IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1111/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 December 2009

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC Appellant

Supported by

BRITISH SKY BROADCASTING LIMITED Intervener

– v –

OFFICE OF COMMUNICATIONS Respondent

Supported by

BRITISH TELECOMMUNICATIONS PLC Intervener

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HEARING – APPLICATION FOR DISCLOSURE

APPEARANCES

Mr. Meredith Pickford (instructed by Osborne Clarke LLP) appeared for the Appellant.

Mr. Rob Williams (instructed by BT Legal) appeared for British Telecommunications plc.

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THE CHAIRMAN: Yes, Mr. Pickford

MR. PICKFORD: Madam, members of the Tribunal, it may be sensible to begin by ascertaining what the Tribunal have been able to see. I presume that you have read the skeleton argument of BT, the witness statement of Ms. Heal, and the documents that were provided by BT on Monday.

THE CHAIRMAN: Yes, we have also seen the witness statement of Mr. Heaney which we received today, and we have all had a chance to read that through, but I do not think we have had a chance to read through the documents that were appended – well I certainly have not.

MR. PICKFORD: The only document, as I understand it, that was appended, was a document which was actually referred to in Ms. Heal's evidence, which is the BT undertakings and I shall take the Tribunal to that in due course, it is actually a document introduced by Ms. Heal, albeit she did not exhibit it to her witness statement.

We intend to rely on the second witness statement of Mr. Heaney. We apologise for the lateness of its submission. It seems clear to us that Ms. Heal's witness statement was some time in its development, and it was the very first time that BT really engaged in any level of detail with the issues that arise on this application. Now, whether by accident or otherwise our position is that we were effectively ambushed by that level of detail on Monday.

THE CHAIRMAN: Well the affidavit really expanded on the matters that they had set out in their letter at the end of November in response to your application.

MR. PICKFORD: Madam, I understand that it was an expansion, but it was a very considerable expansion that we could not possibly have anticipated.

THE CHAIRMAN: You did not anticipate that they would maintain that the information was confidential.

MR. PICKFORD: What we did not understand was in what ways they said it would truly harm their legitimate business interests, because our position is it does not. So until we saw in concrete terms what they were saying about that we were unable to respond properly to it.

If I might take the Tribunal to that letter of 24th November, which is in the bundle at, I believe, AEH2

THE CHAIRMAN: Just give me a moment, Mr. Pickford.

MR. PICKFORD: Of course, madam.

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: If one turns to p.2 of 4 of that letter and go to the first full paragraph under point 2, the letter expressly describes the outline that is provided as "a very brief indication

of BT's position" and although it went on to explain some points in very general terms, saying that they considered there was competition between Carphone Warehouse and BT, they did not explain how that competition was relevant to the information that was sought, or how Carphone Warehouse could be said to be able to take advantage of the disclosure for some nefarious purpose. Furthermore, there are a number of points in the witness statement of Ms. Heal that are entirely new, for example, she now expresses concerns about Openreach's profit and loss account, she expresses concerns about the NGA duct point, about supplier contracts. It raises a point about the BT undertakings. None of those were canvassed in this letter. It was not really something that was feasible for us to anticipate precisely what BT would or would not say on these issues. With the benefit of hindsight - and this is certainly with the benefit of hindsight - perhaps it might have been better if these things had been sequenced. That is no criticism. It is simply now that we see what is on the table from BT we were put in the position, as we explained yesterday, that we were in fact embarrassed and unable properly to engage with today. But, given the Tribunal's very clear indication, we have done our very utmost in order to be able to engage with those issues. We worked late into the night in order to respond to them. We said we really could not fairly have done a lot more, or been criticised for not anticipating the precise points that are taken against us.

For that reason, we would apply for permission to serve this evidence out of time. It is also worth noting that BT's evidence certainly was not served on Carphone Warehouse by the one o'clock deadline that was set by the Tribunal.

THE CHAIRMAN: Is that opposed? Do you oppose this?

MR. WILLIAMS: We do oppose this, yes.

MR. PICKFORD: It was, in fact, as I understand it, served approximately ten hours late. Now, we do not make a big point of that in itself, but what it does illustrate is that in fact technically BT will require permission to serve out of time, just as we will. In all the circumstances of the case, we say it would be grossly unfair to grant BT permission and to deny us permission. We have done our utmost to allow BT as much time as we possibly could to see it, albeit we understand it has been a relatively short period. I have to say, Mr. Heaney's statement is not a particularly long one. The document attached to it is, in fact, a document that BT themselves introduced.

Madam, I do not know whether it is sensible to hear from Mr. Williams on that point and rule on it now - because it is utterly crucial to the rest of our application. So, if we cannot rely on that evidence, we have a problem.

MR. WILLIAMS: Madam, we do say that the way in which Carphone Warehouse has conducted this application is highly surprising. BT has made clear, since this application was raised, that it is one which raises very serious concerns for BT. That being the case it cannot have come as a surprise from Carphone Warehouse that we prepared evidence to support our position as summarised in our letter of 24th November. As we explained in our short letter yesterday evening, the criticisms of BT which have been made for serving its evidence in accordance with the Tribunal's directions are entirely unwarranted. Carphone Warehouse obviously had the option of seeking to abut the points made in our letter on evidence, and it made clear in its letter of Monday lunchtime that it had decided not to do so. It said, "We are going to pursue the application based on the letters that we provided". Those letters have chosen to deal with the substantial points made in BT's letter of 24th November in no more than a sentence on both occasions. So, we think that that was a surprising decision which Carphone Warehouse made, but it was evidently a deliberate one, albeit that it has now thought better of it.

We also say that insofar as there has been time pressure on this application because we have been criticised for serving our evidence when we did, we say that that time pressure is a consequence of the fact that we did not receive the application as reformulated and long-promised until 7.00 p.m. last Wednesday. We say that in that context we could not possibly have been expected to serve our evidence sooner than we did, and we worked very hard over the back end of last week, and over the weekend, to make sure that we were ready for the Tribunal's deadline.

THE CHAIRMAN: That was their letter of 9th December.

MR. WILLIAMS: That is right. -- which we received at seven o'clock and which said, "We expect your response by 5.00 p.m. on Friday". That letter had been promised on 27th November. When we got Carphone Warehouse's letter of 9th December they had had our letter of 24th November for some two weeks, and we had been waiting for a response to that letter since 27th November, which was the hearing before the Tribunal, the case management conference, when we were told that there was another letter forthcoming. So, eight working days pass with nothing happening. Then, four working days until the hearing. We say that in that timeframe we cannot possibly be criticised for preparing our evidence and serving it on Monday. The point is made against is: "Well, BT has been working on this application for some time". Well, of course we have, madam. We have made clear that it is a matter of concern to us. Of course we were preparing evidence, but

we simply make the point that until we got the application we could not finalise that evidence and serve it.

So, against that background we entirely supported the Tribunal's decision yesterday afternoon that this hearing should proceed and it should proceed on the basis of the material which both parties have chosen to provide. We supported that decision the first time the Tribunal made it, and we supported it when the Tribunal made it again when Carphone Warehouse did not accept the first decision. We were deeply dismayed to open our inboxes this morning and to see that Carphone Warehouse had effectively disregarded the Tribunal's direction that the hearing should proceed on the basis of the material already prepared and had taken it upon itself to prepare and to serve another witness statement from Mr. Heaney. It does seem to us that this is quite high handed conduct on the part of Carphone Warehouse

THE CHAIRMAN: Well are you actually prejudiced, Mr. Williams, by the introduction of this new evidence?

MR.WILLIAMS: We say that inevitably we are prejudiced in the sense that we have been thinking carefully about this application for a period of weeks and the issues that have been raised, and the suggestion that we can deal with the points made on the hoof this morning, we say that that would be unfair. What we do say is that if the application is going to proceed, if the Tribunal is minded to admit the evidence then we should be given some time this morning to consider the statement which we did not receive until very first thing this morning. I have not had the opportunity to take instructions on it, those instructing me have not had the chance to consider it, we would need some time this morning, possibly until, say, 11.30 to take a view as to whether we need more time to deal with the points that are made, but we say that we cannot simply proceed at half past ten this morning when we only received the statement first thing. So that, madam, is the minimum that we need.

THE CHAIRMAN: We will rise and consider what we are going to do about this.

(Short break)

THE CHAIRMAN: We will grant permission for Mr. Heaney's second witness statement to be served. We will hear Mr. Pickford's submissions and then Mr. Williams if you feel you need some time to absorb those and amend your submissions in response accordingly then we will grant you some time to do that later on in the morning.

MR. PICKFORD: I am very grateful. I might just note in relation to that point that Mr. Heaney's evidence is essentially responsive to BT so the points that we are going to make relying on it should not be any particular surprise to BT because they are simply answers to their points, but in any event we can proceed on that basis.

Madam, the scheme of my submissions is as follows. First, I propose to deal with a leading Court of Appeal case on the use of confidentiality rings and allowing parties to proceedings rather than merely advisers access to confidential information.

Secondly, I propose to provide a brief overview of the model in this case to put this application in its proper context. Thirdly, I intend to explain why Carphone Warehouse requires disclosure to Mr. Heaney. Fourthly, I shall explain why BT's concerns about Mr. Heaney using that information to gain some competitive advantage are ill-founded, and fifthly, I shall address the issue of the additional safeguards that Carphone Warehouse is willing to provide if its application is granted.

So turning then to the jurisprudence, We rely on the approach that has been developed in the context of patent litigation where the courts have grappled for several decades with how to deal with the issue of confidential information and have established a number of general principles of application that go beyond merely the patent litigation sphere. The most convenient way to take that jurisprudence is by reference to the case of *Dyson v Hoover* which should be in your bundle for this hearing I believe at tab 8.

The reason for taking the jurisprudence by way of *Dyson v Hoover* is that the Judge in that case, Mr. Justice Laddie, deals with the classical Court of Appeal decision of *Warner-Lambert Co v Glaxo Laboratories Ltd* and its summary in a late Court of Appeal decision *Roussell Uclaf* in that case and takes the history of the jurisprudence, and puts it in its proper context in relation to that case.

The *Dyson v Hoover* case was, surprisingly a case about vacuum cleaners, and it concerned a claim for damages by Dyson for patent infringement by Hoover, and one picks up the issue of confidentiality at para. 5, where it explains that there were two categories of document, there were level 1:

> " … which are considered by Dyson to be of the most extreme commercial sensitivity and in respect of which there is a very restrictive disclosure to the personnel acting on behalf of Hoover and vice-versa."

Then level 2 is also restricted class but is less onerous than level 1. Then one sees at para. 6 that Mr. Justice Laddie goes on:

> "There has been a confidentiality club created which deals with documents falling in level 2. As far as level 1 documents are concerned – there are about 2,000 of these – disclosure is restricted to solicitors, counsel, experts and [in this case] in-house solicitors only."

So that is somewhat analogous to the confidentiality ring we have in the present case. It goes on in para. 8:

> " … a problem that has now arisen in relation to the distribution of documents disclosed by Dyson. In essence, Hoover says that the inclusion of a large number of highly material documents in the level 1 group means that Hoover itself, as opposed to its lawyers and its experts, cannot understand properly the nature of the case made against it. This manifests itself in a number of ways.
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> 9. It is said on behalf of Hoover that the lawyers it has retained cannot take instructions from their clients on crucial issues, both as to the evidence which needs to be adduced on the inquiry and also in relation to the future conduct of the proceedings. For example, it is said that Hoover is not in apposition to make (After a pause) properly informed decision as to whether or not to make an offer of settlement, or, more precisely, the level of any such offer, in the absence of a proper ability to understand the case made against it.
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> 10. The problems have already manifested themselves during conferences. Apparently , there have been a number of conferences during which the discussion has had to be halted until Hoover internal personnel could be removed from the meeting so that the meeting could then continue discussing Level 1 documents.

There is then some further discussion. Then, if we can pick the case up at para. 22 where the judge deals with the question of onus on who the onus lies to demonstrate that documents should, or should not, be disclosed. He says,

> "Before turning to the question of onus, I should make it clear it is not a trivial question. The material at issue before me is clearly important. As Mr. Prescott said in his skeleton, Dyson has disclosed, in the hope and expectation of setting out their case on damage decisively, both historic and current financial data in very great detail. I do not doubt, for the purpose of this application, that that is an accurate summary of what Dyson has done. The consequences, it seems to me, are as follows. It is inevitable that that material will include material of great sensitivity to Dyson, and also that it is material which is of great importance to Dyson setting out decisively its claim.
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> 23. In considering the issue of onus, it seems to me that the proper starting point is *Warner-Lambert v. Glaxo Laboratories Ltd.* That was a decision which came before the Court of Appeal. However, to some extent, the need to consider that case has been avoided because it was considered and reviewed and its teaching

was summarised in *Roussel Uclaf v. Imperial Chemical Industries plc*. In the latter case, an application to prevent discovery documents from being seen by a party came before Mr. Justice Aldous (as he then was). Having considered *Warner-Lambert*, he summarised its ratio in the following words at p.49,

> 'Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which will play a substantial part in the case as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for advice given to him and, in some cases, the reasons for the judgment. Thus, what disclosure is necessary entails not only practical matters arising from conduct of the case, but also the general position that a party should know the case he has to meet, to hear the matters given in evidence and understand the reasons for the judgment'.

24. Aldous J's decision was appealed, and counsel for the appellant/defendant, who was seeking the restriction on disclosure to the respondent/plaintiff, accepted the summary put forward by Aldous J. but subject to a significant qualification. That is referred to in the decision of Nourse L.J. on appeal in the following passage at p.34:

> Mr. Floyd for the defendants was prepared to accept that passage as being a correct summary of the test laid down in the *Warner-Lambert* case except he quarrelled with the judge's suggestion that it would be exceptional to prevent a party from access to information which would play a substantial part in the case if by that he meant access through people within the corporate organisation of the party as opposed to its advisors. I think it is clear he did mean that. For myself, I think the judge gave an entirely accurate and very helpful summary of the material test.

25. In other words, it appears that the Court of Appeal had to consider not just whether Aldous J's summary was correct but, in particular, how to turn its attention to the issue of whether it was correct that access had to be given to people within the corporate structure of the party to whom disclosure is made. I should only add that there was brief judgment given by Russell LJ in the *Rousell Uclaf* case. It should be recalled that Russell LJ was a member of the court which gave the *Warner-Lambert* decision.

> 'I agree. In his careful reserved judgment Aldous J, in my view, set out the right test, posed the right question, examined and had regard to the right evidence, indulged in the right balancing exercise and, in the exercise of this discretion, came to a conclusion with which it would be quite wrong for this court to interfere. He then required and obtained entirely appropriate safeguards for the benefit and protection of defendants. For all the full and detailed reasons given by my Lord in this judgment, I, too, would dismiss this appeal'".

So, that sets out the background. Applying those facts in the *Dyson* case, the judge goes on,

> "Although Mr. Prescott accepted in skeleton that the starting point in cases of this kind is that one has to show exceptional circumstances in order to prevent disclosure, in substance he approaches the issue from the other end. He says that the onus is on Hoover to justify being shown the documents rather than on his client (Dyson) justifying preventing disclosure".

He then goes on to set our various arguments that are dealt with by Mr. Prescott on behalf of Hoover. The judge then picks it up.

> "In my view, considering what happens in other European jurisdictions, at least in the way advocated by Mr. Prescott, does not really address the issue that I am concerned with. As far as I am aware, whether or not there is a provision for disclosure, all courts approach litigation with a number of basic rules in common. One of those rules is that the parties to litigation should be able to under not only the nature of the evidence given but also the basis upon which the judge comes to his conclusion. In my view, it is a fundamental part of the conduct of fair proceedings that all the parties before the judge should have access to the same material that the judge himself has access to for the purpose of coming to his conclusion. The same point can be put the other way round. It would appear to me to be prima facie unfair for a judge to decide a case against a party on the basis of

material to which the judge had access but the party against whom he finds does not. In my vie this is at least one of the reasons why, in *Roussel Uclaf*, Aldous, J. said it would be 'exceptional' to prevent a party from access to information which would play a substantial part in the case. As I have said already, the documents at issue before me are likely to play a substantial part in the case".

He goes on over the page, at para. 33, in the concluding passage, to say this,

"In my view, the principle what underlying Aldous J. (as he then was) said in *Roussel Uclaf* is not difficult to discern. Whether one is considering the inquisitorial or the adversarial system, it is essential that the court puts in place procedures which allow the parties to litigate on an equal footing and with full knowledge of the materials before the court.

I do not consider this to be a special case at all. It seems to me that the sort of circumstances which arise in this case arise in many cases, whether in relation to the issue of liability or in relation to the question of quantum. It seems to me that what Warner Lambert has decided and what Aldous J. (as he then was) was saying was eth same thing, that is to say that the essential starting point for considering what to do about disclosure is that there should be full disclosure to the parties to the litigation of all those materials which are going to be considered and which may be put to the court.

This, in my view, is a primary necessity, and that is the starting point when one considers whether or not there should be a restriction. In my view, Mr. Arnold is right that the onus must be on the party seeking to show that the case is sufficient exceptional that significant restrictions on disclosure just be maintained. That must mean that it is on the party trying to restrict disclosure to justify it and to show why, in all the circumstances, notwithstanding onerous undertakings as to confidentiality and the like, nevertheless documents should not be shown to the litigant on the other side.

Mr. Dyson gives evidence in this case of his reasons for not wishing to allow Hoover to see the documents in dispute. [That evidence is then set out.]

