now, that puts at the centre the pre-eminence of the contractual bargain and policies such as imposing a £240 cap, and divorces it entirely from the purpose of GC 9.3 and Article 30(6), which was to prevent outside the scope of the initial commitment period excessive charges being applied so as to disincentivise switching. You have to remember at all times that if it's permissible to charge a high ETC, a higher ETC rate, although of course that will disincentivise switching, that is permissible within the carve-out. Ofcom says even if you take a lower rate, misapply it, and slightly charge more below that cap, you are disincentivising switching, even though the actual cost --

CHAIRMAN: I'm not sure if Ofcom are saying that. We will hear whether they are.

MR PALMER: That is the implication.

CHAIRMAN: You're interpreting what they're saying as amounting to any mistake, or any mistake that leads to a higher charge --

MR PALMER: Yes.

CHAIRMAN: -- is per se caught by 9.3.

MR PALMER: That is the approach they've taken.

CHAIRMAN: That's how you're interpreting it.

MR PALMER: Because they have said so in terms, I'll come back to the point about

materiality, they would say if you're overcharged by 1p, of course we wouldn't say that was a material disincentive, but subject to that point, they say that the baseline is set by the contract, and the error they have identified here is the fact that VM charged more than it says consumers were entitled to expected under the terms of their contract. So it has set that as the material bench line, and I say that does not come out of GC 9.3. You cannot find it there.

In fact what it is borne of is the importation of that fairness test. Even if disavowed now, that is where that approach comes from.

MR HOLMES: In the piece to which you just took us, in the Decision, paragraph 3.60, where you referred to the self-evident point, you are saying that Ofcom's position is that even if it says that there will be a disincentivising effect by imposing an undue cost when a customer seeks to change provider, you're saying that your interpretation of their position is that even if there wasn't an undue cost, they're saying *ipso facto* that follows from the fact that they're charging an ETC higher than the amount in the fixed term contract.

MR PALMER: Yes, the undueness is the *ipso facto* fact that it's higher, that's what they mean by undue, it's not provided for under the contract.

MR HOLMES: We'll see what Ofcom says on that.

MR PALMER: If you want a simple statement of it, at 3.55, Mr Kuppen reminds me, if you just read that paragraph as a whole.

CHAIRMAN: 3 ...?

MR PALMER: 3.55. This is where they depart from their previous methodology and apply this approach instead. **(Pause)**.

So it's there in clear daylight, it's the fact that they agreed one retail price and then treated them as if they were paying another higher price under the contract, and this led to ETCs being higher than it would have been if calculated by

reference to the correct price in accordance with the terms and conditions.

CHAIRMAN: You touched on this before, and I think we want to clarify, is Virgin Media's position that 9.3 has no application at all to ETCs?

MR PALMER: That's the primary position, yes. Because of the carve-out.

MR HOLMES: At whatever level?

MR PALMER: Yes, because the reason why that's perfectly acceptable is because of the presence of the Consumer Rights Act legislation, GC 9.3 isn't concerned with that, because the level of charges are separately controlled by different provisions which are not specific to this sector. So it is not right to say that, you know, on our construction we could charge even a penal sum. We can't do that. And if you look at the guidance, which I don't dispute, that Ofcom and the CMA have both issued, they're very clear that you can't even charge the full contractual price, you have to not charge more than you what you would be able to recover by way of damages on a claim for a breach of contract. In other words, your loss, which is after VAT, after the costs which you've avoided, after mitigation of loss. So that is there, in terms.

MR DORAN: The disincentive that might arise as a result of the ETC is not for specific sector-specific regulation at all?

MR PALMER: No because it carves it out. The main object of 30(6) is, for example, it's related to number portability and that people would be less likely to move if, in order to take their number with them, they would be without service for ten days rather than the one day, which the legislature requires. Similarly, outside the specific context of number portability, if there were delays or costs or additional charges, leave aside inside the initial commitment period, at any stage in your contract, if you were told that there was going to be hassle, you had to fill in a form, you had to send it off, you had to ring up and wait in

a long line for hours before you could get through to speak to anyone, that would a procedure rather than a condition, but familiar consumer problems, they have to be designed and operated in a way which does not disincentivise customers from switching. But there is a carve-out which makes the biggest disincentive that there is, which is paying a large sum to move to switch within the 12-month or 18-month or 24-month period to which you have committed. If you're going to move then, and you have to pay a large sum, as well as then if you're switching to a new provider pay your new provider for the services you're going to receive from them, now that disincentive is specifically allowed, because it allows special offers, attractive offers, discounts to be offered on the basis that the customer will stay with you or else pay as if they were with you over that term. But the precise amount that you charge is not further regulated, it does not need to be further regulated, because customers are protected already.

MR DORAN: Sorry, you'll have to remind me because I don't have the wording immediately to hand, but in respect of procedures which might arise in the initial contract period, and which might disincentive, they are regulated, so a disincentive by endless phone calls or being held on the phone for hours on end or whatever.

MR PALMER: Or "You must inform us in writing, it's not enough to phone us".

MR DORAN: I can see your argument about a condition, but in relation to procedures, are they carved out also?

MR PALMER: Yes, they are. If you look at the terms of GC 9.3, which appear conveniently in the Decision at 3.4.

MR DORAN: Because those clearly wouldn't be caught by restitution or contract.

CHAIRMAN: It's not obviously caught as unfair terms.

MR DORAN: And not obviously as an unfair contract term. So does that mean that procedures where you're given the run around by a provider, and therefore there's a significant procedural grit in the procedural wheels and gear box, so as to allow you to exercise your right to leave early.

MR PALMER: That would be caught, yes, that would be caught.

MR DORAN: So that's not carved out or it is carved out?

MR PALMER: No, it's not carved out.

MR DORAN: Forgive me, I hadn't understood that you were differentiating.

MR PALMER: I don't suggest that's carved out. The reason is because run around procedures, if you can use your terminology, sir, would not be part and parcel of the initial commitment period.

MR DORAN: So without prejudice to any initial commitment period, communications providers shall ensure that conditions or procedures for contract termination, so what you read this as saying is that the conditions could be carved out, but that the procedures can't be?

CHAIRMAN: Can I try to ... you're assuming that the procedures, the run around procedures, apply equally to people in and outside the initial commitment period, but what if I'm a Virgin Media customer and I am not allowed to press, you know, press 3 then press 4, and I end up with a dead end because I'm in an initial commitment period.

MR PALMER: That would be ingenious but not successful, in my submission.

CHAIRMAN: How?

MR PALMER: Because that's not a necessary part of having an initial commitment period. An ETC is. It's the only --

CHAIRMAN: You're starting to read something into the carve-out --

MR PALMER: No.

CHAIRMAN: -- to make that submission.

MR PALMER: I'm reading in what an initial commitment period is, ie what is the nature of your commitment. What it's talking about is made clear in fact by Article 30(5) in the preceding paragraph, it's the fact that you can have a reasonable initial period during which you may not switch to another provider. That is expressly permitted. So anything which is absolutely part and parcel of that agreement is carved out, and a fee to be released from that commitment early is, in my submission, and indeed Ofcom accept that too -- a fancy troublesome procedure designed to make life difficult for you, should you decide to exercise your right to terminate early, in my submission, would not be, I could never say that was part and parcel, and indeed Virgin would never suggest that it was. But an ETC is absolutely inseparable from the nature of the commitment. That's what it is. You are committing, and if not then you leave Virgin in the same financial position as if you had committed and seen it through.

CHAIRMAN: Thank you.

MR PALMER: That takes me to ground 1D, which, again, if otherwise capable of being engaged, ie if that carve-out is not a complete answer, then I say that nonetheless the fact that the conditions or procedures, if caught, must not act as disincentives becomes the key, and that still requires actual effect, not theoretical disincentives, actual effect, I refer you back to what I said about Polska earlier. Ofcom maintained in its Decision that it was not required to do that, you find that at paragraph 3.65 and 3.66. You see it's under the heading just above 3.64: effect on customer switching. And then they're referring to Polska in 3.65. They say that satisfies it because it's been objectively assessed, they've actually worked out the numbers, what the overpayment

was. Then they go on at 3.66 to say:

"A disincentive need not necessarily delay or prevent ... it may just make it more difficult or costly to complete. As recital 47 ... explains, the requirements are imposed because it is important that customers are able to make and give effect to informed choices without hindrance."