I have no doubt at all that Mr. Dyson sincerely believes every word in that paragraph, and I am sure he is concerned that Hoover may misuse information which is disclosed to it. There is, as I have said already, a risk of mis-use, although I see no suggestion, nor do I think it is in any sense likely, that there will be deliberate misuse. I think the important part of Mr. Dyson's evidence is the

> last sentence namely his suggestion that it strikes him as very odd and unfair if this information were to be given to Hoover, even the very limited number of Hoover employees selected out by Mr. Arnold and his solicitors. Once again, I have no doubt that he does not think it would be odd and unfair.
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> In my view, it is the job of the court to consider what is fair to both sides. It strikes me as being odd and unfair if crucial material relating to a very substantial claim made against Hoover is withheld form the personnel with Hoover who are best able to consider that material. In this judgment, I have already referred to the evidence given by Mr. Cottrill as to the central importance of the Hoover personnel, who are the subject of the confidentiality club, to Hoover's business What struck me, when reading that evidence, was that the same points could be made as to their importance to Hoover's decision-making process in relation to these proceedings. It appears to me that what Hoover wants to do, on the basis of the material before me, is to show these crucial documents to the bar minimum of internal personnel who can assess their value properly and allow Hoover to take rational and well-informed decisions as to the future conduct of this case".

I apologise for reading such a lengthy passage, but in my submission the analysis of the court in that case is particularly apposite to the facts of this case.

The principle that one derives is that the starting point is that subject to appropriate safeguards there should be full disclosure - not merely to a litigant's professional advisors, but to the litigant himself. That follows from the basic need for fairness, for equality of arms and for both sides to have access to the same fundamental information. The second point that is well-established is that the onus is on the party seeking to restrict disclosure, i.e. in this case on BT. In the present case we are obviously not concerned with patent litigation but we are concerned with an appeal on the merits, and Carphone Warehouse has to be able to develop its case fully on the merits. A fundamental aspect of Carphone Warehouse's case is whether the modelling underpinning the price control is robust. Now, if the Tribunal is with me that in order to fairly and fully develop that case and to give proper instructions to its expert team in respect of it Carphone Warehouse needs to have access to that information then as a matter of justice it must be given that access. I would remind the Tribunal in this context the proposition that can be derived from the *Eisai* case which the Tribunal has seen previously in this case – it should be in tab 7 of your bundle. I will not go over the background because we have already canvassed this in a previous hearing. I simply want to pick out para. 49 which is in the judgment of Lord Justice Richards, having dealt

with the submissions of counsel for the respondent for the National Institute for Clinical Excellence which were to the effect that a large amount of information had already been provided, so what was Eisai making a fuss about? Lord Justice Richards said as follows:

> "I accept that Eisai was given a great deal of information and was able to make representations of substance. It knew the assumptions that were being applied and could comment on them. It knew what sensitivity analyses had been run and could make comments on those. It could and did make an intelligent response, as far as it went. In my judgment, however, none of that meets the point that it was limited in what it could do to check and comment on the reliability of the model itself."

I say that that case applies by analogy here. Obviously that case concerned the requirements of a fair consultation procedure, but the analogy still holds because whilst Carphone Warehouse can do quite a lot, as I shall seek to demonstrate, there are certain things that without disclosure of the model to Mr. Heaney it still cannot do to properly critique Ofcom's approach on key issues; key issues such as efficiency and fault rates. Moreover, we say that on proper examination the information that we are discussing in this case is not in the category of the greatly commercial sensitive information, for example, the information in *Dyson* when it was, nonetheless still disclosed. So we say that it follows *a fortiori* that it must be appropriate to make disclosure in the present case.

If I could then turn to the model itself, I do not know if your bundles have been updated to include this as well. There should be a note on review of the models disclosed by Ofcom, which was a note that was handed up at the hearing on 2nd November. It is at AEH 16. This is not a new note, it was a note that was, as I say, previously handed up at the hearing that took place on 2nd November. All it does is it conveniently explains the nature of the models that have been relied up on by Ofcom. It explains that there are seven linked spreadsheets, and they consist of four large and complex spreadsheets developed by or on behalf of BT Openreach and those are the four spreadsheets that we see marked in blue. Then there are three spreadsheets that were quoted by Ofcom that were developed from the first four. What Carphone Warehouse seeks in this application is disclosure of the blue spreadsheets and also the first of the red spreadsheets – the Outputs 2003 final service costing spreadsheet. We already have, and it has been disclosed to us because it was ultimately agreed that it was not confidential, the price calculations and the ancillary pricing calculation.

THE CHAIRMAN: So just to be clear, the bottom two, the price calculations, the ancillary pricing, those have been disclosed generally and not just to the confidentiality ring?

MR. PICKFORD: That is correct.

THE CHAIRMAN: The four blue ones and the top red one "Outputs 2003" have been disclosed to the confidentiality ring?

MR. PICKFORD: That is correct.

THE CHAIRMAN: And you are now seeking those five to be disclosed to Mr. Heaney?

MR. PICKFORD: That is correct. In relation to one of those, the CF Final core forecast model we are not seeking full disclosure of that model. Rather what we seek is that it be disclosed in a manner which obscures all the allegedly confidential information by replacing the true figures in the spreadsheet with ones to which a randomised factor has been applied. That is not because we necessarily accept that that information is properly to be regarded as commercially sensitive, as Mr. Williams says in his skeleton argument. He claims we have conceded that point; we have not actually conceded that point. However, we do not see any particular utility in debating it before the Tribunal because we prepared pragmatically to offer a means of addressing any allegedly confidential information in it.

Now, our case, our primary case is that there is not actually a need formally for Mr. Heaney to be admitted into the confidentiality ring. What we seek is disclosure of certain information which, we say, BT has not adequately demonstrated is properly commercially sensitive, and so the Tribunal can properly approach the application on that basis.

However, if the Tribunal is not with me, and is persuaded by BT that there is commercially sensitive information that we seek then in the alternative we would ask that Mr. Heaney be admitted fully into the confidentiality ring. We say nothing particularly turns on that distinction, albeit it is not necessary formally for him to be admitted, because what I seek to demonstrate is that the information that we seek is not actually commercially confidential.

THE CHAIRMAN: Because there is nothing in the three blue ones and the red one that you accept as confidential, and as far as the CF Final one it can be randomised?

MR. PICKFORD: That is correct, subject to a minor qualification to which I shall come, that it is possible, although we do not know that there may be some information, for instance in relation to specific contracts that might be said to be confidential, and again in order to avoid debate in relation to that we would be quite happy for that information to be aggregated up, but that would be a minor adjustment ----

THE CHAIRMAN: Which of those is that in?

MR. PICKFORD: I understand that that is in the Oak models. It is suggested by BT that this sort of information exists, we are not sure it really does exist, but to the extent that they are right, again we do not wish to have a detailed debate about it, we are quite happy to try and find some way forward to address that specific concern but that is a point I will come on to, if I may, madam, when I come to deal with the specific undertakings that we are prepared to give.

So that is, in essence, what we seek, by way of disclosure in this application.

MR.WILLIAMS: Just to be clear, although Mr. Pickford said that he seeks Mr. Heaney's admission to the confidentiality ring, I think what he means is he thinks Mr. Heaney should be given access to the Ofcom model, because I have understood from an earlier letter written by Osborne Clarke that this application was only concerned with Mr. Heaney's access to the model rather than all of the other material that is in the confidentiality ring, pleadings, witness statements and so on.

MR. PICKFORD: That is what I explained, our primary case is he does not need to be specifically admitted into the confidentiality ring. If you read Mr. Williams's skeleton he proceeds on the basis that this application is an application for admission into the confidentiality ring and so my first point is to address that; it is not technically but even if it were then ----

THE CHAIRMAN: Even if he were admitted to the confidentiality ring it would still be limited to access to the model.

MR. PICKFORD: Yes. We say nothing really turns on that distinction. I raise it simply because it is raised against me. It is said that this will be exceptional because there has not been somebody admitted into a confidentiality ring in similar circumstances.

THE CHAIRMAN: Well it would be exceptional whether or not he is actually formally admitted into the confidentiality ring.

MR. PICKFORD: That may or may not be the case. I have sought to demonstrate by reference to the jurisprudence, the Court of Appeal, that in fact it is not particularly exceptional, even if in the very limited jurisprudence of this Tribunal on these issues, it would be a first time in relation to someone in Mr. Heaney's particular position.

So madam, if I may turn to the critical issue of why we say Mr. Heaney needs to see this information. Ms. Heal has in fact put the point rather nicely herself at para. 43 of her witness statement. She says this:

> "Mr. Heaney has some 15 years experience of business modelling together with extensive knowledge of the telecommunications industry, including some time

spent at Ofcom. He is therefore probably better placed than most to interrogate the information in the Ofcom model."

That, very succinctly, summarises the essence of our application. I will go on to demonstrate far more precisely why we say it is needed, but we say that is very much at the heart of it. If one could then go to Mr. Heaney's statement, please, at para. 27, and to give Mr. Williams a proper opportunity to absorb this I propose to read this paragraph, it is a relatively long paragraph but it is highly important to our case:

"BT questions why I should need to have access to the models, given that Carphone Warehouse has instructed expert economists and forensic accountants to assist it. I explain below some of the problems that Carphone Warehouse is currently experiencing.

(a) I have over 15 years experience in the telecommunications sector, including in my current role, direct business experience. I am uniquely placed within the Carphone Warehouse team to assess issues such as efficiency improvements, fault rates, the structure of Openreach's costs and Carphone Warehouse's costs, and associated costs which are all important to the analysis underpinning the price control. In these cases, a detailed understanding of the reality of how a telecommunications network works is required in order to form a proper view of whether the assumptions and modelling approaches adopted by BT and Ofcom are robust and realistic. I am the person who has carried out Carphone Warehouse's main analysis on these issues based on Ofcom's LLU Decision.

(b) The narrative provided by Ofcom in its published documents provided its cost information at a very aggregated level and only provides small pieces of information about the methods and assumptions that have been used to derive the overall cost.

(c) I now understand, however, from the little my advisers have been able to share with me, that there is considerably more detail in the models which is either not explained in the statement, or is even inconsistent with it.

(d) Lack of access to the model prevents me from properly understanding the approach and assumptions used to derive the costs and therefore makes it difficult for me to critique the results. It is the equivalent of only giving me the summary document of a decision (but not the main report or Annexes) and then relying on third parties to read and explain the method, logic and

assumptions that underlie the summary. In a case of this cost model, given its many assumptions and complex logic, a third party adviser who has no detailed knowledge of some of the key network and cost structure assumptions cannot properly scrutinise the model.

(e) This leaves Carphone Warehouse in a position where, as we now go forward to this detailed CC investigation, no one in Carphone Warehouse's camp can properly scrutinise the Ofcom analysis. Given my primary involvement, it is I alone who can really do so.

(f) For example, in relation to the derivation of fault repair costs, I am currently setting these costs and particularly their fault repair LRIC cost difference as between MPF and WLR. The information Ofcom has provided is very limited. The total product management and fault repair LRIC cost difference in 2012/13 is £1 to £3, and the CCA FAC fault repair cost difference in 2012/13 is, I believe, £3. The CCA FAC fault repair cost difference looks incorrect, since it is based on a higher fault incidence level for MPF which is inconsistent with both logic and empirical evidence. Yet I have no way of challenging this data further by, for instance, understanding the assumption of fault rate incidence, adjustment for broadband faults made and repair cost per fault, since I have no access to the model.

(g) I am instructed by Martin Duckworth, of Frontier Economics, that the model is highly complex. The accuracy of the calculations in the model can, in his view, only properly be assessed by someone with a detailed knowledge of such issues, such as the likely level of faults in different parts of the network, the level of activity required to resolve those faults and the relative usage of different parts of the network by different services. This is knowledge which I have, but which my advisers do not. I understand that, due to the complexity of the model, it is not possible to overcome this information asymmetry by decomposing the model into a number of discrete input assumptions and simple calculations based on these assumptions. To fully review the model requires an end-to-end understanding of the calculation, the role of the differing assumptions in the calculation and visibility of the intermediate and final results of the calculation. These can only practically be achieved by having access to the model.

(h) The calculation is critical and material to the overall level of unit cost for CRS products. The calculation also contributes to the differential between MPF and WLR due to differential allocation of repair costs between the different services."

He then goes on:

"(i) As another example of the difficulties I face in giving instructions in this case, Carphone Warehouse had to decide what it should do in relation to Ofcom's modelling of anticipated volumes of ancillary services, where there appeared to be flaws – without itself understanding the true materiality (in its view) of the points we had identified. Without access to the model, I had to rely instead on a broad assessment from my advisers about whether Carphone Warehouse might want to pursue the point rather than being able to decide myself directly on Carphone Warehouse's behalf."

Then he finally concludes:

"(j) In this context I note that it can generally be regarded as best practice for UK regulators either to publish copies of the models that they use to collect costs and charge controls or subject the models to third party audit. In this case, Ofcom did neither. Had it followed the practice adopted by other regulators, I would have had visibility of the detailed methodology and/or assumptions as well as the reassurance offered by an independent review of the models."

So that sets out some examples ----

THE CHAIRMAN: Just to focus on this fault repair cost difference, here we are talking about Openreach's fault repair costs and Mr. Duckworth identifies what he thinks is a discrepancy and he wants to know how likely it is that what is in there is right for Openreach.

MR.HEANEY: It is myself that identified what appears to be a discrepancy, but I have been unable to tie it down to the details or understand what has caused that discrepancy.

THE CHAIRMAN: You are Mr. Heaney, are you?

MR. HEANEY: Sorry, yes. Yes, madam, I am.

THE CHAIRMAN: I see. Then Mr. Heaney can explain "well, within our organisation this is how it tends to work, this is the kind of different level of faults we have in different parts of the network in Carphone Warehouse". Then you are saying it is difficult for Frontier Economics to glean from that information that Mr. Heaney provides about what happens

within Carphone Warehouse to be able to say whether that shows there is something rather odd going on in the model, as to what it shows about Openreach.

MR. PICKFORD: Yes.

THE CHAIRMAN: But I am not sure how Mr. Heaney, seeing what the model says more precisely about Openreach's position is going to help decide.

MR. PICKFORD: He is in a position to evaluate in a way that Mr. Duckworth cannot, the realism and the robustness of the assumptions that are made by BT and Ofcom for a start. If I could just take instructions? (After a pause) The point is it is not about Carphone Warehouse's costs structure, it is about Openreach's costs structure and Mr. Heaney, by nature of his experience generally and his understanding of Carphone Warehouse, amongst other things, will have a better understanding of what BT's costs structure should look like than Mr. Duckworth who does not have the 15 years of experience in this particular industry.

THE CHAIRMAN: So it is not Mr. Heaney's expertise as a person who knows a lot about Carphone Warehouse here, it is his expertise as a person who knows a lot about the telecoms' industry more generally, is that what you are saying?

MR. PICKFORD: That is correct, obviously it is informed by the fact that he knows a lot about Carphone Warehouse and Carphone Warehouse is also in other telecommunications' business, so that is one of the key sources of information but it is not the only one, and yes, madam, it is precisely the information about BT that we are concerned with, that he has a better understanding of that than anyone else in the Carphone Warehouse team. That is precisely why, and I can take the Tribunal to it, when you see the evidence we prepared for our notice of appeal Mr. Heaney prepared by far the most substantial of the witness statements, and in particular, concentrated on issues such as fault rates and efficiency because those are the things that he knows about and understands from an industry perspective in a way that economic consultants do not, however much they might be able to ----

THE CHAIRMAN: Isn't the point that is put against you that it is precisely because of that that it makes it so dangerous for him to see this information, because even if you say, "Well, you can only look at it in Carphone Warehouse's offices. You cannot be provided with copies of it. You cannot take away copies of it", nonetheless, he, by looking at this will be able to see things about Openreach's business which, as someone who is now working for a competitor - I realise it is in dispute whether he is a competitor, but at least potentially - it is particularly damaging that he should see this because, because of that degree of knowledge it is a bit of a double-edged sword.

MR. PICKFORD: Madam, it might be, but it is not on the facts of this case because for the reasons that I will come on to develop Mr. Heaney, whilst he has this expertise, is able to use it to be able to scrutinise whether what Ofcom and BT have done is sensible. Because of the nature of Carphone Warehouse's business and the nature of BT's business he is not actually able to use it to gain any material or realistic competitive advantage. I would like to develop those points more precisely because one needs to look precisely at the particular allegation that is made against us and to understand whether or not disclosure of this type of information is likely to assist Mr. Heaney in the running of Carphone Warehouse's business as opposed to scrutinising Ofcom's model.

But, if I might also add, the point, madam, that you have made is precisely the point that was made in the *Hoover v. Dyson* case. It was said there that the very reason -- Mr. Dyson as complaining that, well, the people to whom this was going to be disclosed in Hoover are the people most able to use it. We say that that is precisely the point, and that is why they need it - because they are the very people who are giving the instructions and have the information which the experts do not have. It was entirely taken on board in that case. It was accepted that in that case there was highly confidential information. But, that did not provide a basis for saying that if fairness and justice demanded that the party to litigation himself, rather than his advisors, saw it, he should be prevented from seeing it.

Madam, I will deal in more detail with the point about the particular nature of the competition between BT and Carphone Warehouse in due course because once one sees that, one sees that actually the concerns that have been raised by BT are not as serious as they might appear from an initial reading of Ms. Heal's witness statement.