Just pausing there, that contention that it may just make it more, in this case, costly to complete is inconsistent, I say, with Polska, they're reading Polska too narrowly. They can't say there's an increased cost and therefore there's a disincentive. And then the next sentence:

"Accordingly, where the source of discouragement is established by reference to clear and objective factors, that is sufficient to demonstrate a breach even if the discouragement does not prevent or delay switching in most cases."

We say that is gloss by focussing on the source being established by reference to clear and objective factors, not to the discouragement being established by reference to clear and objective factors.

Now, Ofcom now heavily relies on the following paragraph, 3.67, as establishing that in any event there was a material effect on switching, but this is entirely based on the CRA analysis I showed you earlier which VM produced, and they rely again on that finding which I showed you, the reduction of a tenth in the switching rates of those customers on fixed term contracts whose ETC had been set too high compared to the switching rates that would have occurred if ETCs had been set correctly. So the scale of this is in fact material in terms of numbers of customers affected. Then they make a point, saying there's a:

"... particular econometric specification and model, and alternative specifications or models not included ... might yield a larger impact (although we do not dispute the broad order of magnitude of the results)."

And then they put forward a different magnitude. So, effectively, whilst noting some uncertainty as to the precise figure, I accept that. There's also a cross-reference, it's footnote 74, to the later paragraph 5.33, which appears in the penalty section but deals with the same point. You just get a bit more detail. You get the actual numbers. We've seen those numbers before, though, from the CRA report, but for your note, there it is. And indeed footnote 114, where you see the difference between the two switching rates expressed in percentage terms there, and where the one tenth comes from, you see the figure which is roughly one tenth.

You recall I took you to the CRA analysis to show you the basis of that finding but then took you on to show you the basis of their finding that it is not material because it's that number of people who are affected in that they're not prevented for deterred from switching, but they delay for a particular number of days, which you will remember as well. And that now, as I have said, you see no reference to that, and no reference to the brevity and no consideration of that in terms of materiality.

So you're left with 10 per cent of a tiny number, in footnote 114, very low switching rates indeed for initial commitment period customers. It stands to reason most people wait until they're out of contract before looking for the next deal, the next best offer. During the contract, very low rates. And when Virgin put in the CRA report with its representations, it was considered by an internal document, which doesn't form part of the Decision but was disclosed in these proceedings of Ofcom's defence. It's in tab 14 of the hearing bundle. So this is an internal working paper, effectively. "Assessment of CRA report." And then there's a summary section of key messages. And you'll see there in the second bullet point it said:

"There is a material impact on switching rates ..."

Which is relied upon by my learned friend now. But look at the following words:

" ... for the customers affected."

That's a shorthand. That's the customers affected by being within the group of customers to whom these ETCs applied, indeed to whom these excessive ETCs applied, and who would have been minded to switch. That 10 per cent reduction is based on a very small figure which is a subdivision of the subdivision of the pool of customers affected. You will recall that large number which they came up with in the notification as the number of people in the relevant pool, as I call it. They're the people on contracts, but it's a much smaller percentage of fixed contracts, a much smaller percentage of those which might be affected by an inflated ETC. It's a much smaller percentage of those who might be minded to switch were it not for the inflation of the ETC, ie those who would not be disincentivised by the correct ETC, but would be by that.

CHAIRMAN: Yes.

MR PALMER: So that is the customers affected. We read on:

"However, when compared to overall levels of switching and the potentially affected customer base [that's the largest figure that you were given], the aggregate impact in terms of the number of customers deterred is quite modest.

"At a high-level, CRA's approach seems sound. However, we have found some errors."

Those are the errors which were subsequently corrected. And:

"Our alternative estimates [at that time]... "

If you just flip back to the final page of the report, there's a postscript in italics, you can see the correction made. We've seen that second figure before.

So in this report, where the first figure appears, we're to read it as the second figure. If you look on page 579 of the bundle, "Comparing CRA's results to our illustrative calculation of", then there's that high figure, "potentially affected customers":

"We said, 'our illustrative calculation suggests that more than [high figure] may have been subject to an ETC which may have acted as a disincentive to switch during the Relevant Period' ..."

CHAIRMAN: Is that a quotation from the notification?

MR PALMER: Yes, it is.

" ... and 'approximately [that number of] customers ... were potentially subject to harm ... '"

I showed you those passages earlier.

CHAIRMAN: Yes.

MR PALMER: "We should not interpret this as saying the excessive ETCs had a decisive impact on the behaviour of all [those] customers, pushing each of them over the threshold from switching to not switching. Presumably, we understood when proposing the penalty that not all ... potentially affected customers would have been deterred in this way. Rather, there was a pool of ... customers, each of which could have been harmed ... We did not make any specific estimates of (or statements on) the number of customers actually harmed due to not switching in the May Notification.

"The CRA figure of [read the new number there] is their estimate number of customers who actually did not switch in the relevant period due to excessive ETCs (ie the subset of the [big number] who were actually directly deterred from switching by excessive ETCs for at least some period of time). In that sense it is new evidence, which fills a potential gap from the May Notification. The two figures capture similar concepts but are not strictly comparable.

"There are questions we should consider ...

"(a) Whether we had something like [that] estimate in mind in May 2018 ... when setting the proposed penalty, how much weight was given to this factor in the penalty and how it compares with its possible scale as discussed in this paper.

"(b) Whether we give any weight to the [high] figure on its own irrespective of the actual harm ... or whether its only useful for judging the actual harm suffered due to not switching.

"(c) How much weight we should place on this new evidence going forward.

"There is some merit to idea that high ETCs only delayed switching for some customers."

And then:

"The overall qualitative findings seem reasonable.

" ... Intuitively, CRA's finding is not particularly surprising as (i) ETCs averaged only about £35 more than they should have been, (ii) switching rates are small, and (iii) only a minority of customers were affected in any given month.

"The aggregate impact on switching (up to [that number, that number instead of the CRA number] of switched deterred for at least some period of time), seems somewhat modest in the context of ..."

And then a series of figures which I leave you to see.

"In particular, the direct impact on switching does not seem large enough to have had a significant impact on national level competition. However, it will have caused harm to the individual consumers affected.

"To change the qualitative finding that the overall effect is modest, the estimated impact would properly need to be orders of magnitude higher. It seems unlikely that this would be the case."

So that is the qualitative finding that the effect is modest. So if you just turn back for a moment to the key message.

CHAIRMAN: Sorry, that “modest” reference. Was that also in the notification?

MR PALMER: No, that's the author's appreciation of --

CHAIRMAN: Okay, so that appears for the first time in this document?

MR PALMER: This document. It's a change from the notification procedure, what was said then. And then just to complete this run, just over the page at paragraph 27 under "Possible implications for our approach":

"The CRA analysis is consistent with excessive ETCs reducing the level of consumer switching, and therefore generating harm for at least some consumers. However the overly impact in terms of customer numbers is confide quite modest, which may influence our view of the appropriate penalty."

28:

"At the same time, we should recognise that analysis takes a relatively narrow view of consumer harm ... that there are other sources of harm from excessive ETCs (eg those who actually incurred the excessive ETCs), and consumer harm is just one of a number of factors motivating the penalty. We should also recognise that the impact on the overall customer switching is modest, in part, because the underlying switching rate is low. The deterrent effect of excessive ETCs would have been great on a more responsive consumer base, and we should consider whether, and to what extent, VM's penalty should be driven by the underlying responsiveness of its customer base."

There we are, that's the whole lot, but the overall conclusion is modest in terms of overall switching. At this point you just have to take a step back and just consider what it is, on any reasonable appreciation, GC 9.3 can be aimed at in terms of its objectives. So if I'm wrong that this level of ETCs is not

excluded from scope by reason of the carve-out, assume I'm wrong about that, if that can in principle be caught, what is it seeking to protect here? Answer, we know, to stop the conditions or procedures which act as a disincentive to customer switching. We know how to approach that from Polska. That is clearly talking about switching overall, just as in the number portability case it is talking about the use of number portability service overall. It is not saying any material effect, 10 per cent or any other threshold, of a subdivision of a subdivision of a tiny number of customers who are caught and deterred from switching for a short period of time, what it's concerned with is protecting the switching process generally overall. So if I'm wrong about my first submissions, the materiality of switching must be judged by its effect on switching overall, not by carving it down to a small subcategory and saying: ah, well, there's a 10 per cent change in this category, which results in those consumers delaying their switch for a short period of time.