Madam, I mentioned in relation to efficiency assumptions that Mr. Heaney had produced a very substantial body of evidence on that. If I could very briefly turn to that witness statement which is, I think, in the bundle at AEH15 -- This is Mr. Heaney's first witness statement, made in support of the notice of appeal. Without going through that in any detail, one sees that he begins his analysis at para. 57 in relation to efficiency. It goes on in considerable detail until para. 132. As I said, there was a reason why it was Mr. Heaney that spoke to this. It was because Mr. Heaney was best able to speak to this. As Executive Director of Strategy & Regulation with Carphone Warehouse he was clearly a very busy man, and if he could equally get his economic advisors to speak to these points, then he obviously would. But, he could not. That is why he produced this particularly detailed witness evidence. The position we are now placed in is that whilst Mr. Heaney was the person who developed all of this primary evidence on which Carphone Warehouse relies in

its appeal, on review of the model by Frontier Economics, what was discovered is that there appear to be certain discrepancies between the model and OFT's LLU decision. This is a point which we have tried to develop as best we are able - given the problems that we face with not having Mr. Heaney included in the confidentiality ring for this purpose - at para. 83.6 of our notice of appeal. I do not need to take you to it. The point that is made there is that notwithstanding a proper reading of the statement, the efficiency assumptions that are set out there do not correspond to what has actually been done in the model in that the statement appears to set out net efficiency assumptions, and yet when one scrutinises the model, one sees that in fact they are treated as gross efficiency assumptions to which costs of achieving the efficiency gains are then deducted to leave a mush smaller net efficiency assumption.

Now, Frontier have done their best to identify what they can without their detailed knowledge. We do not know what Mr. Heaney might, or might not, have identified had he been up to scrutinise them. But, that is not actually the principal point. The key point is that we now have a situation where, going forwards, Mr. Heaney has developed evidence based on the statement. It appears now that this statement is materially misleading - certainly on our case it is. Mr. Heaney's ability to continue to take forward that point on behalf of Carphone Warehouse has effectively been cut off at the knees because he is no longer able to participate in the detailed debate about how efficiency is in practice implemented, rather than how it appears on its face to have been presented in the decision. So, one can see that we will be, in the Competition Commission, attempting to have a detailed bilateral oral hearing about these issues and the architect of our analysis is going to have to leave the room because there may be confidential information in relation to what has actually gone in the model that is being discussed. We say that that is not a satisfactory way for us to have to pursue our appeal.

THE CHAIRMAN: In all these investigations, Mr. Pickford, there is always a person in a company who has lived, breathed, and eaten the whole investigation and been the key person throughout. It is frustrating that that person does not have access to all the confidentiality material. But, what I am struggling with at the moment is why Mr. Heaney is in a different position from the main lynch-pin person in all the telecoms companies who come to this Tribunal, who have been involved in investigations and are now involved in appeals, and who accept that their executives cannot see this kind of information.

MR. PICKFORD: I obviously cannot speak for all of those other companies. What I can say, obviously, in relation to this appeal, is that Mr. Heaney has taken an exceptional level of

involvement which, certainly in my experience, other members of organisations that come forward have not. They have not developed the kind of detailed evidence on these particular types of issues. That may well be because of the nature of the appeals that they brought. The nature of this appeal is necessarily a highly detailed one, which is focused on specific elements of Ofcom's modelling. That is the nature of the criticisms that we advance in this appeal. Now, other appeals, such as, for example, BT's appeal against mobile call termination rates, to a large extent took rather different types of issues. There were some very substantial issues of principle about the right approach for setting termination rates and whether they should be capped at 2G rates. Those were the kinds of issues that are raised in that type of case and evidently did not require the same kind of detailed involvement from someone in the business as we say is required in this case. So, that is one possible reason for the distinction. Beyond that it is very hard to speculate exactly why, in those other cases, they thought that they could get by, or they took the decisions that they did. It may be that in some cases they would have been entitled to make an application, but for whatever reason they did not make it. The important point is that in this case we say we do face fundamental difficulties which may well not have been encountered in previous cases because of the very nature of the kinds of points that we are raising.

I would also add this general point - that the Tribunal will readily appreciate that there are considerable difficulties from not only having the single most informed member of the team outside the circle of those that are privy to relevant information, but where there has historically, and regrettably, been considerable delay by BT in providing non-confidential versions of material which have substantially impeded Mr. Heaney from participating so far. We do have grave concerns about that continuing in the future. If I could just mention two examples, just to illustrate my point? BT served its statement of intervention on 10th November. It was not until over four weeks later, last week, on 9th December, following persistent chasing letters from those instructing me, that it was served with a non-confidential version. So, for an entire period of a month, until last week, Mr. Heaney was not able to see BT's case at all.

A second example is that on 19th October Carphone Warehouse wrote to BT asking for some information which it considered to be obviously non-confidential to be declassified, as it were. One sees that at Tab AEH.B of the bundle for this hearing. There is first a cover letter to BT and then there is a copy of a letter which was sent to Ofcom. We see in that a request under (1) for certain spreadsheets, including, we note there, Output 2003, which is one of the models that we are seeking in this application, to be disclosed. In our view, they

contained no information that could properly be classified as confidential. Now, that was then chased in correspondence, and on 3rd November, two weeks later, BT replied. The letter is at AEH.G. This letter said that some data was indeed not confidential and that it would provide redacted copies of other information, including (one sees on p.2 of 3) the spreadsheet Outputs 2003. BT said, "You can have a redacted copy of that". In relation to a KPMG report, which is Item 4 on p.3, they said, "Well, you can have a redacted copy of that too". That was on 3rd November, 2009. We are now at 16th December, 2009 and no non-confidential version has been provided by BT, notwithstanding persistent chasing by my solicitors.

So, we have a very real problem that not only do we experience all the types of difficulties that I have explained already, which are matters of principle, but in the way that BT has litigated this matter we are subject to constant and persistent delay in even getting the non-confidential versions. That does cause us real prejudice and we envisage that that will continue throughout the process on the basis of the history to date. That really, we say, is not an acceptable way to proceed.

Madam, those are the reasons why we say that we do need this information, and we need Mr. Heaney to be either admitted to the ring or at least provided with this particular information subject to the safeguards that we have explained.

If I could turn then to address the fourth issue, which is why we say this information is not of the great commercial sensitivity that BT suggests it is? The first point to make in relation to that is that Ms. Heal, in her witness statement, makes reference to BT's undertakings which she says support her case. We say, actually, on proper scrutiny they seriously undermine it. If you could turn, please to para. 49 of Ms. Heal's witness statement, at AEH, in the centre of the bundle. Here she explains that BT is subject to certain undertakings, and in particular Openreach is subject to certain undertakings that prevent sharing of information with other bits of the BT business. She explains at para. 52 that,

> "Openreach is prohibited under the BT undertakings from sharing either its commercial information or its customer confidential information with downstream parts of BT except in limited circumstances. The purpose of this restriction is clear. It is to prevent the downstream parts of BT from obtaining a competitive advantage through their connection to Openreach. However, these competitive concerns also apply to disclosure of confidential information held by Openreach to CPW in the context of these proceedings".

So, the point they are making is very clear. They say, "Well, we could not disclose it to other bits of BT where there would be competitive issues. So, plainly, that must illustrate why it should not be disclosed to Carphone Warehouse".

Now, the twist comes in para. 56 because we see there a somewhat oblique reference to the fact that there are in fact personnel who are afforded a special status under the BT undertakings called Annex 2 status, which entitles them to see specific types of commercially sensitive information. Now, Ms. Heal does not append the undertakings to her statement and she does not explain who those Annex 2 people are, but it is very helpful to turn to the undertakings themselves and to scrutinise them. They should be either at the end of my bundle or in a separate bundle which you have been given, labelled WS8. If we could start with para. 5.38.2, at p.28 of the undertakings. There we see the provision that,

> "Save as set out in s.5.41, no employee or agent of BT (including its external advisers and sub-contractors), who is not working for AS [the Access Services division, which is Openreach] shall: ...
>
> 5.38.2 have access to commercial information of AS held by any employee or agent of BT working for AS unless it is of the nature that would be provided to other communications providers in the ordinary course of business".

So, there we see the essential prohibition. Then if we go to para. 5.41 which is flagged as the exception, we see this,

> "As referred to in s.5.38:
>
> 5.41.1 sections ... shall not apply to the nominated individuals (if any), and individuals occupying the roles and functional areas (and their relevant external advisers, subcontractors and agents) listed in Part A of Annex 2 --"

If we then go to Part A of Annex 2, we see the categories of people who do in fact have access to this type of information. They include not only legal and regulatory, but also group strategy. So, people within BT Group's Strategy Department are entitled to see this type of information. They will obviously develop strategies not merely for Openreach, but for other parts of the downstream business that compete against Carphone Warehouse. Now, what is Mr. Heaney? He is the Executive Director of Strategy and Regulation at Talk Talk. If he were a BT employee it is highly probable he would be an Annex 2 employee. So, we see immediately that even BT itself, which puts forward the undertakings as evidence of why this information cannot possibly be shared with Carphone Warehouse, in fact it does share this information with strategy personnel who are in positions to compete with Carphone Warehouse. So, we say that fatally undermines the case that this type of

information is somehow in some sort of completely different category. When one goes on to examine the type of information you see why, in fact, they do allow people in Annex 2 to view it because it is not of the kind of extreme sensitivity that has been suggested.

Mr. Heaney explains this point in his witness statement. He explains that the concerns raised by Ms. Heal are either no realistic ones, or even if they were real ones they could easily be addressed by, for instance, the aggregation that I have referred to previously.

If we could turn to Mr. Heaney's statement again at para. 9 -- I apologise in advance because I propose to read certain passages from this statement ----

THE CHAIRMAN: Can you not tell us which ones you want to read and we can read it to ourselves?

MR. PICKFORD: I can, madam, if you prefer. It is highly important to Carphone Warehouse's case. I would ideally like to emphasise. I am in your hands.

THE CHAIRMAN: No. No. You must conduct your case as you see fit.

MR. PICKFORD: He explains at para. 9 and following his response to the suggestion that this is deeply commercially sensitive information. He categorises Ms. Heal's points. He says that,

> "10. In this context, Ms. Heal's point regarding the fact that the CPW competes (using MPF), for instance with Openreach (for WLR), BT Wholesale (for wholesale broadband), and BT Retail (in retail line rental) are almost wholly irrelevant in practice, given that WLR and SMPF pricing is already in the public domain. I explain my reasoning below.
>
> 11. For example, in W/S Heal, Ms. Heal outlines three scenarios where she claims that CPW would be advantaged: (a) competing against Openreach (in the provision of WLR and like service); (b) competing against BT Wholesale or other operators (who use WLR plus SMPF) in the provision of the voice and broadband service; and (c) competing against BT Retail or other operators in the provision of line rental services".

He then explains the assertions that Ms. Heal makes. If you would perhaps like to read those to yourselves? (After a pause): If you have got to the end of para. 12 he explains, "Cost information is only valuable as a source of competitive advantage as a means of assessing the price that a competitor might sell a service at. However, in this case, due to regulatory requirements such as the undertaking obligations, which require Openreach to price WLS, SMPF at the same price to all customers, the SMP conditions [with which we are obviously concerned in this case] which include non-discrimination obligations and advanced price

publication requirements, combined with commercial pressures, means that Openreach will generally price WLR, SMPF at the price ceiling to set the charge control. Therefore, knowledge of Openreach's costs, whether at an aggregate or disaggregated level, will not in practice affect CPW's ability to estimate Openreach's pricing".

So, the essential point there is that it is the pricing you want to know about. It is how your competitors are going to price that is the key competitive dynamic obviously. In this case we already know that because pricing is heavily constrained by all of the types of conditions that we have just seen not only the price caps, but conditions in relation to non-discrimination, etc. - which mean in practice CPW already knows how BT is going to price. It has to publish it openly. So, seeing the cost make-up of that does not particularly help it in its competitive battles against bits of BT.

THE CHAIRMAN: But is it not valuable to CPW to be able to compare the costs that Openreach is paying for various things with the costs that it, itself, is incurring in relation to the same or similar things and see whether it is doing better or worse, and how it can improve its own position. I am not sure that cost is only useful because it helps you guess what the price is likely to be.

MR. PICKFORD: In our submission, that is the essential competitive dynamic. The other points we make in response to your question, madam ----

THE CHAIRMAN: It is not the competitive dynamic here, is it, because the price is regulated?

MR. PICKFORD: It is still the competitive dynamic from the point of view of someone like Carphone Warehouse. It sees BT. It knows what price BT is going to charge. To the extent that it is trying to compete with some downstream bit of BT it will pitch its offering in that knowledge. That knowledge and that transparency is obviously an important part of Carphone Warehouse's commercial strategy. But, that is already known. It is already in the public domain.

It is worth noting that in relation to cost information Carphone Warehouse and BT operate, as I understand it, entirely different types of network. BT largely operates a network based on old TDM technology, whereas Carphone Warehouse operates an NGN network. So, given that, it is very difficult to see how some cost information about an outdated network that it does not even operate is going to particularly assist it. But, I will come on, as I mention, madam, to our proposition that if they really are genuine in specific contractual elements where BT can point to say, "Well, look, here's a particular contract and there is a price for it there. We think this would be sensitive", then we are happy for that sort of information to be aggregated. We do not think it really exists.

THE CHAIRMAN: When we were looking at that note on the view of the models, there were the four blue ones and the one red one which you are now seeking disclosure of. It was only in relation to the CF Final one that you were suggesting that you accepted for current purposes, although you did not succeed -- you did not concede it that there was confidential information and that that could be randomised. But, as regards the other four - the three blue ones and the Outputs 2003, do you say in relation to those as well that if there is confidential information contrary to what you assert, that that can also be dealt with by applying this random digit to it, or aggregating it?

MR. PICKFORD: Madam, to be clear, what we propose is two slightly different approaches - one for the CF Final model and one for dealing with specific elements of other models. In relation to CF Final, the suggestion that we make is that wherever there are -- We understand that BT assert that there are substantial parts of the model which are allegedly confidential -- that all of those can have a randomisation factor applied to them - a different factor, obviously, for each number so that you cannot extrapolate what the factor was - and that that would render the models utterly value-less from any commercial point of view, but it would still enable Mr. Heaney to interrogate the structure of them. That is important, in particular, for example, in relation to the efficiency point where he is currently shut out, because it would enable him to see how efficiency has actually been applied in the model to drive different categories of costs, albeit that the particular costs they are applied to would have been randomised. He can still see the manner in which it has been modelled by BT and Ofcom. That is the essential part of his statement that he is now blocked from pursuing.

That is what we propose in relation to that model - the CF Final model. It is a fairly substantial means of redacting particular information.

THE CHAIRMAN: What if they just took all the numbers out completely?

MR. PICKFORD: One thing we would lose if there was not the randomisation factor proposed that we suggest is that whilst we have suggested a factor between 0.75 and 1.25 (but it does not really matter precisely what the figures are) that would make it commercially unusable, but what it would still do is at a very, very broad level, maintain some of the relativities and some of the orders of magnitude of these types of points so that at least Mr. Heaney was able to gather something about the materiality of which different bits of the module appear to be essentially driving Ofcom's results without actually knowing any of the particular information because he would know whatever numbers were there were not the true numbers, so that is one of the reasons why we say stripping out all of the information would

not work. There is another point that when one interrogates a spreadsheet such as this, the way one does it analytically is to work through and see what the relationship is between different numbers, and if the whole thing was just blanked out it is certainly my understanding that that would be much harder to do. I can take instructions from those who are more expert in these matters than I am, but they are nodding vigorously behind me.

THE CHAIRMAN: What was the different way you would deal with the other four?

MR. PICKFORD: The approach we are suggesting in relation to the other models is somewhat less invasive and we say that there are only two specific categories where it might apply, and I can come on to those, but anticipating what I am going to say, it is in relation to suggestions that are made that we might be able to see our competitors' volumes, and we say "That is fine, we do not need to see any of that in order to be able to understand what Ofcom has done", all of that can be aggregated so that there is no disaggregation to different types of competitor and that would deal with that particular problem. There is also the suggestion, as we have already canvassed, made by BT that there are potentially certain bits of information that relate to specific contracts and again that could be aggregated. As we understand it, the only specific contracts that are identified in the model at all are the salary contracts for members of Openreach and its Executive, and we have no desire or interest to see how those are broken down and again we are very happy for anything that is currently detailed in that sense to be aggregated so that we simply see a total line. We say that that would be a sufficient means of addressing those specific types of concerns, and it is a less invasive approach than we are suggesting in relation to CF Final.

THE CHAIRMAN: Are those the only objections, or are those examples of the kinds of objections that they have?

MR. PICKFORD: Madam, if I could return to an analysis of what they say, those are the only ones that we can identify where there appears to be something that they might have a concern about that we can easily address. Mr. Williams may tell you that there are others, but we were not able to identify them from analysis of what Ms. Heal had said.

If one returns to Mr. Heaney's second statement, having set out what he said at para. 13 he goes on to deal with the particular categories, and at 14 (a) he says that:

> "In the case of Carphone Warehouse competing with Openreach to supply its own WLR-like service a more detailed knowledge of the costs breakdown for WLR will not, in practice, affect Carphone Warehouse's ability to compete…"

He says the price at which Openreach offers the service is a published price, and he then notes in footnote 4 the point that I have just mentioned, in fact in cost terms BT operate a

different type of network so it is not going to be very helpful to Carphone Warehouse to see any of that information.

Then in relation to providing voice and broadband wholesale services or retail line rental services:

> "… the cost of WLR/SMPF that is paid by BT Wholesale, BT Retail and/or other operators is the published list price. Thus knowledge of the cost breakdown of WRL/SMPF will be of no use in understanding the cost of competitors' wholesale or retail offerings, which is based on the …"

and I would insert 'the known price' "… of WLR SMPF plus their own internal costs", which of course will not be revealed. So concludes:

> "15. It is incorrect to suggest that, knowing the cost breakdown of WLR/SMPF will, in practice, confer any competitive advantage on Carphone Warehouse given that the price BT and others pay for WLR/SMPF is public…"

He then goes on to address seven new points that are raised by Ms. Heal. The first of those is access to the Openreach profit and loss account where it is suggested that we might be able to derive Openreach's P&L and this information might confer some sort of competitive advantage. First, Mr. Heaney sets out the point that Ms. Heal has made, she says that Openreach's own executive strategy team utilises the P&L statements to make assessments of strategic options faced by the business. Then she suggests that Carphone Warehouse might do the same. Mr. Heaney's response is that he is not aware of any research or analysis that is done within Carphone Warehouse as the basis for setting its strategy that in any way considers Openreach's P&L.