MR HOLMES: Perhaps inevitably, because you are you're looking at the CRA report, you're focussing particularly on the quantitative effect, but to your point about standing back and looking at 9.3 and the disincentive effect in the round, you may be coming to this, but what do you say to the point which Ofcom make that unduly high ETCs may have generated wider or longer term impacts on consumer switching due to a loss of trust or the development of other negative perceptions about the switching process which could not be captured by any econometric analysis? Sorry, that's paragraph 61 of Ofcom's skeleton argument.

MR PALMER: I say that it is entirely speculative and unevidenced. Of course you can have a qualitative assessment of effects as well as a quantitative assessment of effects, I entirely accept that, but what you have just put to me,

sir, is the beginning and end of Ofcom's analysis on that point. They say it could have these effects. There's no evidence at all that it has had these effects, whether that's survey evidence, or anything of that kind, or any kind of qualitative assessment, it's just thrown that out there without evidence, and it cannot be assumed, in my submission.

So if you take the actual impact on overall switching, you end up with less than 10 per cent, you end up with a tenth of a tenth, you end up with --

CHAIRMAN: I have some difficulty with that mathematically, because the impact on switching, you mist obviously look at who has switched and who hasn't switched.

MR PALMER: Yes, no --

CHAIRMAN: But you're trying to get back to the broad pool who may never have thought about switching, and then never looked on the website to see what the charge would be.

MR PALMER: No, I'm not doing that.

CHAIRMAN: I've misunderstood you then.

MR PALMER: I'm focussing on the specific number of customers. I can't mention -- I've been given a note with some numbers on but I'm not sure I can mention them. The impact on overall switching, we say, is less than 1 per cent. That's the impact on switching. Not just the number of customers, the proportion of customers who fall in that big pool, that's not my point. 1 per cent of that would be many tens of thousands, I'd better not say. So that is not the point. The point is that CRA calculate the number of loss switchers by using the number of customers who are within the initial commitment period, and then calculating a percentage of those who are exposed to higher ETCs, identifying the differential of those, that's the small percentage you found in the footnote,

of those which would have switched per month, multiplying that up by 12 months in the relevant period, that produces the figure at the very end of the report, the corrected figure, and the length of time. So that's all in the CRA report.

VM's customers, its published figures are over 5 million internet customers, it's published churn rates, the number of customers leaving in any one year of 15 per cent, so typically around about 820,000 customers might leave in any one year, might switch in any one year, that's about typical for these companies, given that people are always shopping around for the best deals they can get on 12-month terms. So you have, of those 820, overall switching, less than a tenth of a tenth, less than 1 per cent is what we get down to. That's the level of overall switching. Not that higher figure, not that pool, I'm not going by reference to that. And that is what this assessment --

CHAIRMAN: So you're comparing it to the actual churn?

MR PALMER: The actual churn, yes. You can see that --

CHAIRMAN: Is that, sorry, if and when I read the CRA report, is that going to be obvious to me?

MR PALMER: What it identifies is the differential number. What you have in the assessment of the CRA report produced by Ofcom internally, paragraph 22, is an aggregate impact on switching, "seems somewhat modest in the context of", and it there proposes various different measures, the first one being "among in-contract customers being overcharged in the relevant period", then the second one "switches among in-contract customers in the relevant period."

MR HOLMES: Sorry, which paragraph are you on?

MR PALMER: 22.

MR HOLMES: 22, thank you.

MR PALMER: Then a large number of customers with an excessive ETC on average each month, then the pool number, and then in-contract customers during the relevant period, and I just posited another one to you as well, a point of comparison, which is about 820,000 customers switching away each year, that's the churn. Now, whichever of those metrics you take, the point being made here is that this is somewhat modest, and if you add into that the point about the length of delay that we're talking about being a limited number of days, rather than a decision not to switch at all, it's very modest indeed. So my submission is that materiality has to be seen in the context of the purpose of Article 30, that switching should not be disincentivised, it's not right to take the very smallest denominator that you can find, find a small change in that and say: "ah, that's a big 10 per cent change, that must be material". That's losing sight of the purpose of Article 36, GC 9.3, applying a very strict and previously undisclosed standard.

Similarly, other points, for your note it's 5.6 of the notification, at that stage Ofcom thought that there would be harmful effects on competition, identified that as one of the points of harm, the CRA analysis, taking you back to that at tab 12, it's the final section of that, page 523, section 3.4.4: impact to ETC over recovery on competitive conditions. That is directly answering the point at 5.6 of the notification, we see that from footnote 40 and 41 to paragraph 89. I'll leave that to be read, but the conclusion appears at 93. And indeed in the Decision, Ofcom abandoned that point and found no harmful effect on competition.

MR HOLMES: Isn't Ofcom entitled to reconsider its analysis between the period of the notification and the Decision? Isn't that the purpose of it?

MR PALMER: Certainly they are, that's entirely the point, and when we get to the penalty stage of this, if there is a penalty, they've reconsidered their analysis, abandoned a whole load of points, but not reflected that in the penalty which has been imposed. But yes, I make no criticism of them changing their position in response to the representations that were made, that's obviously precisely what the system is there to do. My point is when you look at the substance and see what's left, no material effect on competition, Ofcom accept, the effect on switching, we say, is not material. They've only arrived at it being material on the basis of that 10 per cent of the smallest figure, when you look at the purpose of GC 9.3 and the overly effect on switching, including the length of time for which switching was delayed, you see something which cannot credibly be called material. We say Ofcom was wrong.

CHAIRMAN: We need to take another break.

MR PALMER: Yes, that is a good moment. I'm grateful.

(3.22 pm)

(A short break)

(3.37 pm)

MR PALMER: Madam, members of the Tribunal, that concludes what I want to say on ground 1. We say that Ofcom's approach doesn't give full effect to the carve-out, it duplicates national law, fails to reflect legal certainty, fails to identify any material effect on switching and erred in so far as they considered the effect was material, and in the absence of any material effect on competition either, there is no basis for a finding of breach on the facts of this case. That's ground 1.

Grounds 2 and 3 would be unnecessary entirely, of course, if I succeeded on ground

1. They proceed from the basis that there is a contravention of GC 9.3.

So, so far as ground 2 is concerned, I won't turn it up again, but just to recall and bring to mind the statutory scheme I showed you earlier, you will remember section 96A requires the notification to set out a penalty which Ofcom is minded to impose at that stage, and that notification may be given in respect of more than one contravention, where it is a separate penalty, may be specified in respect of each contravention, and I say that discretion has to be exercised fairly and in the interests of transparency and good regulatory practice as required by section 3 of the Communications Act, which applies to Ofcom in fulfilling all of its functions. Those provisions are significant, I say, because, as you will recall also, section 96C(4) imposes a limit on the penalty which can then be applied at confirmation stage, being the "minded to" figure which acts as the cap.

So in the event of success in respect of one contravention a provider is entitled to have the total penalty reduced in line so as to reflect the position that it would have been in had the unsuccessful charge never been brought. I pose this question rhetorically of course, but why should a provider be in a worse position than it would have been had a baseless charge never been raised in a notification? I say there can be no good reason. And that problem could be solved by one of two ways. One is by stipulating separate penalties in the first place, But that's only one way. We know that clearly is open. That means that if you have separate penalties specified, one contravention is then knocked out, you're left with a new top limit in respect of the remaining one or ones. Put another way, whilst imposing only one penalty, would be to be clear as to how that penalty breaks down, clear in the reasoning, clear in some contemporaneous document, even if not appearing in the reasoning,

some basis upon which it could be said that if this other contravention goes, this provider must be left in the same position of having that top limit, because to do otherwise is unfairly to deprive them of a statutory protection.