THE CHAIRMAN: That might be because they do not have access to it, but if they had access to it ----

MR. PICKFORD: Well they do have access to it, the annual accounts do set out a fully audited profit and loss account, and that is one of the points Mr. Heaney in fact goes on to make, he says the type of information here is not an audited P&L it is produced on a different basis for specific regulatory purposes, and is actually less useful than the audited published P&L that is provided in the public domain by BT, so that is one point. They could rely on that if they wanted to but they do not, and he explains why they do not, he says what they are interested in is the performance of their major retail competitors, such as Sky, Virgin, and BT Retail, and just to put the point in context he notes that only 3 per cent of Talk Talk Group's total business has got anything to do with the supply of WLR in potential competition with Openreach. It is just not a material part of what they do.

He goes on, further since the majority of the revenues are internal he then makes the point that I have just made about the published P&L being on a different and more valuable basis and then explains that it is largely in the public domain.

He then goes on to address a point that was raised against us in relation to a service, for example, called "RedCare" and says he simply cannot see how it would be in Carphone Warehouse's interest to be able to use that information but again he said that if there is specific information here, this is the sort of information that could be dealt with by the aggregation process that we have suggested.

Finally, he makes the point that this is old information in any event so it is not of particular use, even if the other points that he makes were not accepted, but for the reasons I have advanced, those are substantial reasons why it is not of any particular use to Carphone Warehouse to have access to this information.

We then have the point about access to competitors' volume information where he makes the point first that much of this is in the public domain but insofar as there is a problem then we are very happy for it to be aggregated so that we cannot see any of it. He then deals with the point that it is suggested that detailed information is confidential *per se* and we explain that there is not any reason for that as a *per se* approach.

He then deals with the point that is made against us in relation to NGA deployments, and duct information in respect of them. He explains there that Ms. Heal suggests that if that information was revealed it could provide an insight into costs, underbidding Openreach's and BT's future plans for NGA and the RAV contains detailed confidential information in relation to copper and duct assets and costs, and that information could provide Carphone Warehouse with a clear insight into the unit cost and that information could provide Carphone Warehouse with a clear insight into the unit cost-stacks for Openreach's suite of wholesale NGA products. Again, Mr. Heaney rejects that suggestion. He says it is simply not realistic and he explains a number of reasons for that, first: the model only provides aggregate data for "duct" and for "copper", which is not disaggregated any further. As he understands it, it is also related to past investment and does not cover the whole of the UK.

He then makes the point which relates to the point I have made previously that no potential NGA investor would seek to attempt to replicate Openreach's duct and network, and so information about BT ducts would not be of any material use, because obviously BT is in a very different position from the kind of competitors that we are talking about in terms of Carphone Warehouse as having been the incumbent monopoly with its existing set of ducts, and as he understands it unit cost data for duct and cable is not available in the model in any

event, and nor is volume. Further, if one really did want to get that kind of information you could get quotes from suppliers, and that would be just as, if not more, valuable as the sort of information we are talking about here.

THE CHAIRMAN: Yes, but you do not know the quotes they are giving you are the same as the quotes they are giving ----

MR. PICKFORD: I have explained, for the reason that BT is the incumbent monopolist with a vast network of existing ducts that has been built up to service its existing copper network. BT's cost structure in relation to that is simply going to be something that is totally alien to Carphone Warehouse or any other competitor in its position. So that, we say, deals with the point about NGA deployments.

He then goes on to address the suggestion that is made that if there is disclosure that is going to affect the willingness of customers to share information with Openreach and he explains that those fears are also unfounded. First, the sort of information we have been talking about, for the reasons already given, is of very limited commercial value and we say essentially no real commercial value.

Secondly, customers already provide that information to Openreach in the knowledge of the BT undertakings which permit their competitors within BT Group to see that information and that has not prevented them, and we say Carphone Warehouse is in really no different position

THE CHAIRMAN: That is the Annex 2 status ----

MR. PICKFORD: The Annex 2 point, yes, that was the point that I began with. Finally, he addresses the point, although this is a point for legal submission, that it is suggested by Ms. Heal that provision of the information would arguably constitute a breach of the BT undertakings equivalents requirements not to share information with competing providers.

If one turns to clause 17.1 of the undertakings one sees there:

"Compliance with these undertakings does not affect the duty on BT and its respective directors and officers to comply with any of its obligations …" including under the Communications Act 2003. This is obviously an appeal under the Communications Act. The Tribunal's jurisdiction derives from the Communications Act, in particular s.192(3) which permits it to apply its rules in relation to this appeal. We say it is plain that any order that the Tribunal made pursuant to those powers to compel BT to disclose information would protect it in relation to para. 17; it is impossible to see how compliance with a court order in these circumstances could possibly constitute a breach, so we say that is a bad point.

Mr. Heaney then goes on to make other comments on Ms. Heal's statement, essentially to the effect that there are a lot of very generalised assertions about how Carphone Warehouse might use this information to its competitive advantage, but in reality when scrutinised they do not amount to anything; there is very little in the way of anything concrete there, which BT is able to rely upon. So we say for all of those reasons, on proper scrutiny, the type of information we are concerned with is not of the considerable degree of commercial sensitivity that BT suggest. Even if it were, one has seen from the case law that I took the Tribunal to at the outset, that is not a good reason for saying that, subject to appropriate safeguards and making sure it only goes to the most limited number of people possible, it should not be disclosed. We say that even if it was commercially confidential, there is still a very good reason for disclosing it in the interests of fairness in this particular case, but we do not accept BT's case in relation to the sensitivity of it.

Madam, if I might then turn finally to summarise the safeguards that we are willing to offer? Whilst we dispute that disclosure of the information to Mr. Heaney would cause any realistic or serious difficulties to BT we are obviously keen to seek to be as pragmatic as we possibly can in order to allay BT's concerns, and we wish to be sensible in coming to a satisfactory solution that can keep everyone tolerably happy. So I have explained firstly the safeguards that we propose in relation to the CF Final model, and hopefully I have done that in sufficient detail I do not need to go over that again.

It is worth just picking up what BT says in its submissions about that. BT does not say: "That would not be good enough". All BT say is that it is unclear whether that proposal would work or not, so we are not prepared to play ball in relation to that because we do not know."

THE CHAIRMAN: What would be the position if BT had not intervened in this appeal which they are not required to do, presumably then it would be up to Ofcom to carry out this work of randomising the figures, or are you suggesting that it is your people who should undertake this?

MR. PICKFORD: We are very happy to undertake to do that in collaboration with BT. Clearly it is BT that needs to say what it thinks is commercially confidential, that is not something we can do on its behalf. But if it tells us what it thinks is commercially confidential then our experts, if BT does not want to go to the trouble of doing the randomisation process itself, can carry out that process on BT's behalf to produce a version of the spreadsheet which no longer contains any genuine commercially sensitive information in it.

But to answer, madam, your point about what would have happened had BT not intervened to some extent, obviously, it is speculative, but I would submit that what would be most likely to have happened is this, that had we got to this stage and it had then become apparent that we needed access to this model and we did not have it, we would have applied to the Tribunal, Ofcom would have written to BT to say: "What is your view?" and BT would have done one of two things. It would have either, if it was sufficiently concerned about it, have come to the Tribunal to make submissions and to intervene if only for that purpose, or it would not have done if it did not think that it was sufficiently material for it to bother. So we do not see any particular problem arises in relation to the hypothetical situation where BT had not originally been intervener. There is no suggestion by anyone here that BT would have been shut out from advancing a case on it had it wished to do so.

Returning to the point about BT's response to our suggestion about randomisation, we say it is not really satisfactory for BT simply to say: "we do not know whether that would work and so we are not going to play ball or take that further forward". It needs to form a view, and we say there is absolutely no reason why it would not be satisfactory.

It may be helpful for the Tribunal to know that at Carphone Warehouse's suggestion there has been a meeting between the experts on either side. BT asked for that meeting to be without prejudice, so I cannot disclose to you.

MR. WILLIAMS: That is not right, it was proposed on a without prejudice basis

THE CHAIRMAN: Well it was a without prejudice meeting in any event.

MR. PICKFORD: For whatever reasons – my instructions differ from that, but the essential point is it was a without prejudice meeting, so I cannot say what did or did not go on. But our position remains today that it would be entirely possible to do this and we are willing to collaborate with BT in order to do it.

THE CHAIRMAN: That is the CF Final?

MR. PICKFORD: Yes, that is the CF Final, and we say that that is clearly the sensible way forward in relation to that particular issue. In relation to the other aspects of the models I have gone – at some speed – through the particular arguments that are raised against us and Mr. Heaney's responses to them and I have identified that where there might, and I have emphasised "might", be arguable confidentiality points they can be addressed through aggregation of those specific items of data, and again we are very happy to collaborate with BT in order to do that, and to do whatever work is required in order to effect that adjustment to the BT model. BT simply has to tell us: "Here are the points", and we will go away and do the work in order to render the model safe from that point of view.

Furthermore, Mr. Heaney has obviously explained that naturally he is prepared to give the undertakings that any member of a confidentiality ring would give, indeed, he goes further than that to make clear that he is happy only to review the model on Carphone Warehouse premises and not to take any copies of it to allay fears that this information might somehow reside in his home, and thereafter not return at the conclusion of these proceedings. Indeed, he is even willing, if BT want him to do it, to go on the BT training course that Annex 2 personnel are required to go on in order to understand how to deal with confidential information. It may be thought that that is unnecessary, but if BT say "That is something that our people would have to do" then Mr. Heaney is very willing to do it.

We say that we really have bent over backwards to try to find sensible and pragmatic solutions wherever possible, but those have to be borne in mind, and in the context of what we say is a real pressing need to see this information and the fact that BT has not established that it is commercially sensitive in the way that it suggests. In all the circumstances we say it is fair, just and proportionate that an order should be made for disclosure to Mr. Heaney with the parties to liaise in relation to the limited adjustments to the models that I have just described.

THE CHAIRMAN: What do you say of the point that Ms. Heal makes about the risk of parties, as she calls it "gaming" the system, that this Tribunal deals with a lot of these telecoms' appeals in which all the parties are all the competitors in the market, and is there a danger that if they should get a sniff of the idea that on the basis of an appeal if they attack the model that Ofcom used then their executive director is going to have access to the information that is claimed to be confidential on the part of the other parties, not necessarily BT but all of them, information which, if the parties were to sit in a room and exchange it amongst themselves they might risk substantial fine, that we would never hear the end of these applications in which we have to dissect in great detail what the information is, what the responsibilities of the relevant person who sought to disclose it is, what can be aggregated or not aggregated, whether that would undermine the usefulness of it. At the moment we have survived on the basis of fairly straight forward procedure, setting up these confidentiality rings, but if one makes a breach in it then what do you say to the risk that there will then be endless applications for disclosure of information to executives in these companies.

MR. PICKFORD: There is a number of points we make in response to that. First, as Mr. Heaney notes in his witness statement at para. 27(j), best practice for a Regulator would have been to base the information that it used for its modelling on publicly available data. That is

what regulators ordinarily do; it is what is done in the water industry, it is also what is done in a number of other contexts by Ofcom itself. One of the particular difficulties we find ourselves in in relation to this case is the fact that Ofcom did not adopt that approach. Indeed, in the statement as I recall it canvasses what the best means of modelling BT's business is and it decides that in this case it will rely on BT's own internal confidential planning documents because it thinks that those were more relevant in this particular case, but that is not ordinarily what it does or what other Regulators do. So in most cases we say this sort of situation will not arise because the essential modelling which we are trying to get access to would already be in the public domain. That is the first point.

The second point is we would suggest it is deeply speculative that companies will really want to game the system to incur all of the costs incumbent on litigation and, in particular engaging in these detailed disputes in order to gain information of this particular sort in this case because, as we say, in this case, the information really is not of the prime commercial sensitivity that is suggested because of the nature of the competitive relationship between Openreach and various other companies in the industry. The third point I would make is that each case clearly needs to be assessed on its own merits, and one can see that for example, in the context of mobile litigation where we are all very used to five mobile companies all turning up in the Tribunal with their various armies flanked beside them, that in those sorts of cases there might need to be particular safeguards because of the nature of the competitive relationship between them, and it might be that it would not be possible in those sorts of situations to engage in the sort of disclosure that we are seeking in relation to this case, but that would be because of the facts of those cases rather than because there was any general principle that should be applied across the board.

THE CHAIRMAN: Well in this case, for example, would you expect Sky would also need to see the information that Mr. Heaney sees?

MR. PICKFORD: If I might just take instructions for one moment? (After a pause) Certainly from our point of view we would not object to any application being made by Sky. We say Sky are in basically the same position as we are in relation to the way in which they compete or do not compete with BT, and the fact that they already know the prices, the critical point, because those are in the public domain. It would really be for Sky to make the case, to explain why it particularly needed that information to pursue its case, and I would say without prejudice to any point that might ultimately be made in relation to this, that one can see there is a distinction between Carphone Warehouse and Sky in that it is our appeal that we have brought on the merits in this Tribunal and the role of an intervener is

necessarily a subsidiary one, so it might be that Sky were not able to persuade you that they should see it, but we have no objection to them seeing it. Apart from the point I have made about their respective positions in the appeal we fail to see why Sky would be any different to Carphone Warehouse. They will obviously have to be prepared to give all sorts of undertakings that we are prepared to give as well, but we do not see any particular opening of the floodgates in relation to that one intervener, unless BT is able to explain why disclosure to Sky would be somehow worse than disclosure to Carphone Warehouse and on its face it is difficult to see why that should be.

Madam, if I could merely conclude by going back to the *Dyson* case with which I began my submissions, which is that the onus is on BT to demonstrate why there should not be disclosure, and we say that BT has failed to do that, it certainly failed to do that in the face of the reasonable and pragmatic propositions that we make in order to preserve confidentiality, alleged confidentiality, in relation to the specific points that it makes.

Madam, unless I can be of any further assistance.

THE CHAIRMAN: No, thank you very much, Mr. Pickford. Mr. Williams, do you need some time?

MR.WILLIAMS: I wonder if you would say 2 o'clock, madam. We will get to 1 o'clock quite quickly.

THE CHAIRMAN: How long do you think you are going to be.

MR.WILLIAMS: I would have thought about as long as Mr. Pickford. It may be because the Tribunal has read Ms. Heal's statement, and seen some of the material beforehand I can be a bit quicker, but I would anticipate being at least an hour.

THE CHAIRMAN: Can you usefully make a start now?

MR.WILLIAMS: Can I just have a quick think about that, madam, because I think your earlier indication was that I would have a chance to react, so I have not thought about which bits of my submissions I ----

THE CHAIRMAN: Yes, why do we not come back at half past twelve and then let us know whether there is something you can usefully do before lunch.

MR.WILLIAMS: Yes, indeed.

(Short break)

MR. WILLIAMS: Madam, I am going to take my submissions slightly out of order in order to try and make use of the time we have got before lunch.

THE CHAIRMAN: The alternative to that would be for us to break now and come back a bit earlier at half past one or quarter to two. I do not want to interrupt your submissions.

MR. WILLIAMS: I do not think it will matter. I was simply going to deal with the issues of confidentiality and competition before coming to the authorities because obviously the authorities proceed on the basis that issues may arise on the facts. But, it really does not cause me any difficulty to deal with the legal framework and then to come back to those issues afterwards, by which time I will have had the opportunity to take instructions over the lunch break.

Before coming on to that there are just some introductory observations that I wanted to make. Then I will come onto five areas. The first will be legal framework, now, corresponding to Mr. Pickford's opening submissions. Then I will deal with the confidentiality of the information contained in the model. The Tribunal may be able to tell me to what extent it has digested certain points from Ms. Heal's statement. I may be able to take some of those points a little more quickly. Then, issues relating to competition. Then the reasons why it is said that disclosure ought to be given to Mr. Heaney. Finally, CPW's particular proposals.

If I could start by saying that you will have seen BT's submissions and its evidence, and it should be clear to the Tribunal that this is an application which has very serious - and I hope understandable - concerns on BT's part. If I could just put its position in the wider context of BT as a regulated entity - price-regulated entity -- BT obviously recognises and understands that because it is the provider of products which have been identified as SMP products, it is price-regulated by Ofcom in relation to those products and for that purpose it has to provide information to Ofcom - in some cases confidential information - in order that Ofcom can exercise its functions. BT also obviously recognises and understands that if that price control is challenged proceedings may be brought before this Tribunal and it is very likely in that event that some sort of confidentiality ring arrangements will have to be established. That has, indeed, happened in this case. BT made no objection to that.

But, what is now proposed is something really very different from the ordinary arrangements as to confidentiality rings in proceedings of this type before this Tribunal. That is the sharing of BT's cost modelling outside of the confidentiality ring of advisors - in particular, with persons on the business side of Carphone Warehouse whom BT regards, as I have said, as a competitor. It is proposed not only to give information on the business side of Carphone Warehouse, but to a person who occupies the role of Executive Director of Strategy within Talk Talk.

So, as the Tribunal observed during Mr. Pickford's submissions, we do say that this is an exceptional application, certainly as far as this Tribunal is concerned. I will come on to

address the legal framework in just a few moments, but it is right to say that there is little or no precedent for an order of the type sought today, and insofar as there is precedent - and I am referring to the *National Grid* case - that suggests that the terms on which disclosure might be given are very different from the terms which have been put forward by Carphone Warehouse and I assume that terms of that sort would be entirely unacceptable to Carphone Warehouse.

We do say that in making this application Carphone Warehouse has failed to grapple with the character of the information in question. Its position in its letter of 17th November was simply to deny that any issue of confidentiality arose and to deny that there was any competition between BT and Openreach. Its more recent letter of 9th December continued to say that there is no confidentiality at all in three of the four cost models, and went so far as to characterise BT's position on the question of competition between Carphone and Openreach as disingenuous, albeit that that was just put forward in a sentence. We say that that was not correct, and we have provided evidence to explain what our position is. We put forward our position in Ms. Heal's statement, and in my submissions, and, as I say, it may be that I can show you more or less of that, depending on what will assist the Tribunal.

The other point I wanted to make by way of introduction is that we have seen a gradual rowing back of what CPW is seeking. The application as originally formulated was simply -- When I say 'unconditional', obviously Carphone have put forward certain safeguards, but it wanted Mr. Heaney to have access to all of the information contained in all of the four spreadsheets. That was its proposal, subject to the safeguards they have identified. Its letter of 9th December proposed something quite different in relation to the CF Final spreadsheet which corresponds to the Openreach strategic planning model. Gradually, as there has been the further exchange of representations and correspondence, and submissions, we have seen Carphone row its position back further and further and it is now making more and more *ad hoc* proposals to deal with what may be particular points as to confidentiality. That, we say, reflects the fact that this was not a carefully thought through application in the first place.

It is important to have in mind that what is now proposed in relation to CF Final in particular is that disclosure should be given on terms which would allow Carphone to examine the structure of the model.

That is obviously quite different from what was proposed in the original application, and that suggests to us that disclosure for those purposes would plainly -- The fact that Carphone has sought to justify disclosure by reference to a different purpose, a different objective suggests that this really was not a carefully thought-through application in the first

place. Really it is a speculative application for which no compelling justification has been identified. We see that with the shifting sands, with different justifications relied on over time.

So, with those introductory observations I will move to the legal framework. I was going to start with the jurisprudence of the Tribunal, if I may. Then I will come on to deal with the patent authorities relied on by Mr. Pickford.

THE CHAIRMAN: I think you are set out in your submissions the Tribunal's jurisprudence. I think it is common ground that it was only in that *National Grid* case that material has been disclosed. That was on the basis that the person then was taken out of the business effectively for the duration of the appeal and for some time after.

MR. WILLIAMS: It was for a period of twelve months. We obviously make the point that what we have here are forward-looking costs models. So, to that extent one could not even assume an undertaking of the sort given in *National Grid* ----

THE CHAIRMAN: It is not offered.

MR. WILLIAMS: That is right, madam.

THE CHAIRMAN: I think it is the *Dyson* case we are interested in.

MR. WILLIAMS: I will deal with that now. What I would say is that the decisions of the Tribunal do take the approach that I have set out in our skeleton argument - in particular, the *Sky* case really turned on the question of whether good reason had been shown for the disclosure. Plainly, it was for the applicant - in that case, Sky - to show good reason for the disclosure. I will explain in a few moments why it is that the dynamics and issues of onus are different before this Tribunal. But, we say that is very clearly the way in which the question was approached in *Sky*, and we say rightly so.

It is right to say that there is a difference of emphasis, at the very least, between the approach taken in the patent cases which Mr. Pickford took you to this morning, and the approach taken by this Tribunal. But, we say that insofar as there is a difference in emphasis, that is explicable. Secondly, if one looks at the substance of the balancing exercise that both the High Court and the Tribunal do, the same sorts of factors are given weight in both contexts. So, we say that actually when it boils down to the facts, when it boils down to the detail, actually there is not really a divergence between the two bodies of jurisprudence.

I was going to comment on the patent authorities by reference to the *Roussel Uclaf* case rather than by reference to the *Dyson* case because I think, as Mr. Pickford indicated, it was that Court of Appeal case that Mr. Justice Laddie applied in the *Dyson* case. So, if the

Tribunal could go to that case which is at Tab 9 - I would like to pick that up in the judgment of Mr. Justice Aldous on p.3., five paragraphs down,

> "In patent actions it is not unusual that documents disclosed on discovery include matters which a party considers contains valuable confidential information. The procedure normally adopted I that disclosure is at first made in confidence to counsel, solicitors, independent patent agents and independent experts. In many cases this enables the parties to prepare and argue their case properly. Further, the parties can often agree that all that is necessary to preserve the confidential information is that certain parts of the documents are blanked out. Unfortunately this has not proved possible in this case".

Skipping over the next paragraph,

> "Under the Rules of the Supreme Court, the normal procedure is that a party to an action is entitled to inspect documents disclosed on discovery. However, it is well settled that in certain circumstances the court may restrict such inspection to an agent such as a solicitor. However, before that will be done, the party seeking restrictions on inspection must establish that the restriction is necessary for the proper administration of justice".

So, the patent line of authority exists against the different procedural framework where litigation is conducted on the basis of what is now referred to as 'standard disclosure'. As part of that process both parties are required to put forward lists of documents relevant to the dispute. Madam, I am sorry. This will be 'old hat' to you, but I make the point just for the other members of the Tribunal. The other parties are then entitled to inspect all of the documents included in that list.

It is right to say that confidentiality is not a bar to disclosure or to inspection, but it is a factor going to the exercise of the court's discretion as to how that process ought to work. Accordingly, one sees a confidentiality arrangements established in the high court, just as they are established in this Tribunal. But, these authorities to start from this 'cards on the table' approach, if you like.

It is probably worth me making the point at this stage, madam, and I make as well make it now, that before this Tribunal the position as regards disclosure is different - and we say for good reason. Disclosure is on the basis of specific orders made by the Tribunal. For example, in these proceedings there has not been, so far as I am aware, any order for disclosure. We say that is not at all surprising in a competition appeal Tribunal because the nature of the subject matter means that the exchange of information between the parties

needs to be carefully managed. It is an iterative process. What one has seen in the consistent practice of the CAT is disclosure managed on that pragmatic and iterative basis, but always with one eye on the question of confidentiality and commercial sensitivity in the context of competition, which is obviously a key issue in deciding what the proper ambit of disclosure is in proceedings before this Tribunal.

So, we say that there is a different dynamic around disclosure before this Tribunal and in the High Court, albeit that at the end of the day there is a balancing exercise to be done, and the same sorts of factors weigh in that balancing exercise.

Turning over to p.4, I probably do not need to take you through the whole paragraph, but at the top of the page there, in the long paragraph starting, "In the present case --" the judge sets out the concerns that were raised as regards the disclosure of the particular information sought in that case, and he concludes in the second paragraph on that page,

"Upon that evidence, I conclude that the defendants are right that the restricted disclosure of their process and documents is proper and I therefore turn to decide whether somebody in Roussel should be allowed restricted inspection".

So, as I explained a few moments ago, that is the court deciding that although there is a general presumption in favour of disclosure, disclosure needs to be controlled.

It is really against that background that the paragraph in the middle of the page, which is relied on very heavily by Mr. Pickford, and which has been cited in other cases, needs to be considered. It is right to say that in the High Court the onus is on the respondent to an application to show that there is a particular reason why inspection of documents ought not to be granted to particular persons within the business structure of the other party, but this Tribunal approaches the matter rather differently for the reasons that I have already identified and, in a sense, there is almost judicial notice that these questions arise in principle, and as a result the dynamics of disclosure are then managed on a different basis. One does not have a presumption that information ought to be shared with everybody or even with particular people on the business side of the other parties to a litigation.

However, in any event, one comes on to the following paragraph. It is probably worth reading the whole paragraph.

> "The plaintiffs and the defendants are the leaders in the field in the technology with which this patent is concerned. They both have a wealth of knowledge in this field of chemistry, some of which will be useful in the action. The plaintiffs' advisers, having seen the defendants' process of description, have devised and carried out a programme of experiments which they believe will support the

> plaintiffs' allegation of infringement. However, they cannot discuss those experiments with anyone in the plaintiffs. They contend, and I believe reasonably contend, that the action has reached stage where they will have to decide upon the way that the case on infringement will be argued it seems that to establish infringement they will need to rely upon experiment and they are unable to discuss these with anybody in the plaintiffs although they have considerable knowledge in the field.
>
> A number of specific difficulties are raised in the evidence".

I do not need to take you through all of the detail there, but we do emphasise and rely on the significance of that factor in the balancing exercise that the court went on to do.

At the top of the following page,

> "I believe that the difficulties of the plaintiffs' advisers are real and that they are at the moment hampered in the preparation of their case by the restrictions imposed by the defendants. The documents and the process description are at the root of an important part of the whole case and the plaintiffs are severely hampered in the preparation and understanding of the case by the defendants preventing anybody in the plaintiffs seeing the documents an the process description".

I think I can probably leave the judgment of Mr. Justice Aldous there, save to note that he then goes on to deal with the issue of safeguards.

Then, starting at the bottom of p.6, one has the judgment of the Court of Appeal. Lord Justice Nourse starts at the bottom of the page. About half-way down p.7 I just note that there is a paragraph that starts, "A large amount of affidavit evidence was put in on both sides –" That is in rather start contrast to the way that Carphone has approached this application.

Over to p.9, there is the paragraph that Mr. Pickford relied on, "Having listened with great care to everything which Mr. Floyd has said, I have to say that he has wholly failed to persuade me --"

I am not sure that that was the paragraph that Mr. Pickford relied on, but if you could read it anyway, madam, members of the Tribunal --

> "Having listened with great care to everything which Mr. Floyd has said, I have to say that he has wholly failed to persuade me that there is any good ground on which we could properly interfere with the learned judge's order. He has not satisfied met ht the judge took into account anything which he ought not to take into account or that he left out of account anything which he ought to have taken

into account or that he erred in principle, far less that his decision was plainly wrong. Mr. Floyd's complaints seem to me to amount only to this, that the judge, in striking a balance, held that the plaintiffs; need outweighed the risk to the defendants. That is not the basis upon which this court can interfere".

THE CHAIRMAN: I think it was the passage at the bottom of p.7 ----

MR. WILLIAMS: -- which is similar. I was simply going to draw your attention to that paragraph next.

THE CHAIRMAN: It is the question about whether the statement in Mr. Justice Aldous' judgment that it would be exceptional not to allow disclosure applies even when you are talking about disclosure to the commercial people in the ----

MR. WILLIAMS: That point is plainly dealt with in this judgment, madam, and I am not seeking to say that it is not. I am simply making the point, firstly, that the dynamics around disclosure are different before this Tribunal for the reasons I have explained, and, secondly, that one can see from the paragraph I have just taken you to, from the paragraph at the bottom of the page under the heading 'Lord Justice Russell' and, again, over the page, the Court of Appeal saw this ultimately as a balancing exercise. So, notwithstanding that Mr. Pickford relies very heavily on the point that it would be an exceptional case, etc., etc., we say that what one sees the court doing is weighing up the competing factors in that case -- the strength of the applicant's need to see the information as against the concerns that have been raised as regards commercial confidence and sensitivity, and coming to a view overall that the proper course was disclosure to a person within the applicant's business structure. In other words, it is clear that notwithstanding that the court starts with the principle outlined by Mr. Justice Aldous, it then goes on to do the sort of balancing exercise I have talked about, and, in other words, the court was concerned to ensure that the reasons for which disclosure was sought did, at the end of the day, outweigh the concerns that had been raised by the respondent to the application.

One sees that in particular the judgment of Lord Justice Beldam is quite illuminating on that point because - and the Tribunal may just want to read it - the paragraph I particularly rely on is the one on p.10 which says,

"For my part, the aspect of Mr. Floyd's argument which carried greatest weigh with me, and perhaps greater than it may have done with the judge, was that the evidence filed by the plaintiff in support of the application did not establish that it as necessary for the fair disposal of the action to disclose at that stage the defendants' process beyond the disclosure to the experts advising them which had

already been made. However, merely because, had I myself been hearing the application, I might have taken a different view of the weight to be accorded to that evidence is beside the point".

So, the jurisprudence seems to be that there is, in the High Court, a presumption that disclosure will be on terms which allow the claimant, the appellant, or whoever the other party is, access to the information. That will include somebody on the business side, but that does not preclude a careful weighing of the arguments for disclosure against the harm that might be caused by disclosure and the risks that attend that disclosure.

That is why I say, madam -- Madam, you frown.

THE CHAIRMAN: I am not frowning at that. I am frowning because I am thinking about something - the point you were making, I think, about the difference in the dynamic, as you described it here, compared to the High Court, because in both the *Roussel Uclaf* and the *Dyson* cases you are talking about *inter partes* litigation. This case is different from the *Dyson* case because in the *Dyson* case, Dyson was pursing a claim for damages against Hoover and saying, "We are suing you for however much money -- millions of pounds - and yet we are not prepared to show you the information on the basis of which we are putting forward that claim -- We are not prepared to allow the commercial people in your business to do it". Here, this is not an *inter partes* case between BT and CPW. It is a challenge to the regulator's decision. What I was looking for in this was, I thought there was a reference in the case that Mr. Pickford took us to to inquisitorial and adversarial proceedings.

MR. WILLIAMS: That was in *Dyson*, madam.

MR. PICKFORD: Paragraph 33 of *Dyson*, madam.

THE CHAIRMAN: Another difference here is what is it that the Competition Commission will have access to when it is considering whether there is anything wrong with Ofcom's decision.

MR. WILLIAMS: Yes I do not rely particularly on the point that the Competition Commission element of the process is more of an inquisitorial character. I say that. Nobody is jumping up and down. That was simply an observation by me. I do not rely on that point. I am simply making the point that although Mr. Pickford relies very heavily on the generalised statement of principle that was articulated by Mr. Justice Aldous, one can see that ultimately it is not a case that there is necessarily a rebuttable presumption or a close to irrebuttable presumption (if I could put it that way). Even in the High Court one has to carefully look at the arguments that are put forward for disclosure and the evidence that is advanced by the

party seeking disclosure in support of those arguments and to weigh that against the harm that may result.

The point I am making - and it is not a grand point, madam - is that those are the sorts of considerations that have influenced this Tribunal in establishing the sort of approach that it has taken routinely to competition disputes. In fact, the way Lord Justice Beldam puts it is precisely the way -- or, he uses the same sort of language that the President used in *BSkyB*. So, we say this is not really a radical perspective. Ultimately, this case is going to come down to the trade-off between the risks to BT and the reasons why Carphone Warehouse says it need access to the multiple.

That may be a convenient point at which to break, madam. I can take stock over lunch.

THE CHAIRMAN: Have you finished your legal framework points?

MR. WILLIAMS: I think I have. I might just make a brief comment on the *Eisai* case. He has argued about that case more than I have. We say that that case does not really inform this application at all. I am not going to rely on legal differences because the legal differences are obvious. It was concerned with what is required for a fair consultation rather than what ought to happen on disclosure. But, there are two obvious differences. The first is that the confidentiality claimed in *Eisai* was the confidentiality of the people that had created the model. There were no issues around disclosure of commercially sensitive information to competitors. So, it was an entirely different dynamic, if you like, again, around the issue of confidentiality in that case. Secondly, in *Eisai*, nobody had seen - nobody on the claimant's side, the applicant's side - had seen the executable version of the model. They had only seen the model which did not allow the user to interrogate the model, and so on. So, we say that really that case says nothing about the proper approach to disclosure in the context of this application. It is just a very different case.

THE CHAIRMAN: Thank you very much, Mr. Williams. We will reconvene at two o'clock.

(Adjourned for a short time)

MR.WILLIAMS: Madam, if I could just start by recapping on where I had got to in my submissions before lunch. Mr. Pickford presented his submissions on the legal framework, I think more or less exclusively by reference to the patent line of authority and did not address the jurisprudence of the Tribunal at all, the implication being that there is quite a different approach taken. What I sought to do was to suggest that that is not really the case, that in fact when it comes down to the nuts and bolts of a given disclosure issue one can see that the same sorts of facts are given weight both by the High Court and by this Tribunal

and, specifically, that it is very important in both contexts for the party seeking disclosure to be able to show that there is good reason for the disclosure sought.

We do make the point that if the thrust of Mr. Pickford's submissions were right and the Tribunal were now to move to a practice whereby there is a presumption, if you like, in favour of disclosure of competitively sensitive information in proceedings before this Tribunal it would mark a sea change in the way that this Tribunal approaches disclosure; it would be a very radical development, and one which – the Tribunal made the point – being realistic it is going to have a significant impact in all manner of proceedings before this Tribunal.

Madam, you put the question to Mr. Pickford: why is this case different from all of the other cases we have dealt with? In my submission he really failed to answer that question. What he said was: "This is a case where Mr. Heaney is very involved in the detail of the issues and those issues feed into the model." Well I am sure this is not the first competition case before this Tribunal where there has been someone very heavily involved in the detail of the case, whether modelling issues or not, and I am sure that other parties to other litigation could have made that sort of point, but ultimately this Tribunal has found that the balance lies in all but the most exceptional cases in favour of disclosure to external experts where one is dealing with this sort of information.

At that point I am going to come back to the issues of confidentiality and competition.

What I might do – madam, perhaps you can tell me if this is a good course – rather than summarise what Ms. Heal says, which you have obviously read and it is clear that the Tribunal has in mind, I thought I would make some observations and perhaps try and deal with confidentiality and competition together by going through Mr. Heaney's statement, making such comments as we have been able to develop over the lunch adjournment.

THE CHAIRMAN: Yes, thank you.

MR.WILLIAMS: As I say Ms. Heal dealt with both the issues of confidentiality and competition.

Dealing first with confidentiality, it is obviously important for us to stand back from all of this and ask: "What is the purpose of this model?" The purpose of the model is, in the first instance, to build up a picture of the entire Openreach cost base using real life business plans, that is the source of the information, and then to derive the costs of the LLU products, i.e. the products which are the subject of this appeal, from the total cost base, but it does not – in terms of its content – deal only with the LLU products, it deals with the full range of Openreach products because obviously if one is taking a global view of costs one then

needs to allocate that cost to something and so the model works on that across business basis.