There's another subsidiary reason, but nonetheless an important one, why I say that should be done in a notification or otherwise, which is that you will have seen and understood that there is a settlement procedure available to providers under Ofcom's own enforcement guidelines. We know that EE took advantage of that in a similar case which we mention, and you get the maximum discount of 30 per cent if you settle before the notification, 20 per cent after the notification but before you've filed any representations, and 10 per cent after you've filed representations. What do you do, I ask again rhetorically, if having seen the notification you decide to plead guilty to one but to resist another charge? You cannot know what the discount will mean in practice, even though it should be transparent, unless that penalty is capable of being broken down in some way, and say: well, in that event, you'll get the discount on the element of the penalty which relates to the contravention to which you've pleaded guilty. And there's another consequence of a failure to adopt one of those proceedings, which is it limits your ability as a provider to exercise your right to mount an effective appeal. Of course, it will be said by Mr Herberg, it is said by Mr Herberg: well, they're here appealing, they have a proportionality challenge under ground 3, what's the problem? Mr Palmer's being very effective, I'm sure. I say I'm not, I'm limited, I'm handicapped, and I'm going to be in the same position, as I hope will become clear, as the Tribunal finds itself, when the Tribunal comes to ask itself the question raised by ground 3: is this penalty proportionate, you'll be looking for some kind of yardsticks. You'll be looking to understand what difference it made that the

originally notified penalty was X, a large figure, it came down, we know, from whatever it was to 7 million, it came down in circumstances where the home movers charge had gone, but we can't tell what proportion or to what extent that reduction was due to that fact and to what extent it was due to some other fact or combination of facts. We don't know what Ofcom's minded to decision would have been absent that home movers charge. We don't know to what extent its removal, its failure, made any difference, and indeed what would happen if this appeal were to succeed on ground 1, that would still leave the GC 9.2(j) contravention sitting there, the matter would have to be remitted and reconsidered, but again there's no clarity as to the upper limit, of course they'll probably come up with a new figure, but what would be the upper limit which they would direct themselves to be bound by pursuant to section 96C(4)? There isn't one, beyond that original big figure which embraced all of these.

CHAIRMAN: Are you effectively saying that despite the fact that the legislation doesn't require separate penalties, one way or another those building blocks have to be provided?

MR PALMER: Have to be fairly done. May I offer a slightly involved explanation to that. If you remember, I showed you the billing condition which requires accurate billing. It is quite possible to imagine a case where you have a whole series of billing errors in respect of different customers certainly but also to different periods of time, and you might say that the only rational way we can address these separate contraventions is to deal with them all together and to impose a single penalty in respect of each of them, because they're all essentially of the same character, of the same nature, it does not really matter that there are different periods, different reasons for why it

happened, it's the fact that it happened, the fact that it broke down, the fact that customers were charged more than they should have been. In those circumstances, we say obviously what you should do here is identify all the contraventions and impose one penalty in respect of all of them, and that would in those circumstances be fair. But in other circumstances, you have a situation where contraventions are of a different nature, on the face of it of different weight, on the face of it potentially different seriousness, and in a situation where Ofcom is bound by principles both of transparency and of proportionality, and of ensuring the effectiveness of rights of appeals and the effectiveness of that statutory cap, we say in those circumstances fairness would require the discretion to be exercised either to separate out the penalties, or, if not, at least to have some basis upon which you can say how the penalty breaks down. Otherwise, that statutory protection is lost.

So you can have different circumstances yielding different answers, and that's why it's a broadly based discretion, you can have more than one contravention on a single notification, you can have more than one penalty separately identified or not, that's what the legislation allows for, but the fact that there's a discretion doesn't mean Ofcom as a matter of public law can simply do what it likes here. It is bound to reflect the interests of fairness and bound to give effect to a provider's rights, including the application of that maximum and including the effective right of appeal, and in a case such as this, which is all I need, the need for such an approach, in my submission, is manifest.

MR HOLMES: If I accept what you say, I'm struggling to see in what circumstances you could justify not exercising a discretion to show separate penalties, either at the stage of imposing the minded to penalty, or at the subsequent stage, revealing what that penalty would have been, because the factors you're

describing would point towards the need to separate them out at some point in, I would have thought, all cases.

MR PALMER: Well, I gave you an example of one I suggested that wouldn't fall into that category, which was separate but related billing errors under GC 11, where they would be similar enough in nature and effect and consequence that you could say that one penalty is enough in respect of all of this.

MR HOLMES: But, again, doesn't your point apply that you might accept some aspects of those errors and not others?

MR PALMER: But because of the similarity and nature of those, which are all essentially to the same effect, customers were billed more than they should have been, you would have a clear basis to bring down a penalty which would be comprehensible, it would be proportionate to -- if you actually were able to show well, these bills were accurate, you're wrong to suggest that they were inaccurate, you could say okay, well a proportion of the bills were inaccurate, it would make no sense to have a separate penalty for each bill, or a separate penalty for each group of bills in those circumstances, because the contraventions would just be too similar to make that.

But the way you have completely different contraventions based on different facts, I say in those circumstances I would adopt your suggestion, sir, which is that in practice yes, you should, and a discretion can be a duty as a matter of public law, it can be expressed as a discretion but operated as a duty in the interests of fairness, in the interests of operation of the statutory mechanism effectively. In a case such as this, I say that discretion does become a duty, or if not, to compensate for that by splitting it up informally, if not formally.

So instead of that position, in the notification we got a single figure, you've seen that, I needn't take you back. It appears, for your note, in the notification at

paragraphs 5.10 and 5.48.

I just want to briefly show you, without labouring it, Virgin Media asked about this right from the outset, raised the point at the earliest opportunity. If you go to hearing bundle 1, tab 16. This is a letter dated 24 May, that's three days after the notification was given, dated 21 May, the notification. You'll see paragraph 2, the second point:

"... seeks urgently a breakdown of the proposed penalty by reference to the specific contraventions in order to allow Virgin Media to respond to Ofcom's case."

It was identified very early on, a matter of days. And the answer came back six days later, at tab 17, over the page, page 602, under the heading "breakdown of penalty":

"Your letter seeks a breakdown of each of the contraventions. In this case, the provisional decision maker did not break down the penalty in this way."

And then there's a reference to the statutory provisions saying we're not required to, and:

"The proposed penalty there set out that we are minded to impose is in respect of all of the provisional findings. We cannot therefore provide a further breakdown of the penalty amount."

The next thing that happens is matters progressed, obviously Virgin made its representations, the matters progressed to the confirmation decision, which, as we know, was dated 16 November, and at tab 18 Ashurst have now been instructed and so they write, and at paragraph 3 you see:

"The purpose of this letter is asking you to provide both an explanation of the basis upon which Ofcom decided to impose a £7 million penalty and disclosure of Ofcom's working documents and internal correspondence."

So now the focus is on the new penalty. It rehearses the background at

paragraphs 4 and 5, saying that we asked for a breakdown at that stage but you told us there wasn't one. Paragraph 6:

"It was therefore impossible to know how Ofcom weighted the various contraventions. It was hampered in its ability to make meaningful submissions as to the appropriate quantum of penalty in the decision."

Paragraph 7, it abandoned its case of the net movers complaint, no longer contended it amounted to contravention of GC 9.3, so it was reduced, but it was entirely unclear what reduction Ofcom applied by reason of the abandonment of the on-net movers complaint, and what if any reduction Ofcom applied by reason of any of VM's written and oral representations in respect of the other alleged contraventions identified in the notification.

It goes on to make clear that everything's obscure and asking for that, saying at paragraph 12:

"Absent any reasons explaining Ofcom's approach, this decision appears to VM to have been reached on a wholly arbitrary basis."

And contrasting with others, and the final sentence of 13:

"That is a vital procedural protection if any right of appeal is to be effective."

So a number of requests there, including at (a) by what figure the original proposed penalty was reduced to exclusion of the on-net movers complaint, and so forth, I won't read all of those out, but that's the request made, as well as a request for disclosure.

The response came on 8 January at tab 19, just declining to provide any further reasoning at all, or any documents. The correspondence continued, I shan't take time over it now, tab 20, tab 21, tab 22, still asking to understand the basis upon which this was reached.

And tab 23, where you have it explicitly stated here by Ofcom on 22 March, and

explaining by reference to Mr Leathley's witness statement, Mr Leathley being the final decision maker, that he didn't determine the penalty by reference to the amount proposed in the provisional determination. It is said there:

"The relevance of the provisional penalty to his decision was only as a cap on what could be imposed as the penalty, in accordance with the statutory requirement."

Just pausing there, there you have it in terms, you're meant to have a minded to penalty, representations, and then Ofcom either imposes that penalty or some lesser penalty which takes account of the representations made. What they did, instead of doing that in respect of each contravention, is they lumped them all together as one penalty, dropped one of them but maintained the same cap, and instead of using that minded to decision in any way as the reference point beyond that statutory cap, is not to arrive at it in any way by reference to that, beyond that imposition of the necessarily overly high cap.

MR HOLMES: If Ofcom had taken the minded to penalty as a reference point, wouldn't that increase the risk that you would be criticising them for confirmation bias?

MR PALMER: No. No, Ofcom's internal system is to have a provisional decision maker and then to bring in someone fresh to the case, in this case Mr Leathley, to take the final decision, and as I understand it, Ofcom's internal procedures, and I'll be corrected if I'm wrong, but my understanding is they deliberately take someone who's not in the same team and hasn't had direct contact with it. So the idea of that is to prevent confirmation bias.

But Ofcom, as Ofcom, as the regulator, has obligations under the statutory scheme, which is to tell the provider what they're minded to do, then listen to their representations based on what they are minded to do, take those

representations into account and then come up with a new decision, which might be the same, or might be lesser.

So there is no risk of confirmation bias in doing that, it's simply telling you in advance the basis upon which they propose to act, responding to your representations about that, and they're not operating on some new previously undisclosed basis, but factoring the points you have made into what they had previously been minded to do, and coming out with an answer as to what their final decision is, and if you do that, and leave reasons which show you what you have done, it means that the provider then can understand that, can understand whether there is a basis upon which to appeal, and on appeal the reasoning is legible to the Tribunal, you can see what they proposed to do, what they were told, what they then did, and the reasons for that.

But instead what we have is explicitly Mr Leathley saying, we'll go to his witness statement in a moment, "I did not determine the penalty by reference to that other than as expressed in this penalty", bearing it in mind as the cap.

MR DORAN: Are you critical of the fact that, as you seek to imply from this sentence here, that the amount set in the notification was merely a cap, and it's the outer limit of a proper penalty as opposed to being something where there was a stepped --

MR PALMER: Yes.

MR DORAN: Right. So you would say the statute requires at that stage more than merely an outer limit to what the penalty could be?

MR PALMER: Because part of what contributed to that outer limit has now been dropped and gone away, there needs to be some thinking through of the implications of that, and some transparency as to what had happened. The difficulty here, as we have put it, Virgin feels like it's boxing at shadows, it

knocks down something and feels that it can't see what effect that has. It's knocked down a whole allegation in the shape of the home movers, it's knocked down various other points to which I'll come which were originally levelled, but Ofcom has listened to those points, taken into account and dropped various allegations, no criticism of that, but how then does that translate into effect on penalty?

So I make a series of linked points under ground 2. The first is the cap applies without adjustments, despite the fact that had the home movers penalty contravention never been identified, you would expect that the penalty would be to some unknown extent lower, we don't know to what extent.

The second point I make is that the final decision maker here did not even treat the provisional decision maker's minded to decision as a starting point, he just came out with a fresh evaluation of his own. And we say that makes a mockery of the consultation procedure which the statute requires. We made a significant number of important and weighty points which must have affected the provisional decision maker's reasons.

CHAIRMAN: Well it doesn't make a mockery of the procedure if those points made on representations are actually taken into account. You're going further and you're saying that we need to understand the precise way in which they were taking into account, and the precise impact.

MR PALMER: Well, I wouldn't use the word "precise", because it's said against me that I'm urging upon the Tribunal some precisely mathematical approach. I make clear, as we did in writing, I'll make clear to the Tribunal, no I'm not. Broad evaluation is required, but here we have nothing. We have nothing apart from the upshot. We proposed X, now it's 7.

CHAIRMAN: Well, that's not right, you have the reasoning in the Decision.

MR PALMER: Yes.

CHAIRMAN: Which you're effectively saying is inadequate.

MR PALMER: Is inadequate, but also unfair, because it is a limit then to how we engage with that reasoning. Because I'm entitled to bring an appeal to you on grounds of proportionality, and in responding to that appeal, the Tribunal is bound obviously to evaluate the proportionality of that decision, and you will be doing that exercise without knowing what weight Ofcom attributed to very significant parts of the claim, a prime example of which, the easiest point for me on this is the home movers point.

You have no idea, I can give you no idea, and Ofcom refuses to give any idea, as to what difference that made to the penalty. Did that account of all of the difference? Or if not, some of the difference? How much? And therefore you would have more of an idea as to how Ofcom weighted the remaining factors, how much weight; they say at various points, "We give weight to X" or, "We give weight to Y".

Now I don't suggest that every single time they do that, they have to hang a price tag on it. But I do suggest, which brings me on to the next point that I make, that this stands in stark contrast to the approach of other major regulators equipped to impose significant penalties, those which regulate water, Ofwat; gas and electricity, Ofgem; financial services, FCA; the CMA; the European Commission; all of which adopt a staged approach by which they take a starting point, adjust the starting point by reference to aggravated and mitigating factors -- that does not mean that each one has to be separately itemised and quantified -- they just say, "These are the factors which push our starting sum up to X, these are the factors which push it down to Y, now I stand back and look at the matter as a matter of proportionality and totality,

and that leads me to Z."

So you just have the broad contours of the reasoning behind the penalty decision, to which Ofcom's answer is, "Oh, that might be what they do in their guidelines, but our guidelines aren't that precise." I say that's irrelevant, because the reason that they're doing that -- and I can add to that list of course the criminal courts as well and the application of sentencing guidelines, including of corporate defendants, health and safety breaches and so forth, there are sentencing guidelines which again adopt that same approach. Starting point, aggravating and mitigating factors, leaves you with an ending point and then any further reductions, the principle of totality as it's called in the criminal world.

These established ways of setting a penalty exist for a reason. They exist in the interests of transparency, they exist in the interests of allowing a defendant to mount an effective appeal, and for the court to be able to, if you like, read the reasoning of the person who made the decision. They exist to allow a sense of proportionality overall to be gained, and to give the reviewing tribunal more of a grip on what weight in the estimation of the regulator -- or the judge in the criminal context -- is attributed to what. Broadly. Not precisely, not mathematically.

There is nothing in Ofcom's guidance which prevents such an approach being taken. It identifies the factors which might be taken into account, but there is nothing which stops it from spelling out its reasons in that broad level, so that we would have had some idea what the original penalty was for the home movers, for example, and therefore what we can now disregard and say well actually that's just been deducted, and we can concentrate on the sort of pros and cons, the strengths and weaknesses, the aggravating and mitigating

factors in relation to the surviving allegations.

MR HOLMES: So just to be clear, you're not saying that the guidelines were unlawful?

MR PALMER: No.

MR HOLMES: You're not saying that Ofcom did not follow its guidelines?

MR PALMER: No.

MR HOLMES: What you're saying is in these circumstances there was some sort of duty on Ofcom to do something which was not prohibited by those guidelines?

MR PALMER: Yes. Indeed, it's actually encouraged by those guidelines, because Ofcom's guidelines -- which I'll now have to remember where we have them, I think it's at the back of the authorities, bundle 3 of the authorities at tab 49. These are the current penalty guidelines. If you look at 1.18. We don't have anything transparent as regards the weighting of the factors considered. We don't even, beyond that, have anything transparent about something much more fundamental, which is the allegation which was dropped, an allegation for which a penalty was devised to reflect. That's not a factor, that's a whole contravention gone. We just don't know.

MR DORAN: So is what you're trying to say that in the notification, each of those, each of the elements that added to penalty, should have been in some sense, not in precise detail, but in some sense sketched out as a weighting?

MR PALMER: Yes.

MR DORAN: So that when you got to the final decision, after the representations, you could see which of those were removed, and you would have a sense of scale?

MR PALMER: Just have a sense of scale.

MR DORAN: Do you think that's a matter -- that's not a matter of what the Act

requires, you referred us to the cap in the Act which Ofcom refers to in its letter of 22 March, where they say that the relevance of the provisional penalty to his decision was only as a cap.

MR PALMER: Yes.

MR DORAN: You're not saying, are you, that there's something else in the Act which requires something other than a limit to the penalty being identified?

MR PALMER: No, I'm not, and of course on the facts of this particular case, in respect of the home movers contravention, we say it does in fact require that, because the discretion to identify a separate penalty in respect of that must be exercised in the interests of fairness to specify it.

MR DORAN: Because in a sense the Decision which then doesn't refer to the home movers, and which calculates a different penalty by reference to whatever factors and applies the guidelines, that's insufficient, the delta there so to speak is insufficient for your purposes?

MR PALMER: Yes.

MR DORAN: Right.

MR PALMER: Because I can't tell, and you can't tell as the Tribunal, what would have happened had the home movers allegation never been brought, what would the statutory maximum have been, and then, would that maximum have been affected, and if so to what extent, by the representations that Virgin made, which were substantial in their nature?

You have to remember at this point that they included for example the production of the CRA analysis, which put a number on the materiality of the effect, which Ofcom simply didn't have, they speculated it could be substantial and significant, and they ended up with a number which, even if I assume against myself for the purposes of this ground was material, was still on any view

modest.