Standing back from all of this, we say it is not a surprising proposition that BT should regard much of the information contained in that model and, in some instances, the sum of the parts, as confidential and giving an insight into its confidential business plans. We have been surprised by the push-back that we have received from Carphone Warehouse on that point. We do sense that their commitment to that push-back has waned, although Mr. Pickford said that Carphone Warehouse has been pragmatic in its current position. I think the language that it used in its letter last week was that "We accept that there maybe certain confidential information", so we say that that position has moved and that they do now accept that at least up to a point the contents of the model are going to be confidential.

THE CHAIRMAN: Well in the CF Final.

MR.WILLIAMS: In the CF Final that is right, the point is made in that context. But, as I say, we think that is a much more realistic position given the character of these models and what they do.

In terms of the four models, I am going to deal with all but the Output model in part by dealing with Mr. Heaney's statement, but I thought I should probably say something about the output model just to clarify the position because, as Mr. Pickford said, BT has agreed that Carphone Warehouse can have access to hard copy redacted versions of the Output model, and the redactions deal with the fact that the Output model deals with a range of properties as I have already explained, not just those within the scope of the appeal, and so disclosure is not going to be given. The agreement was that they would have developed material rather than cost material relating to other products.

THE CHAIRMAN: Is that an agreement that was made after you received this application or is that ----

MR.WILLIAMS: No, no, that was the correspondence that Mr. Pickford showed you from October, and early November. He said BT had been slow to respond to that correspondence.

THE CHAIRMAN: Is that the red box then in this note of review?

MR.WILLIAMS: Mine is black and white.

THE CHAIRMAN: Oh dear"

MR.WILLIAMS: Yes, it is the top red box, I think.

THE CHAIRMAN: Outputs 2003, yes.

MR.WILLIAMS: But I do not think this point is really contentious. The criticism that was made was that BT had not provided that yet. I think BT's position has been that the request of 19th October was made to Ofcom but because the request raised the question of whether Ofcom could share BT confidential information with Carphone Warehouse BT inevitably became involved in dealing with that request, and so BT gave its consent to certain versions of the hard copy, redacted versions of the model being given to Carphone Warehouse. BT have not understood that it was going to provide those versions itself, but were happy to do. All I would say is that there was a two week period during which BT considered its position between 19th October. Madam, I should say this point is not relevant to anything before you, it is simply that Mr. Pickford made the point that BT had been difficult about this.

THE CHAIRMAN: So what you are saying is that there is agreement between the parties to disclose a redacted version of Outputs 2003 ----

MR.WILLIAMS: Hard copy, not the model. Not the model for the sorts of purposes that I think are ----

THE CHAIRMAN: Redacted, the redactions exclude information that relates to products which are not part of the appeal. What I am not clear about then is whether Carphone Warehouse's complaint is that they have not received that and it does not interest us particularly why, or whether they are saying that that is not enough, they need the rest of it.

MR.WILLIAMS: I think they are saying the latter, but they are making two points. They are first of all saying: "Pursuing this appeal is very difficult for us, we do not have information, and we have sought to reach agreement, even as regards non-confidential information with BT, and BT has been difficult about that." That was the first point, so that was a sort context point, I think, for the application, and I am simply seeking to explain to you that we took two weeks to consider our position. We recognise that actually probably that decision could have been made a bit quicker but there were other pressures on time at the time, most notably the fact that our statement of intervention was due at or around that time. Following the arrival at a consensus position BT had not understood that BT was going to provide the models, it thought it was giving its consent to a request that had been made of Ofcom, but which raised issues in relation to BT's position. I am afraid this is a storm in teacup, madam, but I just wanted to tell you ----

THE CHAIRMAN: Yes, well just putting that point on one side then, what is the other point that is still in issue?

MR.WILLIAMS: I think that even on the basis that it is going to get redacted hard copy versions of the output model, Carphone Warehouse is applying as part of this application for Mr.

Heaney to be given access to a suite of models which he will then be able to work in as models rather than simply to look at hard copy documents. The point I am making to you, madam, is that the output model contains a great deal of costing information relating to products nothing to do with this appeal, so they are not relevant; they are also confidential to BT in the sense that that costing information is not in the public domain, and it includes information relating to products which, as Ms. Heal has explained, give rise to concern around potential competition, if not actual competition.

THE CHAIRMAN: But do they accept – or perhaps Mr. Pickford can answer this; they are not happy with just the hard copy of a redacted version, they want the model that they can work, but do they want also the information for more products than were included in the hard copy?

MR. PICKFORD: Madam, as I understand it, the answer to that is so long as we can see the basis on which the allocation of central costs has been made, because our concern obviously in our appeal is that the allocation of costs to the core rental services was too great relative to the allocation of costs to other services, so long as we can see that we have no need whatsoever to see any of the other information and, again, acting pragmatically and responsibly we are quite happy for that information to be removed, redacted in whatever manner satisfies BT's concerns in relation to it.

MR.WILLIAMS: In relation to that all I say is that there is an agreement they can have it in hard copy. I am not sure that Mr. Pickford has made any case at all as to why Mr. Heaney needs to be able to interrogate that model given that it is an output model, so I am not sure that disclosure of that model would achieve anything. Questions might arise out of severability of technical questions which I am not in a position to deal with now, but it sounds like in substance this bit of the application is not necessarily very important, although Mr. Pickford will tell you if I am wrong about that.

THE CHAIRMAN: Yes, you can make a point in reply if you want to.

MR.WILLIAMS: So that is the output model, madam, I was going to deal with the other three models in the round, if you like, by looking at Mr. Heaney's second statement. I perhaps do not need to overemphasise the point but we are reacting to this at incredibly short notice, and I made all of the points about why we feel that this is evidence which really ought to have been put forward sooner, if not on the detail on the broader picture.

Picking it up at para. 4 – I have not had a chance to compare this to Mr. Heaney's first statement but I think that the language is broadly the same, and we have simply made the point that if one looks at that description, that characterises Mr. Heaney's role in the most

general terms in relation to the matters for which he is responsible. In correspondence Carphone Warehouse have sought to say "Oh, but it's actually only really next generation access", well there is no evidence to support that. What we do have is the language of para. 4.

So picking the statement up at para. 9 I think probably, madam, you can tell me whether I need to address you in any detail on this because you did make a point which it seems to me goes to the heart of what Mr. Heaney says in paras 9 to 15 in the course of Mr. Pickford's submissions, which is this really: Carphone Warehouse competes with BT both at the wholesale and at the retail level by taking MPF from Openreach and adding its own platform, its own network, to make up the full package of broadband and telephony services. Where it does that it is competing directly with BT Wholesale and BT Retail in respect of the telephony element which will be taken on a WLR basis from Openreach. It is obviously right to say that the total cost of WLR, MPF and SMPF is in the public domain by virtue of the transparent process by virtue of which Ofcom sets those prices and so on. But that is not the point we were making. The point we were making is that within the total cost there are elements in respect of which Openreach and BT on the one hand and Carphone Warehouse on the other hand are directly competing and it would plainly give Carphone Warehouse a potential advantage to be able to see a detailed breakdown of the costs incurred by BT or Openreach in respect of the element where there is direct competition. It is quite a straightforward point; that is the point Ms. Heal made.

THE CHAIRMAN: So you take issue with the first sentence of para. 13, that you do not agree I take it ----

MR.WILLIAMS: We absolutely do not agree with that.

THE CHAIRMAN: -- that because everybody knows what the price is – well everyone knows the price at which BT is acquiring the services from Openreach because it is the same as the price that everyone else is acquiring.

MR.WILLIAMS: Yes, madam.

THE CHAIRMAN: But you say the costs that go to make up that price might be useful to a competitor ----

MR.WILLIAMS: That is seeking to use its own network to provide part of the service that might otherwise be taken from BT. Madam, the way you put the point to Mr. Pickford was to say: "Would it not be useful to see how you were doing against them in respect of costs within the stack", and that is the point, madam.

That really, in our submission, means that all of paras 9 to 15, although they are presented as a rebuttal to what Ms. Heal says, they actually miss Ms. Heal's point for the reasons I have just given.

Dealing then with the P&L, the first point I would make is that the P&L demonstrates that it is not right for Carphone Warehouse to present the issue as to whether BT can demonstrate on a cell by cell basis, whether the information in particular cells is looked at in isolation confidential. We say the combination of information in both the oak model, and the CF Final model, the aggregation of information up to a level which shows the Openreach P&L on different bases constitutes confidential information; it is confidentiality of a different character to detail granular information but nevertheless it is commercially sensitive information in itself. So that is the reason why the approach which is suggested by Carphone Warehouse that one needs to drill into the models on a cell by cell basis and identify why this piece of information is confidential, followed by that piece we say that misses the point. Both Oak and CF Final it is the sum of the parts that raises concerns in the same way that some of the detail does. That is an overarching point about the P&L issue.

Dealing then with some of the points made under para. 16. Madam, you made one of my points for me in the course of Mr. Pickford's submissions, when Mr. Pickford said "This information is not used by Carphone Warehouse", you said "They do not have it". Mr. Pickford said "Yes, they do", but what they have of course is historic P&L information that is revealed through the regulatory accounts. Madam, what they do not have is a four year forward looking forecast of the P&L.

THE CHAIRMAN: I see, so when we refer to the Openreach P&L here, what you are talking about is a forecast P&L for the next four years?

MR.WILLIAMS: The effect of the four year cost model is to present P&L figures over the four year period which the cost model shows. Obviously that is information the Carphone Warehouse does not have, and although Mr. Pickford is saying: "We do not work with this information", well it does not work with historic information, what would it do with forward looking information?

There is a figure of 3 per cent in the last couple of lines, all we would say is we obviously have not had an opportunity to consider that figure as a figure, but we notice immediately it does not deal with the issues of our potential competition that we raise, for example, in relation to Ethernet and ISDN services, which certainly would not be within that figure as presented.

So then if I can move on to para. (b) is that in essence the P&L is presented on a different basis that being CCA (current cost accounting) rather than HCA (historic cost accounting). As a result of that it would not really be of any interest to Carphone Warehouse. Actually that point is wrong on its own terms. The Oak model is presented on a CCA basis but the CF Final model is presented on an HCA basis, so that point is wrong. Not only that, both models are based on information which is not in the public domain, so in a sense it does not really matter – if I may say so – in what form Carphone Warehouse is used to encountering profit and loss account information. The point is that through the revelation of these models to Mr. Heaney it would be presented with additional new information of the quality and sensitivity that I describe and which would allow him to do the sorts of exercises that are described in Ms. Heal's statement.

Moving on then to (c) he says: "The majority of the P&L information is already available in the public domain". I should say, madam, these points I think are all covered, the thrust of them is all covered by Ms. Heal's evidence, I am just now presenting them in a rebuttal way rather than as they are set out at the statement. So (c)(i):

> "the vast majority of the revenues relate to services for which information has already been disclosed as part of the Leased Line Charge Control, LLU…"

It is interesting the choice of the word "information". It does not say it is the same information, and it is not the same information, madam. Some information is available, but it is new and different information and it is at a different level of detail.

Then over the page at subparagraph (ii), this is the point that I have already made:

> "an even larger proportion of Openreach's P&L relates to services for which information is provided in the regulatory financial statements."

- but that is historic information rather than forward looking.

Subparagraph (d) – an interesting approach has been taken in this paragraph:

> "I cannot envisage how knowledge of revenue and cost for other services (e.g. RedCare) could, in any way, be used to further Carphone Warehouse's interests as suggested."

Well, we did not make any suggestion that they could use the information in relation to RedCare, we made the suggestion they might use it n relation to, for example, Ethernet and ISDN which are areas where there is actual competition in relation to ISDN, and we say potential competition in relation to Ethernet, so really that, it seems to us, is an attempt to evade our point rather than to deal with it.

Finally:

"(e) The information in the model is probably at least 15 months old and thus is of limited commercial relevance."

That is wrong, the information was updated as at March 2009 and as I have already explained it is four year forecast information so the fact it was formulated at a particular point in time, obviously business moves on, but one has to have regard to the fact that it was a forecast intended to cover the four years from that point. So we say that even in the limited time we have had available to deal with Mr. Heaney's statement there are a number of very obvious objections to the points that he makes.

Perhaps I should just recap, madam, the first issue I dealt with, paras. 9 to 15, as we have explained in Ms. Heal's evidence, those points go to the confidentiality of the Oak model because it is the Oak model that shows the detailed breakdown of the costs that I have described, and I say that because obviously the Oak model is one of the models which Carphone Warehouse has maintained is not confidential, subject to isolated exceptions.

THE CHAIRMAN: Is that Oak final and Oak ----

MR.WILLIAMS: It is both Oak final and Oak ancillaries, that is right madam. The P&L point, as I have already explained, applies to both the Oak model and the CF Final model, albeit that the two models are presented on a different basis – HCA v CCA. The points we have made there go to the confidentiality of the Oak model and, as I said, the P&L point goes to the confidentiality of the model as a whole rather than on a cell by cell basis.

Coming back to para. 17: "Ms. Heal asserts that the access to the model will provide me with volume information …" and so on. Paragraph (a) deals with a point which is not in dispute and which we have never relied on. We have never said that there is commercial sensitivity around the volumes for the core rental services, as opposed to ancillary services.

THE CHAIRMAN: Which model does this volume information relate to?

MR.WILLIAMS: It is in the CF Final for this purpose, madam. It is suggested in para. B1 that this information does not give any additional information over and above the volumes for the core rental services which are already in the public domain. We say that is not right, madam, and we have dealt with that in Ms. Heal's evidence at para. 71. I will not take you to it now, but in essence what is said is that looking at the detail of which ancillary services a customer is purchasing will give you an insight into changes in customer behaviour being their movement between different providers, and their movement between different technologies – I was going to say "platforms", but I think the right word is "technologies", and one does glean additional insight from seeing movements in the volumes for those

specific services, which one does not get from the volumes for core rental services. As I said, the reference is para. 71 of Ms. Heal's statement.

The other point I wanted to make in relation to volumes is that there has been a suggestion for the first time in this morning's witness statement that this could be dealt with through aggregation. As I say, it is not a suggestion that has been made before. We are reacting to that on the hoof, but nevertheless it does seem to us that it is not really a straightforward matter because one would need to start to reconstruct the model because the model is currently constructed on a BT and other volumes basis and what is being suggested is that they would need to be brought together and that would involve rebuilding that part of the model. I cannot say any more about what that would entail now, but it does strike us that it would be a significant piece of work.

I am not really going to say anything about paras. 19 and 20 because that mischaracterises the position that Ms. Heal takes in her statement. We say that we have explained what it is about the detail that gives rise to concern and notably the first example at 19(a) relates to the detail within the Oak model relating to cost stacks, and I have already dealt with that point, para. 9 to 15, so it is an unfair characterisation of Ms. Heal's position.

In relation to the RAV model we do stress in relation to para. 22(b) that this model is also a forward looking cost model.

THE CHAIRMAN: Is this the duct information?

MR.WILLIAMS: "… the data relates to the past investment and ongoing maintenance …" so there is an attempt to inject a flavour of historic quality to that but I am making the point that it is a forward looking model in the same way as the other models.

THE CHAIRMAN: This duct information, which model does that relate to?

MR.WILLIAMS: This is the RAV model, so I have dealt with outputs before I came to Mr. Heaney's statement, and explained the position in relation to that. I have explained some of the concerns in relation to the Oak model. The CF Final model, madam, as you have already noted is in a different category because Carphone Warehouse have made a proposal in relation to that but the volume information is in that model and now I am dealing with the RAV model. But really I was not going to say very much, madam, because you made my best point which is the Carphone Warehouse suggestion that this is not confidential information because one can go out into the market and ask for quotes. The very point is that this model would allow them to compare the quotes with what BT is spending.

I do not think I can really say very much about paras. 23 and 24 which are really a clash of views between Ms. Heal and Mr. Heaney, save to say that Ms. Heal expressed real

concerns. She has been around Openreach from its previous life as an integrated part of the BT business, and its current life as a functionally separate entity, and I am not giving evidence but in a sense I have not been given any choice, she says to me over lunch that this is a real point, that because of the functional separation of Openreach customers are more willing to share information with Openreach than they would otherwise be, because they have that confidence that it is separate. So in a sense there is a clash of views, but that is Ms. Heal's view communicated through me.

That, madam, I think makes most of the points I wanted to make about confidentiality and competition albeit by way of rebuttal. I am just going to go back to my script, if I may.

Pulling the points on confidentiality together, I hope we have made it clear to the Tribunal why we say that this information -- that each of the models for different reasons constitutes confidential information which rightly belongs in the confidentiality ring, and we say that really that being the case it is really over to CPW to understand why it is that they say that exceptional provision should be made for Mr. Heaney to have access to the material. We also say that in considering whether there ought to be that sort of relaxation, it is highly relevant to have regard to the competitive overlap between BT and Carphone Warehouse, and that is a factor which militates very strongly against the sort of order which is sought. That is a consideration which in my submission underpins the Tribunal's entire approach to this issue.

I perhaps do not need to labour the point about our particular concerns as they relate to Mr. Heaney. Madam, you made the point which is the double-edge quality of Mr. Heaney's expertise in the field - his ability to interrogate the model to understand it, to gain insight from the information that is there. That is the source of concern, combined with his role as Director of Strategy and the wide-ranging influence he might have within the Talk Talk business.

There was a suggestion in Carphone's correspondence that his role was more limited than that, but that point has not been dealt with in this statement. As I have said, it has not been dealt with by Mr. Pickford. So, I think that is the basis upon which the Tribunal has to proceed.