Now, does that affect the scale of the effect on disincentive to customers? Does that affect the penalty which should be applied? In my submission undoubtedly, it would be absurd to apply and disproportionate to apply the same penalty which had a substantial effect on switching rates as against one which had a close to immaterial effect on switching rates. That would affect your assessment of the seriousness of the contravention. Did it have any such effect? We have no idea. None at all.

MR HOLMES: I think this is something for tomorrow, but I think we'd interested in hearing what Mr Herberg has to say about paragraph 1.18 to which you just referred in the penalty guidelines.

MR PALMER: I don't say that 1.18 in itself taken alone imports as a matter of generality a specific requirement, but in a case like this, it is impossible to understand how Ofcom can assert that it has fulfilled its duty of transparency and adequacy of reasoning by taking the approach that it has. All they say about their duty of transparency is that their duty of transparency does not impose any particular standard of transparency. That's a recipe for forgetting it altogether. There is no transparency as to the basis upon which these figures were arrived at, either at notification stage or at the final stage.

Very briefly before I move on to ground 3, as I must given the time, home movers has gone (Inaudible). The second point, this is just illustrative, GC 9.2(j), a separate contravention, we know it's not the principal basis upon which the penalty was fixed, that is apparent from paragraph 5.100 of the Decision, but what difference does it make? We have no idea. A reduction from that very large number, the potential pool, that was all that was available in the notification, down to that significantly smaller, two orders of magnitude smaller

number which emerged from the CRA report. Modest, not significant, effect, to use the language of Ofcom in both cases. What difference? We don't know.

There's a judgment made on the culture within Virgin, which I won't say out loud, that appeared in the notification. It does not appear in the Decision. The notification is a confidential document. The Decision in its non-confidential form is not, of course. But it does not appear. It did appear, for your note, given the time, in the notification at paragraphs 5.8 and 5.32. It was the subject of significant pushback by Virgin Media. The written representations, just for your note at this stage, included a section specifically addressing it from paragraph 8.59 onwards, I invite your attention to that.

CHAIRMAN: Sorry, what is tab is that?

MR PALMER: It's hearing bundle 1, tab 11, page 463, paragraph 8.59 and following. I won't go to it now just for reasons of time.

And then the oral representations which were made at the oral hearing, which is part of Ofcom's process, to consider representations, you will find the transcript of that at tab 13, and you will see the first named representative of Virgin Media on the cover page at tab 13, you'll his name and his position, and you'll see what he had to say about this from the foot of page 540 to the end of page 542. A very substantial amount of the representations he made as a whole to the panel, in fact over half of what he said, was targeted at that point, explaining why that criticism was not justified.

In the Decision at paragraphs 5.55 to 5.56, you find the paragraphs which are, if you like, the analogue of those which appear in the notification, but without those cultural criticisms. They go. That's clearly a response to the very significant representations which were made about that point, which you will understand,

for that criticism to be made publicly of Virgin Media would be extremely damaging.

The submissions that were made is it was, on the evidence, wholly unjustified to draw that wider inference from what amounted in particular to a single individual, referred to as [initials of VM employee] in the decisions, who made what Virgin Media acknowledged at all times to be the wrong decision as to how he responded to the discovery that he made, and you will find that in Virgin Media's written representations at paragraphs 6.26 to 6.27.

MR HOLMES: Of which document, sorry?

MR PALMER: Tab 11, Virgin's written representations. I'll just give you that reference at the moment. It is acknowledged that that was wrong, and it said:

"VM wants to avoid any doubt. VM does not consider that --"

CHAIRMAN: Sorry, you'll have to give the paragraph number.

MR PALMER: Sorry, 6.27, page 433:

" ... it was wrong ... avoid any doubt: it does not consider that a delay from February to November to fix such a problem could or would have been acceptable. It would not be."

And then two further points made.

The criticism, you'll remember, of [initials of VM employee] was he came across it in February and thought it could be fixed by means of a price change to come into effect in November. That was one of the missed opportunities to do what he did not do, and should have done, which was report that to compliance or senior management, the regulatory division, the legal division, or any of them. That's what should have happened at that point and did not, and there has been no secret made of that fact, Virgin fully accepts that that individual did the wrong thing, but it could not be inferred from that that it was fair to make

the cultural point of the kind.

That was the effect of the representation, which Ofcom accepted by omitting those passages, if you look at what appears. They're now somewhat rowing back in answer to this appeal, but we say it's their decision, and it's a clear omission in respect to what was one of the main concerns of VM.

What difference does that make to penalty, getting rid of the generalised allegation and bringing it down to that specific individual in particular? We don't know. No idea.

So I turn to ground 3, which in many ways is a partner to ground 2 and best considered together, and I ask you to remember that I am inhibited in what I can say as to the proportionality. As to the approach that you should take, there's the authorities bundle 2 at tab 24, the Kier Group decision of this Tribunal, presided over by Mr Justice Barling. Page 24 of that judgment, from paragraph 74. Some observations by the Tribunal on its role in penalty appeals.

This was a Competition Act appeal, it was the construction industry, which no doubt members of the Tribunal will remember, and so the penalties arrived at in this case by the Office of Fair Trading, as it then was, reflecting the Competition Act guidance which included a staged approach. It cites that passage just above that from Napp Pharmaceutical Holdings, approved by the Court of Appeal in Argos. I would invite to you read those passages in due course.

It then, commenting as follows:

"... deals succinctly and clearly with how the Tribunal should regard the guidance itself and its application by the OFT in any decision under appeal. In short the Tribunal will disregard neither the guidance nor the OFT's approach and reasoning in the specific case. On the other hand, the Tribunal is not bound

by the guidance, and should itself assess whether the penalty actually imposed is just and proportionate having regard to all relevant circumstances as put before the Tribunal in the course of the appeal. So much seems to be common ground."

There's a discussion about the language used about the margin of appreciation, we can skip over that. At the foot of that page, eight lines up from the bottom:

"The guidance reflects the OFT's chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the guidance at each specific step. As the Tribunal said in Argos, the guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low."

What that is a reference to is, after the starting point, adjustments up and down for aggravating and mitigating factors, an overall view of proportionality which might bring it down further at that point.

"On the other hand if, as in all the present appeals, the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in."

Of course that allies with my point about ground 2. If you're with me by the end of my submissions on ground 3 that the overall penalty is excessive, your ability to scrutinise the process and see where the error has crept in is now limited because of the lack of transparency of Ofcom's reasoning.

What should you do in those circumstances? If you're with me at the end of my submissions on ground 3 that the penalty is excessive, you will have to exercise your own judgment, because you have been given no other props by Ofcom upon which to assess the proportionality. You have been left with no other option to do that, and Ofcom in those circumstances cannot claim any particular margin of appreciation or deference to reach a decision as expert regulator, because it has not given you the tools as the Tribunal to assess how it deployed that regulatory judgment discretion and its position as specialist regulator.

It has chosen not to adopt a process which allows to you follow that and assess that, so you're left with the basic position that proportionality as ever is a matter for the court, it being a matter of law, clearly established, it is not a Wednesbury review, your duty is to ensure that the common regulatory framework is upheld and that the ultimate penalty imposed in respect of any infringement is proportionate.

MR HOLMES: Just to be clear, you're saying that we should assess whether or not the penalty is just and proportionate?

MR PALMER: Yes.

MR HOLMES: And if we consider that not to be the case, would the conclusion be, you're suggesting that it should be remitted, or are you suggesting we could substitute our own view?

MR PALMER: Has to be remitted under the statutory regime, but to follow any direction that you as the Tribunal give.

CHAIRMAN: Yes, you were giving the impression a moment ago that you thought we should just come up with a number.

MR PALMER: My primary submission is that you must, you needn't fix a final figure,

but you could say it would need to be substantially reduced by at least X factor, or a realistic cap would be Y, given that Ofcom deprived themselves of the benefit of knowing what their own statutory cap was in relation to the surviving contraventions. You could direct as you, the Tribunal, think appropriate. But it would have to be having come to the conclusion that the £7 million penalty is disproportionate and that a lesser penalty to some extent, or for whatever reasons you have identified as informing that conclusion, identifying what they are and expecting Ofcom to come up with a new number. That would be my secondary position.

MR HOLMES: Wouldn't that imply, so long as it was less than the number in the notification, which is the cap, that that number could be lesser or greater than the £7 million actually imposed?

MR PALMER: It cannot fairly be greater, in my submission, for two reasons: this is Ofcom's appeal as to the proportionality. If that succeeds -- sorry, Virgin's appeal as to the proportionality of the Decision. Your remedy powers only exist if we succeed in that appeal, in showing that the penalty was excessive and disproportionate. If you come to that conclusion, then the only logical conclusion would be for the penalty to go down, not up. If you don't come to that conclusion, then the result is that the appeal is dismissed.

You look puzzled by that, sir, but that's the --

MR HOLMES: I'm just putting the question to you. Could it not be disproportionate, but not be -- it could be disproportionate in terms of what we do see, and I'm not saying this is our conclusion at all, but it could be more or less than the 7 million on that basis?

MR PALMER: No, your task is first of all to assess whether it's excessive, and if it is, to assess by whatever yardsticks you decide upon to identify the reasons

why you think it's excessive, and that might lead to you give directions to Ofcom as to what approach it should take on reconsideration, which might be by reference to a fixed proportion, or a fixed maximum, or might be by reference to something less certain than that, depending on the views of the Tribunal. I don't think I can take that further. That's the approach that you're left in taking, because you haven't been given a clearer picture of the position. I'm conscious of the time, I don't know if there's any scope to sit slightly later than 4.30?

CHAIRMAN: I think you need to finish your submissions. How long do you think you need?

MR PALMER: There is a certain extent to which I can cut my cloth and I will do that, but if you were prepared to sit until 4.45 ...

CHAIRMAN: Yes.

MR PALMER: I'm very grateful for that accommodation. Thank you to the Tribunal for that.

So then turning to the skeleton argument on ground 3, which in order to save time, again, I will take as read, if I may.

CHAIRMAN: Yes.

MR PALMER: But just to highlight some of the points which come out of it. So dealing with ground 3, that begins on page 28. Again, we emphasise on that page that we're not seeking any kind of minute or mathematical analysis. Then the first main head is that this is disproportionate on its own terms. The second main head would be it's disproportionate as compared to the decision of the same day, which was made in relation to EE.

So on its own terms, the first point we make relates to the required deterrent effect. The Decision was expressed to have been made on the basis that it was

necessary to impose this penalty to highlight to VM's senior management that it should not be more profitable for the business to break the law and pay the consequence than to comply with the law in the first place.

You see my points at 129 on the facts. At no stage did such a consideration come in. There was no stage at which it was thought it might be more profitable, no finding that it was, nor was there any evidence to that effect upon which a finding could be based. It was an oversight.

It is said that there were opportunities to spot that. One of the points made at notification stage was that the senior management review went through a process of governance, but that didn't spot it. The point that VM made to Ofcom in respect of that is that it is simply unrealistic to think that because there is a governance review in respect of a review of a pricing structure across Virgin's basis that a senior boardroom level figure is going to be drilling down and saying, "What about this figure on the rate card, that seems wrong", or anything of that kind. They are at that point assessing from a far higher level.

That is not by any means seeking to excuse the original error that was made and the failure of [initials of VM employee] to draw it to anyone's attention when it was spotted, but it is unrealistic of Ofcom to say that there were further opportunities to spot this because it went through a governance procedure, and certainly in the Decision Ofcom expressly made no findings of fault on behalf of any senior manager.

Then at 130, you see the point in relation to the Decision that Ofcom said it considered the size of the gain VM may have obtained from its wrongdoing. The cross-reference there, I'd ask you to go back to it, is to the notice of appeal, paragraph 6.6, which is that VM made no financial gain from the

alleged contravention. That is because it provided refunds to all with interest.

Ofcom accepts that it did not rely in the Decision on any finding of a material gain, it didn't identify a material gain in the Decision. It now in its defence goes on to argue that in the short term VM have made a gain, that has to be balanced by the fact that when it was paid back it was paid back with interest, and an assertion that if Ofcom had not opened its investigation, VM would have retained that gain.

We say there's no evidential basis for that at all. That should be a specific point which was identified in the notification, Virgin Media's representations sought on that allegation, a finding made on the basis of those representations. It is not open to Ofcom to make that sort of allegation when it did not appear in the Decision under appeal. So for that reason we say it should be disregarded.

The second main head, I've said quite a lot on it already during the course of my submissions. That's the abandoned allegation of the further breach of GC 9.3. But this raises a serious point of concern. I would just ask you to consider, just take out for a moment the notification at paragraph 4.40. That's hearing bundle 1, 4.40. Sorry, tab 10, I should say.

Just to set the scene for this, Virgin Media understood the home movers allegation to be a very serious one. We denied it was a contravention, Ofcom accepts that, but if it had been a contravention, it would have been a very serious one. The reason for that is apparent if you only begin to look at the numbers and compare them to the numbers with which the overcharging allegation was concerned.

To put this in context, at this point Ofcom's case was that this category of customer on moving home to an area where they were still served by the Virgin network should not be charged an ETC and should not be offered the opportunity of

entering into a new 12-month commitment instead of paying an ETC. That was their case.

If you look at paragraph 4.40, you can see the scale of the numbers of the people involved, had that been a contravention. I am hampered, of course, by the confidentiality of those figures, but:

"Over the period September 2016 to June 2017 [you see the number of] subscribers said that they terminated their contract before the end of the initial commitment period as a result of a home move to a property within reach of VM's network and of these subscribers [that percentage and that number] signed up to a new initial commitment period with VM at their new address. We note that, in comparison, a smaller proportion [that lower number] of customers that were outside of their initial commitment period when terminating as a result of a home move signed up to a new fixed term contract with VM at their address."

So two points arise from that. The first one is an overcharge. Those who paid the ETC, they did switch and had to pay the ETCs. You can see the number of people who fell into that category by deducting the seconds number from the first, because the first number is the total number of subscribers, deduct the second, and you get left with those who did not sign up to a new initial commitment period, and therefore who paid the ETC. You can see without working out the precise figure, the broad order, the broad number of people in that category. Now, average ETCs were around £170 at this point. The reference for that is Ofcom give, in their skeleton at paragraph 40, a range of 120 to 220, which has a £170 midpoint. So all you have to do is multiply that number, 170, with the number which represents the difference between those who moved and those who signed up to a new, to get the figure of

overcharges paid, which on Ofcom's case at this stage was 100 per cent overpayment, none of it should be due, and that figure, if I ask you to do that maths, is considerably larger, you'll see by what order, than the 2.8 million of which the overcharging complaint is concerned, people who paid overcharges.

So the quantum of what was said at this stage to be illegitimate ETCs was substantially larger. But it doesn't stop there either because there is then affected customers who signed up to a new commitment period, and you get the scale of idea of that by looking at the differential between the two percentage figures, the point being that when they have a free choice, uninhibited by the threat, as it was perceived, of a new ETC, fewer of them signed up for a new contract than if you do have that.

So what you need to do is multiply that first total number by the second percentage, and if you deduct that number from the number in brackets after the first percentage, you get a number of customers who were deterred from switching, and that again, by a similar extent, is considerably greater than the number identified by CRA in respect of the effect on deterring from switching.

So on both metrics, we're substantially more serious in terms of the seriousness and consequences of this.

So we apprehended that this was treated seriously, in particular because it was added in respect of section 5 on the specific subject of these home movers, if you go to the Decision, page 347 of the bundle.

CHAIRMAN: Sorry, you're still in the notification?

MR PALMER: No, I'm now in the Decision, sorry, if that wasn't clear. No, sorry, you're quite right. It's the end of the day. I'm in the notification. I'm in the same document, at page 347. At C and D on the left-hand side, page 347,

you get more detail of the numbers there. This is all in the context, if you turn back, to "primary considerations under seriousness and culpability". A and B relate to the overcharging, C and D relate to the home movers, and then at 5.20, the further point about those who signed up rather than pay, and at 5.40, further consideration of the home movers in terms of this allegation.

And then in the same bundle at tab 25, you see how those factors influenced the provisional decision maker, which is a contemporaneous note that she prepared for her own purposes in fixing the original penalty. Note in point 2 --

CHAIRMAN: Sorry, you're going to have to give me that number again.

MR PALMER: It's tab number 25, point 2, just to notice in passing, higher than fair ETCs, and the use of the figure Z, the use of that for fixing that large penalty. Point 3, the number of customers overcharged, familiar with those figures, and then point 4, the number of customers who moved home entering into a new 12-month contract. Unable to quantify the actual at this stage, they couldn't do that comparison with effect switching at this stage. And then under duration of 12 months:

"1. Only stopped when we opened investigation.