The other issue on competition that I wanted to deal with was this issue of the undertakings because, leaving aside Annex 2, the exceptions, I hope that the position is clear to the Tribunal, which is that as part of the regulatory framework within which Openreach has been created, there are prohibitions on the flow of confidential information between BT and

Openreach. I do think I need to labour that point, but I think that is a clear illustration of the prima facie concern about risk to competition.

Mr. Pickford's submissions concentrated on Annex 2, and he suggested that, in a sense, Annex 2 blows a hole in that point and that in fact it militates in favour of the application that his client is making. In our submission that is wrong, and misunderstands what Annex 2 does and what it is there to do. Annex 2 exists because Openreach is not a separate legal entity, but part of the BT group. So, what it does is that it permits the flow of information from Openreach, as a business, to the group of which it forms part. That is inevitable, madam. I hope the reasons for that are clear. What is suggested by Mr. Pickford is, "Well, if one looks at group strategy, which is one of the categories in Annex 2, well what is all this fuss about strategy? Annex 2 contains strategy". In our submission, the key word there is 'group'. It is group strategy which is included in Annex 2. Mr. Heaney works for the Talk Talk group which forms part of the Carphone Warehouse group. But, Talk Talk corresponds to BT Retail or BT Wholesale. If Mr. Heaney worked for BT, he would be working for one of those businesses - possibly straddling both of them.

THE CHAIRMAN: I see. In Annex 2, those people are the strategy people for BT retail and BT wholesale ----

MR. WILLIAMS: In Annex 2 it is BT Group - not BT Retail ----

THE CHAIRMAN: I am saying they are not included.

MR. WILLIAMS: That is right, madam, yes. Actually, the point can be illustrated in this way - and, again, forgive me for giving evidence, but we are dealing with the point in a rebuttal way - Ms. Heal is Director of Strategy for Openreach. She is not on Annex 2 because the restrictions flow in both directions. She is not entitled to see information relating to BT Group ----

MS. HEAL: BT Wholesale and other parts of the company.

MR. WILLIAMS: BT Group, still less BT Retail and BT Wholesale.

THE CHAIRMAN: Yes. I see the point.

MR. WILLIAMS: The suggestion that Annex 2 permits the flow of information in circumstances where the flow of that information might give rise to a risk of competition is just not correct, madam. That is to misunderstand the portals which it opens up and how they work.

THE CHAIRMAN: If the information was disclosed to someone in Group Strategy, are they then restricted in passing it back down to BT Retail and Wholesale?

MR. WILLIAMS: Yes, madam.

THE CHAIRMAN: There is a lot of nodding going on.

MR. WILLIAMS: I cannot tell you precisely what the legal machinery by which that takes place, but we discussed this point at lunch, and, yes, that is right, madam.

I think Mr. Pickford characterised the reference to Annex 2 as 'oblique'. It is not oblique, madam. It is clearly dealt with in our witness evidence. But, that, I think, explains why the Annex 2 point is not the point which Mr. Pickford said it was.

I think I can then move to the reasons why Carphone Warehouse says that Mr. Heaney needs to have access to this material. As I said at the outset, the notable feature of the application is that the justification for the disclosure sought has been something of a moving target - implicitly, if not explicitly - because the sort of disclosure and what it would permit Mr. Heaney to do has changed over the course of the application. We do say that that is very telling. It does say that this is not an application which started with a particular compelling justification and has stuck to the guns. In a sense, it has moved with what seems pragmatic at the point in time, depending on what arguments are levelled against it. Mr. Pickford can say, "Well, we are just being pragmatic. We are trying to arrive at a solution", but if one is trying to understand what it is that Carphone Warehouse says that it needs to do, then, in a sense, that ought to be the starting point. As I say, the shifting sands are telling in our submission.

It is worth re-capping on the course of the correspondence. The point made in Carphone Warehouse letter of 17th November was that Mr. Heaney needed access to the model to allow him to consider the consistency of the model with Ofcom's published documents. We have not heard mention of that point since then.

THE CHAIRMAN: I think, to be fair, that is still their case - that it is these discrepancies that they have noticed between various points that are expressed or described in the statement and how the model deals with them that has then alerted them to possible new avenues to explore.

MR. WILLIAMS: Perhaps it is a reformulation of the point. Perhaps that is a fairer way of putting it. But, it is certainly a difference of emphasis in our submission when one comes to consider the new proposal, for example, that Mr. Heaney ought to be able to look at the structure of the CF model. I am simply making the point that it is a different sort of proposal for a different purpose.

The letter of 17th November went on to give three examples of the points which are relied on. I do want to look back just very briefly to those points because in a sense I think the fact that Carphone had not really stuck to those points -- or, at least, that the points can be rebutted is material in understanding the fact that there really is not much at the heart of this

application. The letter is at AEH1. I will try and take this briefly because it is not quite the way the application has been put today. The first example given was at p.4 - the implementation of efficiency assumptions. It says,

> "The main analysis of Ofcom's approach to efficiency assumptions was carried out by Andre Heaney and is set out in his witness statement as described above. The operational knowledge from within industry (in this case CPW) that was drawn upon to support this analysis is, by its nature, not fully available to advisers outside the industry, such as those within the confidentiality ring. The inability of those analysing the model to discuss operational experience with experts outside the confidentiality ring has hindered the analysis of the model".

But, really, in his statement, Mr. Heaney relied on his own operational experience to suggest that the efficiency targets that had been suggested by Ofcom for Openreach were too low. They went to the level of the efficiency targets based on his operational experience. There is not a clear relationship between his operational experience and his ability to then interrogate the model.

In a sense, madam, that point is illustrated if one looks at the second paragraph, which is the gross versus net point that Mr. Pickford drew to your attention this morning. What is then said is that an issue has arisen in relation to whether the model properly implements Ofcom's decision as regards the efficiency targets to which Openreach has been subjected. But, that point has been picked up by CPW's experts from their review of the model.

THE CHAIRMAN: Is this the same point about the fault?

MR. WILLIAMS: No, it is not - I do not think. No, it is not the same point. I am going to come to the fault point.

The first paragraph under (a) says that Mr. Heaney's operational experience is very important, but then, actually, the example that is given is a point which has been identified by CPW's experts who do not have that operational experience. The point I am making is simply that it is not really clear how Mr. Heaney's operational experience better enables him to assess whether there are discrepancies between the model and what Ofcom decided. As I said, the proof of the pudding, if you like, is that this is a point which has been put forward by CPW. It has been pleaded. It is part of their appeal. They obviously believe in it. They have identified that point and pursued it without Mr. Heaney having been able to interrogate the model.

THE CHAIRMAN: Let us see where this takes us. You say that they have identified it. They have been able to plead it. Presumably Ofcom is able to respond to that pleading because

they, of course, all have sight of everything. Then the point is to be determined by the Competition Commission. The Competition Commission and their staff will presumably all have access to the whole model because they are presumably all within the ring ----

MR. WILLIAMS: I think that is too important to be subject to such things as the confidentiality ring.

THE CHAIRMAN: I am sorry?

MR. WILLIAMS: I think they are too important to have to worry about things like confidentiality.

THE CHAIRMAN: Yes. But, they are certainly to be trusted with absolutely everything. So, they get to see it. They are told, "Well, what about this point about these discrepancies between the information as set out in the decision and the information in the model?" Now, they then have to decide whether they think it is a good point, whether there is a problem there. Now, what would happen if they were to put further questions to CPW and CPW might say, "Well, we cannot really answer those because we would need our experts to discuss it with Mr. Heaney". I am just thinking aloud whether this is a possible scenario that might arise, or whether the Competition Commission can make up their own minds having looked at the model themselves.

MR. WILLIAMS: The question is simply whether the model functionally gives effect to Ofcom's decision as regards the application of gross efficiency margins or net margins. It is a mechanical question, I think. It is a question about the mechanics of the model. Really I am making two points. First of all, it is not clear how Mr. Heaney's operational experience is relevant to that sort of mechanical question, which deals with the relationship between the statement and the model. Secondly, insofar as it is suggested that the current arrangements put CPW into difficulty, this point has been identified by its experts, and in our submission we do not find that surprising because it is a point of mechanics rather than operational experience. So, we are simply saying that this point does not really fortify the idea that Carphone Warehouse is hamstrung in its ability to put up the case. We would say the converse - it is a point which has been identified. Also, it tends to suggest this operational experience point is not really material either.

(b) I will deal with, I hope, very briefly. Ofcom's approach to ancillary services. This is a question about suggested inconsistencies between the volumes used in the rentals part of the model and the ancillaries part of the model. The short answer to this point is that it was at one stage para. 118(a) of the notice of appeal, and it is a point which Carphone have decided not to pursue even with this application pending. So, they have obviously come to a

view about whether it is a point worth pursuing, or not. We say that that further tends to suggest that Carphone is able to make decisions on these sorts of points under the current arrangements.

Finally, over the page at p.5 - Ofcom's approach to the calculation of the share of costs that are compressible. I hope I can deal with this again briefly. The point here is that in its defence Ofcom says that the level of non-compressible costs for MPF services, as opposed to all operating costs, is more like 75 percent than 60 percent. What this point says is that, well, actually there is a disagreement between Mr. Heaney and Ofcom because Ofcom has put forward this figure of 75 percent and Mr. Heaney thought the number was 60 percent. But, there is no disagreement. They are just talking about different things. Mr. Heaney has identified - and it would appear from Ofcom's defence correctly - that the percentage of non-compressible costs is 60 percent across the whole operating costs base, but is more like 75 percent, Ofcom says, if you just look at MPF. So, there is no disagreement. But, if Carphone Warehouse does not understand that point -- does not understand Ofcom's position it can ask Ofcom in the first instance to explain how it gets to the number and the issue can be developed in that way. So, this point, in our submission, does not suggest actually -- It is not a good illustration of Carphone in difficulties. We thought, reading that letter, that it appeared to us that Carphone was struggling, if I can put it that way, to identify particular problems, concrete problems, that it was encountering in the preparation of its case because all of those three examples one could see through them pretty quickly.

Against that background we noted that the letter of 9th December, which is at AEH6, approached the matter very differently. This is at the bottom of p.3. I am sure the Tribunal has read it, but I just wanted you to have it in front of you while I make my submissions, which is that this is an entirely generalised explanation of the difficulties that Carphone claims to be encountering. It is put at the most general level. There are no particular crunch issues which Carphone is struggling with. They simply say Mr. Heaney is uniquely placed and the Tribunal has already picked up that that point is of itself double-edged for them. So, we say that this letter marked a notable retreat from the effort to really explain what were the crunch issues. We made that point in strong terms in our submissions on Monday. Following those submissions we have received Mr. Heaney's witness statement. The question of why he needs to see the model is dealt with at para. 27. (a) is familiar stuff. It is just his role. Paragraphs (b) and (c) say that he has not got the whole picture without the model. We note in (c) that there is considerably more detail in the models and that has been one of our points on confidentiality. (d) is, again, generalised. (e) is, again,

generalised. What one has then at (f) and (g), and (h) and (i) are really two examples of suggested concrete difficulties. I can deal with (i) quite easily. That is the ancillary service volumes point that I have already dealt with. So, that is a point which has already gone away. So, that point does not really add anything.

THE CHAIRMAN: That is already dealt with in the 17th November letter.

MR. WILLIAMS: In (f) one has the fault rates point. All I can say about the fault rates point at the moment, madam, is this: it is a point which it seems to us a point which arises from the CF Final model, which is the model in relation to which Carphone has accepted that there may be modifications made to protect BT's confidentiality. This is a point which relates to the content of the numbers. It does not appear to us to be a point about the structure of the model.

THE CHAIRMAN: Are you saying then that if they got the CF Final model with the numbers randomised, they would not be able to deal with this point?

MR. WILLIAMS: No - and I think that illustrates, if you like, the crux of this, madam, which is that we say that what Mr. Heaney really wants to be able to do is to work with the content of the model in order to look at the substantive question of what costs have been allocated to Openreach and whether those costs are justified. But, that is a matter of content. There may be issues of structure, but a lot of it will be content, and a lot of it would depend on his ability to interrogate the content of the model. The one example that he has given which, in our submission, remains live - and, as I say, we are reacting to this at short notice - is a point about content, not structure.

So, we say that CPW has arrived at a position where the application which it makes and maintains in relation to the CF Final model is not really a productive or worthwhile application. It does not really enable them to do what Mr. Heaney wants to be able to do. We say that it is really just an attempt to salvage something from an application which was made in far too broad terms in the first place, and which they have now scaled back, recognising that they had probably gone too far in the first place. So, we say that although Mr. Pickford presents it attractively, and seeks to say, "We are just being pragmatic", we say that actually one has to drill down and say, "What would this really achieve? What would it enable you to do?" What we see is that the one example of a point which they give where there might be productive dialogue between the experts and Mr. Heaney, actually that could not happen on the basis of the disclosure they propose. That all goes back to our key point, which is that there is not really a good reason for it -- It has not been justified, or

rationalised, or explained. In those circumstances it is not something that the Tribunal ought to accede to.

But, we do make a further point about the proposal that is made in relation to CF Final, which is this: It is not entirely clear to us what is mean by Mr. Heaney being able to examine the structure of the model. For example, I am not sure whether it encompasses the point that has been made about net and gross efficiency gains. If it is, if that is an illustration of a point arising from the structure of the model, that point has already been identified by the experts. What we say really is that if one is looking at mechanical questions of that kind, then there really is not a reason to think that CPW's experts are not able on the basis of the very, very substantial work they have done, to identify points of that sort. You may have seen, but not read, madam, members of the Tribunal, the second witness statements submitted by Mr. Hoopis and Mr. Kelly as a result of their review of the model, and which deal with points arising exclusively from their very detailed review of the model. I stress that those points go to the non-price matters, but they are concerned with the very question of how the model relates to Ofcom's decision in the context of whether Carphone would have been able to make additional representations had it had access to the model. But, it is all about the interplay between the model and the statement decision that has been made, and the issues that Ofcom was looking at.

So, those are issues which have been explored in great detail and dealt with in evidence in great detail, and presented in very detailed new amendments, which the Tribunal has seen in a different context and which I do not need to take you to now, I do not think.

We say that these issues have been explored. We are now well into the case ----

THE CHAIRMAN: Are the Hoopis and Kelly witness statements limited to the confidentiality ring, or are they ----?

MR. WILLIAMS: I presume they are. We could check that. But, the point I make is that it is that piece of work, madam. As I say, if this point about gross and net efficiency margins is said to be a point about the structure of the model, then it is already out there. So, that work has been done. So, we ask ourselves the question, "What is it that Mr. Heaney would really add to this?" We say it is really speculative, madam, to suggest that allowing Mr. Heaney to examine the structure, the mechanics of the model, would yield additional benefit over and above that which has already been derived from the very, very substantial work of Carphone's experts. Those experts make the point in their evidence that they have been selected partly having regard to their telecoms experience. That point is played down in the context of this application, but it has obviously been played up by the experts in the context

of their evidence and in the context of the issue of how much weight ought to be given to it. So, we say that Carphone is playing a little bit fast and loose with that question. We do say that it is speculative to suggest that Mr. Heaney looking at the models on a purely structural basis is really going to achieve anything.

Madam, I can make the point in passing - and it is not a major point for today's purposes - that BT's expert evidence in connection with the model which has been presented by Deloittes contains a structural analysis of the model of the very type which has been proposed. They come to the conclusion that the models work as one would expect, and so on, and so forth. We are simply saying that our external experts have done that sort of exercise, looking at the model on a 'model as a model' basis. They have done that work, and they have managed to express their own opinions about it. So, in a sense, we do not see why Carphone's experts cannot do the same thing.

We say that that sort speculation about whether there might conceivably be some sort of extra point that they would spot is not really a basis for the Tribunal to make this sort of exceptional order.

When I say that it is exceptional I should make two additional points really. The first point is that we do not concede for today's purposes that a randomisation exercise, certainly of the type that is proposed by Carphone, would necessarily do the job that it says it would do, i.e. protect BT's confidentiality. It was very interesting that in his submissions Mr. Pickford started off by saying, "Well, what we have in mind is something that would completely obliterate BT's confidentiality, and put it beyond any possible visibility". He started off with very general words, but then said, "But, actually, we would like the parameter to be around 0.75 and 1.25 so that we could retain some ability to have insight into the relativities of the figures". Again, madam, what that brings us back to is that Mr. Heaney does want visibility of the contents of the model up to a point. As I say, the application has been scaled back, in our submission, for good reason, but one can see actually that that further casts doubt on the idea that what Mr. Heaney wants to do is to look at the structure of the model. Again, it suggests that what he is really interested in is getting to grips with its content.

The second point I wanted to make is that the proposal in relation to creating this shell model, if I can put it that way, made by Carphone last week, suggested that it would be a relatively straightforward solution - and I think 'straightforward' is the word used in Osborne Clarke's letter of 9th December. We do not accept that. We have explained in the

evidence that although Carphone uses the word 'spreadsheet' - the CF Final spreadsheet, it is actually twenty-seven spreadsheets.

THE CHAIRMAN: Is this still the randomisation point?

MR. WILLIAMS: It is still the randomisation point.

THE CHAIRMAN: So, what is it that comprises twenty-seven spreadsheets? The CF Final?

MR. WILLIAMS: The CF Final. Twenty-seven tabs. I probably should not call it twenty-seven spreadsheets.

THE CHAIRMAN: I know what you mean.

MR. WILLIAMS: Again, if I could just pick up the note produced by Carphone's experts on 2nd November, which Mr. Pickford took you to - the red and blue box diagram; the first paragraph says: "These consist of four large and complex spreadsheets", and then underneath the diagram:

> "The four larger spreadsheets are (a) a costs forecast model which calculates the total cost of the Openreach business including the labour inputs required for approximately 50 different activities, the spreadsheet contains 33 individual worksheets".