"2. Virgin knew earlier of our concerns re: home moves policy but did not change it."

That is because, as you will have seen from Mr Tidswell's witness statement, there was correspondence from which they drew this point to Virgin's attention and they didn't change it, because rightly, they said it's not a breach.

So that was taken into account. We see the next point under governance:

"VM has cooperated throughout and moved swiftly to fully remedy once investigation opened.

"Time wasted by with us through incorrect information provided."

I'll come back to that in a moment, and then turnover figures, which at this point you

can see at the foot of the page are being explicitly compared with ETCs. So there's that document. There's no similar document in respect of the final decision.

Just sticking with the home movers point, the point which I emphasise is the seriousness of the numbers, the seriousness with which it's being taken, we said we wrote to them and they didn't do anything about it. What does Ofcom say about this? They say: oh, it was only mentioned second, that's their first point about the seriousness, and, secondly, they say: oh, fewer paragraphs of the notification dealt with this point than the overcharging point. Those are the two points that they make about the relative seriousness of this allegation.

We say that is simply not credible. On any view, it was taken as part and parcel of the seriousness of the ETC breaches, it was dealt with on an equal basis there in that provisional decision maker's document, and when you do the numbers, you see how it compares in terms of the number of people affected and the quantum of ETCs overcharged.

If I were asked to offer a figure, which I don't think anyone has asked me, I would say, you know, half of the provisional sum could be attributable to this and half to the overcharging, because the quantum of the sums involved are of the same order. But you don't have the answer, Ofcom haven't given you any such indication at any stage.

So that's the point on the abandoned allegation. Then, going back to my skeleton argument, paragraph 142, several points for which there's no apparent basis upon which the points that we have succeeded have been taken into account. I've covered most of this territory. I just note 143(i), in the notification significant consumer harm was identified as opposed to marginal effect on switching. Potential harm to competition, that became no effect on

competition. A high number of overcharged customers deterred from switching, that became a very low number, which you've seen, indeed just delayed from switching, not deterred from switching. A high number of home movers deterred from switching, again, you have that point, and then you've heard me on that last point; and that is elaborated upon in the following paragraphs, I needn't say more about that.

A point a paragraph 148 is that having identified a material effect on switching, a material impact on switching, which you will recall is based on that 10 per cent of a very small number, that became a substantial degree of harm. We say if it was material, it was marginally so, at the very lowest, before becoming immaterial, and it cannot be equated into a substantial degree of harm.

And then there's the effect of breach of GC 9.3, which again are a reference to paragraph 5.100, Ofcom's own approach was that the penalty was principally in respect of the contravention. We say this was a significantly serious allegation, it was raised for the first time, as Mr Tidswell says in his statement, just days before the notification came out, where we were asked to cooperate by agreeing with all the evidence that had been gathered, another purpose could be used, that agreement was forthcoming, it was late in the day, and not of substantial comparable seriousness to the GC 9.3.

That leaves only the EE case, which I can deal with briefly. Can I just identify to you the document which you'll need to read. That is at the back of hearing bundle 1 at tab 41, it's a short document because it was a settlement decision, it's considerably shorter. May I just ask you to note that date, 16 November 2018. The same date as our Decision. They came out together.

CHAIRMAN: They were published on the same day?

MR PALMER: Published on the same day, yes. And so the information in this was therefore available to the decision maker. He chose, and he's given evidence to say he did not take this into account, his fixing of the £7 million penalty was, on his own evidence, made without taking account of this decision. You will recall that one of the duties on Ofcom is to act consistently. You will also recall that the penalty guidelines allow reference to precedents and say they can be helpful. You will recall that in the Decision reference is made to precedents, but precedents under GC 11, not GC 9.3 and GC 9.2(j). There was nothing to stop this decision maker from taking account of this decision to ensure consistency as between the two decisions. He did not do so, apparently deliberately. The fact that it was deliberate does not make it any better. There is now a wide discrepancy. The principal metric by which Ofcom assesses the proportionality is by reference to the penalty precedents. I just ask you to turn back to tab 29 in the bundle. You will see a document which was provided to the decision maker setting out penalty precedents. You will see in the first column the case, the second column the penalty, the third column the percentage of relevant turnover, and summary points as to harm and dates. That information was provided.

Before that, in the previous tab, tab 28, a document of relevant penalty precedents limited to GC 11.1 and one other, which is entirely confidential, the last one. A different case entirely. But in each case, again, identified by reference to the percentage of relevant turnover.

At tab 30, a document that was produced during the process, Mr Leathley explains his document in his evidence, if you want to read that for the context, in which it's clear from the top right that the EE decision maker hadn't yet reached

a view on the provisional penalty, TBC, but it was being compared with the provisional penalty in the VM case. Again, the percentage of turnover identified in the VM case would have applied if that provisional penalty had been applied. And various aspects of the two cases being compared at that provisional stage. But this effort to produce consistency, or opportunity, at least, to produce consistency, was not followed through, in my submission without any good reason.

You will have seen Ofcom's amended skeleton argument, and if you saw the original skeleton argument, you will see that it denied that Virgin was right to contend that the EE penalty by reference to the relevant turnover, percentage of relevant turnover, was 20 per cent lower than Virgin's penalty, even after you've looked at the full, non cut settlement discount. They got a penalty. They said no, no, nothing like that, and it turns out it's actually more. They give you the figures so you can readily see what the actual percentage is. It's inordinately significantly higher.

Now, was VM's case so substantially more serious than EE's? To the contrary, on every relevant point it was less serious. You have the points in my skeleton argument. I ask you to look at those by reference to the two decisions.

I will restrict myself to making four points in conclusion, which arise from Ofcom's response in their skeleton argument. The first point, which relates to their paragraphs 87.2 to 3, Ofcom ignores the fact that EE's contravention went on for six years, as opposed to 11 months. They say that Virgin's breach was undetected until the end of the relevant period, which isn't correct, and is then contradicted in the next sentence.

87.4, we make the point that the amount over-recovered by EE is not even known. Because it went back for so long, six years, EE had lost a lot of the relevant

records, so could not refund all of the customers. We refer to the up to £1.6 million which might not have been refunded, and it's correct that that is the upper limit, but if you look at paragraph 2.10 of the EE decision, I don't ask you to do that now, but it's the EE decision, paragraph 2.10, which says:

"We also recognised that EE has undertaken to provide refunds of 2.7 million to those consumers it has been able to identify from its billing records who were billed for an ETC that was higher than it should have been. However, this means that up to 1.6 million of the amount overpaid is unable to be refunded."

That's Ofcom own point, that there is no comparable caveat in relation to Virgin Media. We have complete records, complete refunds, except those that are genuinely untraceable, or sums under £1, which were put together and donated to charity instead.

Then, as you saw in the provisional decision maker's note, Virgin Media have been consistently cooperative throughout. Ofcom now relies on the fact that a separate notification had been made, separate contravention in respect of inaccurate information being provided --

MR HERBERG: Sorry, we don't rely on that sorry.

MR PALMER: Sorry, it was explicitly left out of account by Ofcom, so it's not relied upon, it says nonetheless there were some other breaches, but it's very difficult to understand what they are, I'll deal with them in reply if they're identified, or why they can be said to justify a conclusion of Virgin Media not being cooperative to the extent that it could have any impact on the Decision.

That's the third point I make in reply to Ofcom's skeleton argument.

The final point is the relative size of the penalties, upon which you have my submissions.

So when you set the two infringements side by side, you see a greater duration,

greater extent, less refund, less recovery, and various other aggravating factors as spelt out in our skeleton argument, we say it is impossible to understand how that resulted in such a substantially higher penalty, in relative terms, given that VM is obviously a much smaller business than EE, again, again you have the confidential figures on that, should be treated as deserving a higher penalty, and Ofcom offer no such justification.

So when you as a Tribunal stand back and assess the proportionality of this Decision, we ask you to conclude on the basis of all that that it is excessive, a greater reduction should have been made to reflect all of those points, and that a more proportionate penalty should be substituted.

Madam, you have been very patient, I have gone on for five minutes longer than I said I would, and I'm very grateful for the indulgence you have given me. Unless there are any questions from the Tribunal ...

CHAIRMAN: I think we should stop there for the day.

MR PALMER: I'm grateful.

(4.53 pm)

(The Court adjourned until 10.30 am the following day)