And you might as well just pick up in (b) the last line: "The RAV model 16 separate sheets", and then the complexity of the Oak model is described in para. (c), 37 individual worksheets.

Over the page:

> "These spreadsheets contain worksheets which are both large and complex using long and complex formulae to calculate and allocate costs."

So we just make the point that the idea that this would be a straightforward exercise really is not borne out by the material that Carphone themselves have produced and put before the Tribunal.

THE CHAIRMAN: Well the amount of spreadsheets – sometimes things can still be done in half a nanosecond; I do not know whether that is the case if one just puts in an instruction: "Multiply everything by …" I do not know how you do this "… by a number somewhere between 0.75 and ----"

MR.WILLIAMS: The first point to make about that is Carphone's position, we are only entitled to do that randomisation exercise in relation to specific cells within the model whereby we can justify a claim of confidentiality in relation to those cells. So it is obviously not just a matter of applying a factor to the entirety of the model, and we say that point is important for this further reason: Carphone has been very clear that if we do go down the route of

creating this randomised model it would reserve the right to challenge the assertion of confidentiality in relation to any given point. We say it is not difficult to foresee where this exercise will go; it will generate an enormous amount of satellite dispute in relation to particular issues of confidentiality on a cell by cell basis. With the best will in the world it is clear that the parties are a long way apart on the extent to which this information is confidential and BT can claim confidentiality over this material. So although Carphone's solution may seem convenient today it is something which would inevitably give rise to significant work and significant cost and we say that that has to be taken into account in deciding whether this is an appropriate solution and one has to weigh all of that in the balance with what would Carphone get from the exercise. We say that that weighs very heavily against going down this road, generating all this additional work, potentially time consuming, a huge distraction from the issues before the CC in circumstances where we say not having access to the model Carphone has not really identified a good reason for it.

I will just deal very briefly with the safeguards that were proposed by Carphone in relation to the other models – Oak outputs to some extent, and RAV. We are concerned that those models do contain information, certainly Oak and RAV that may be relevant to competition between BP and Carphone Warehouse and we are not satisfied that the safeguards proposed which consisted of the undertakings plus provisions like Mr. Heaney must attend its advisers' offices, we think those are entirely inadequate to deal with the very real concerns that we have expressed, and we say that the approach of the President in *Sky* is very much along those lines.

We are conscious that during the course of his submissions this morning and through Mr. Heaney's second statement, Mr. Pickford made a number of more specific proposals as to how particular issues relating to confidentiality may arise, one was aggregation of volumes, and another was dealing with particular contracts. There is also the general question of whether randomisation using the priorities put forward by Mr. Pickford, or some other set of parameters, would be effective. We say that unfortunately this matter has come before the Tribunal at a point in time when it is not possible for BT to put forward firm submissions as to what would and would not adequately protect its confidentiality, what is and is not practical, what would and would not be time consuming, and I am thinking of the aggregation of volumes point. We say that in the time that has passed since 9th December it just has not been possible to get to that point, so we do say that whatever is the outcome of this application the Tribunal is not in a position to make any detailed order dealing with the confidentiality. Our primary case is that that issue does not arise for all the reasons I have

given, but we do say that if the Tribunal is against us on any of that, that we are not in a position where the Tribunal can make a specific order that disclosure on particular terms ought to take place. Carphone Warehouse really has not grappled with the issues that arise in relation to Oak and RAV and in our submission we just are not at that point yet.

Those are my submissions.

THE CHAIRMAN: Thank you very much. Yes, Mr. Pickford.

MR. PICKFORD: Madam, I have quite a few points to make in response, and I will take them in the order that Mr. Williams made them and I will try to be as brief as I possibly can.

The first point that Mr. Williams makes, and it is something of a light motif of his submissions, he said it repeatedly, there have been shifting sands and this just goes to show how this is not a good application in the first place because it is ill thought through, and we do not really know what we want.

We have made it quite clear in Mr. Heaney's evidence and in correspondence the reasons why we seek this information. We say we have been far more concrete in relation to that than we have heard from Mr. Williams in relation to why there were problems with that disclosure.

But I return to a point I made in my opening remarks which is that we are trying to be sensible and practical, and indeed Mr. Williams himself said that this whole case turns on the question of balance, it is all about balancing the interest, and that is entirely what we are trying to do when we provide accommodations to reflect the concerns that BT has raised. But we could not, with the best will in the world, have anticipated precisely what concerns were going to be raised until they were raised, and they were first raised in a concrete fashion that enabled us to respond concretely, with the kind of suggestion that we do in Mr. Heaney's statement, on Monday, and that is why these matters have progressed. In my submission, it is not a good basis for turning down this application, the fact that we are simply doing our level best to find an accommodation which balances both parties' interest, that is surely what the Tribunal should call upon us to do.

The next point that is made against us is in relation to the test in law. It is said that in the Tribunal disclosure is dealt with very differently to in the High Court; as I think Mr. Williams described it: "The dynamics differ", and that was a point he made a number of times.

Of course, the one reason why there has so far been no order for disclosure in these proceedings is because Ofcom made disclosure. Ofcom, as any public authority in public law proceedings is under a duty of candour itself, it is not the same as in party and party

litigation, but that does not mean that there is not disclosure, and there has been disclosure, and what we have arrived at now is a situation where we are asking the Tribunal for an order for disclosure because there is now an impasse.

The difference is between this public law litigation and party and party litigation should not be exaggerated. For a start, in many ways, this litigation is being fought out like party and party litigation because we have BT here, we have ourselves here, we do not even have Ofcom in the Tribunal today.

THE CHAIRMAN: That is just for this application.

MR. PICKFORD: Yes, but it is this application that we are concerned with today.

THE CHAIRMAN: Well no, I think the point that is being made is it is a different dynamic because this is not commercial litigation in which this idea that the Judge refers to in the *Dyson v Hoover* judgment of the parties being on an equal footing, an equality of arms, and that kind of consideration, are to the fore, whereas here the parties are Ofcom and Carphone Warehouse and there is not really a question of them being on an equal footing because Ofcom always has access to a lot more information than Carphone Warehouse does, as does the Competition Commission when it comes to investigate it.

MR. PICKFORD: Madam, with respect, we would say that the philosophy underlying there being an equal footing is equally applicable in this jurisdiction because this is an appeal on the merits, this is not mere judicial review, and in order to advance an appeal on the merits to enable the Tribunal and to enable the Competition Commission to engage in the rigorous and intensive scrutiny that it is required to engage in, we need to have essentially an equality of arms in relation to the information that we have before us. It is not appropriate for the litigation to be carried out on the basis of Ofcom having large amounts of highly relevant information that it is not possible to share with, in our case, the key person who is responsible for advancing our case on certain aspects of the decision, so we say that there are actually very close parallels with party and party litigation given the underlying principles for why it I required. Madam, you correctly record the comments in *Dyson* at para. 33 which refer to the inquisitorial nature of some proceedings and the adversarial nature of others, and the comment made there is it does not matter which you are concerned with, the underlying principles remain the same. It is worth just repeating what was said in that particular case:

> "Whether one is considering the inquisitorial or the adversarial system, it is essential that the court puts in place procedures which allow the parties to litigate on an equal footing and with full knowledge of the materials before the court."

Then there is a very important point that is made at para. 27 which, in my submission relates to a point that you, madam, addressed with Mr. Williams about whether he can rely upon the Competition Commission to effectively fill the gap here. At para 27 it is said:

> "In my view, it is a fundamental part of the conduct of fair proceedings that all the parties before the judge should have access to the same material that the judge himself has access to for the purpose of coming to his conclusion."

Now in relation to the Competition Commission stage of this case, the Judge is the Competition Commission. We have very great faith in the Competition Commission, that it will do an excellent job, but ultimately it is still our appeal and we need to be able to advance our best case to persuade the Competition Commission, we cannot simply rely upon the Competition Commission naturally reaching the right result without our endeavours to persuade it and that is why Carphone Warehouse has employed the consultants and lawyers that it does to act on its behalf. So we think there really is not the kind of difference that Mr. Williams has tried to persuade you that there is between these proceedings and the proceedings, for example in *Dyson*.

The next point that he made, very briefly he, as I understand it, tried to distinguish the *Eisai* case on the basis that the confidential information was different in that sense because it was the confidential information of the National Institute of Clinical Excellence itself. It is worth just noting very briefly what is said about confidentiality in that case, and it is at para. 59. Again this is in the judgment of Lord Justice Richards, and he deals with the confidentiality point and then concludes in relation to it:

> "The argument concerning confidentiality is not one to which I would attach any weight", and the reason for that in this case is because he did not think that there were confidentiality concerns. "It should not in my view have a material effect on the court's decision as to whether procedural fairness requires the fully executable version to be disclosed to consultees. I should add, though I do not think it arises, that even if disclosure were *prima facie* a breach of confidence …"

- which was what being said in this case it was not merely that it was confidential information and they did not want to disclose it, it was that actually it was a breach of confidence to disclose it.

> "Mr. Giffin conceded that NICE would have a public interest defence available to it if disclosure were necessary in order to meet the requirements of procedural fairness."

It is a point that is well taken by Mr. Williams; it is a different context here, but again what this does illustrate is fairness is paramount, and fairness can ultimately trump confidentiality concerns. In this case there is no need for a trump card to be played, because when one looks at the balance that Mr. Williams urges you to look at you see that the balance then firmly comes down in my client's favour, but it is worth noting what is said there in any event.

The next point that was taken against us is that this order we are seeking is unprecedented in the Tribunal, and I tried to meet that beforehand, madam, when you raised that point with me. The only additional point I would make is to remind the Tribunal that in the calls to mobiles litigation where there was no such order for disclosure to the parties beyond their external advisers, the reason for that is because there was a model that was disclosed in that case, it was based upon an efficient competitor, and that model was taken as a proxy for all of the mobile operators and it was a substantial and detailed model, and there was no need to go behind that because that was the model that was the basis for the decision and it was a publicly available one, as I understand it, it was not even disclosed in the proceedings. It was a model that Ofcom had always made publicly available. That is one of the issues that did not arise in those proceedings, and merely because it did not arise then does not mean that it will never arise, and this is a case where it has.

THE CHAIRMAN: No, but there was lots of other information within the confidentiality ring in those cases to which none of the executives had access.

MR. PICKFORD: That is true, but none of it really had any particularly crucial bearing ----

THE CHAIRMAN: No, that is the point that you make.

MR. PICKFORD: -- on the issues in the case, and in particular the central model that underpinned it was actually publicly available even if there were extra bits that each party itself was able to see.

The next point made by Mr. Williams, I think it was suggested that in some way we were trying to distinguish the CAT and the High Court but we are plainly not. We say that there was a clear read across and that is why I relied on the authorities that I did, so insofar as I have correctly understood that, that is obviously not a point that we are taking.

Mr. Williams also said there simply cannot be a presumption in the same way as there is in the High Court here because otherwise the whole system in the Tribunal will be turned on its head. We do not need to rely upon a presumption, it is clear that the Judge in that case thought that the underlying interests of fairness required such presumption, but in this case

we are quite happy, we can deal with this on the basis of balance, and we say where we are in relation to that issue.

The next point that Mr. Williams made was in relation to the correspondence, and he said in relation to the letter that was provided at AEHg, which is when BT said that it would provide non-confidential versions. He said "Well we never said that we would do anything more ourselves, we were simply waiting for Ofcom to do something", but if one looks at that letter what they say in the concluding line is:

> "We propose to liaise with Ofcom to prepare such a version of the outputs 2003 spreadsheet which can then be disclosed outside the confidentiality ring in hard copy."

Then in relation to point 4, they do not know whether there is a non-confidential version of the KPMG report, if not they will review the confidential document and identify any BT commercially confidential information that needs to be redacted from the non-confidential version. They do not say to you, madam, that they have done that and sent it to Ofcom and Ofcom have not done anything with it. Indeed, and I do not need to take you through it, one sees from the following correspondence that those instructing me have followed up on numerous occasions to BT saying: "When are we going to get this information?" and they have not had the response: "We thought this was all in Ofcom's domain". Typically we have not had a response to those letters at all, so it really is not, we say, sustainable to suggest that the reason why we have had six weeks at least of delay in relation to this is because this was all on Ofcom's head, and the blame can all be laid at Ofcom's door. We are only too willing to lay the blame at Ofcom's door where it is appropriate, but we do not do so in relation to this point.

The next point that is made by Mr. Williams is in relation to the Outputs 2003 spreadsheet and he says "We have already offered a hard copy", but he has not explained at all why they could not offer a soft copy, which is what seek, there has been no particularisation of why that would cause them any difficulties at all. It is, however, plain on our side that if one can see a soft copy of something you can see how one cell relates to another cell and interrogate the structure in a way that you cannot do if all one has is a series of numbers then you cannot see the relationships between them. The relationships are obviously an integral part of any model.

The next point is that his entire case, as I understand it, on the confidentiality in response to the points that Mr. Heaney makes at paragraphs around 13 to 15 of his witness statement, the point is that it is the cost stack that matters he says, and because there is a cost stack that

we will see we can benchmark ourselves against it. He did not address at all the response that I gave to you, madam, when I explained that that was not of any use to us, that our system is based on a completely different technology, so BT's costs based on their old technology are not going to assist us in any way, shape or form. That was a point he simply did not address.

Also, he claims that the point about costs and being able to benchmark against costs meets all of our points on competition, but that is simply fallacious. To the extent that it could meet any point it is only relevant to the alleged competition at the highest level which is between Carphone Warehouse and Openreach itself, which, madam, you will recall is the 3 per cent of Openreach's business, and that is the only point that that goes to. If you, for instance, consider retail competition, the competition between Carphone Warehouse and BT Retail or Sky, all that matters there is: what is their input cost from BT Wholesale, which we know, and the other costs of those competitors at the retail level which we do not know. The cost stack argument there, the benchmarking argument does not stack up at all, it is simply not relevant to that lower level of competition and so he does not have an answer to our response on those issues.

The next point he takes is in relation to four year forecasts. He says that we have said that the profit and loss account is already available. That is wrong because what we are focused on here is four year forecast and that is more valuable. In fact, what Mr. Heaney refers to at para.16(c)(i) of his witness statement is forecast data. He says there:

> "The majority of the P&L information is already available in the public domain:
>
> (i) the vast majority of the revenues relate to services for which information has already been disclosed as part of the Leased Line Charge Control, LLU Decision and WLR Decision."

Unfortunately, I do not have the LLU Decision to hand. I do not know what decisions the Tribunal has to hand, but I can give you the reference.

THE CHAIRMAN: This is in the Leased Line Charge Control?

MR. PICKFORD: That is right and also the LLU Decision and the WLR Decision. What I have currently in the documents before me today is the WLR Decision, because that is the decision that Mr. Heaney makes the point about fault rates in relation to, and in the WLR Decision, if the Tribunal has it, at p.79 it is in Ofcom's defence at DF3, tab 31, we say for instance in table 7.6, a profit and loss account based on "CCA costs and revenues for WLR rentals, assuming prices remain fixed in nominal terms before adjustment for enhanced service costs." One sees there it is a profit and loss account and it projects from 2007/08 up

until 2012/13, so the point that is taken against me that the only information in the public domain is historic, and that is what is unique about the information that we are seeking access to, is a bad one because this is a clear illustration of Ofcom publishing forecast profit and loss style information.

The next point that is taken against us is in relation to volumes for ancillary services and it is suggested in response to our proposal to aggregate where we do not know how difficult that might be, but the point is we are happy to do that, all they have to do is tell us what they want to be excluded and we will do the difficult bit, the aggregation for them, and allow them to approve it. So it is not really any answer to say it might be difficult. We do not think it is going to be particularly difficult and that is why we are quite willing to undertake the task.

I should add in relation to that point that I would invite the Tribunal to approach this on a model by model basis in that if the Tribunal is not with me that our entire application should succeed, for instance supposing that it was persuaded that there was a particular issue that arose in relation to the RAV model, the appropriate course would be to say: "We have been persuaded that it is appropriate for you to see the RAV model, but we will allow you to see the other models subject to the terms on which you have sought access to them, rather than to dismiss the application as a whole.

It is said against me next that Mr. Heaney's expertise is a double-edged sword but as I think I responded to you, madam, that is a point that is made in the *Dyson* case (para.38)

The next point that is taken is in relation to annex 2. Mr. Williams has done his best in relation to Annex 2, but we say that his answer is still unsatisfactory. He suggests that there is no problem with the inclusion of personnel from group strategy in the Annex 2 list because they deal with group strategy, but if one pauses for a moment to think about what does group strategy involve, group strategy is not some abstract concept it is strategy for the entire BT group, i.e. all of its various businesses including its businesses such as BT Retail - the business that we are concerned with in this case.

THE CHAIRMAN: Yes. But, I think the point is that they are not deep down in the detail. They are looking at the big picture as to how the overall group should develop. They are not going to be interested in the minute detail that we are going into here that the BT Retail people would be. I think that is the point that is being made. There is a distinction between the group strategy and BT Retail or BT Wholesale strategy. Madam, my instructions are, as I said previously, that the sort of people we are talking about who would be involved in

group strategy carry out exactly the same role as Mr. Heaney carries out for Talk Talk group or Carphone Warehouse.

MR. WILLIAMS: For Talk Talk group. Then there are operating divisions.

MR. PICKFORD: It is true that Carphone Warehouse has other businesses such as selling mobile phones through shops, but Talk Talk group is the business that is concerned with telecommunications access networks. It is in relation to the Talk Talk group that all of the various competition concerns that are raised by Mr. Williams are said to arise. It is not in relation to other aspects of Carphone Warehouse.

THE CHAIRMAN: No. That is the point, I think. That is the point - that if we were talking about disclosure to someone who was in charge of overall strategy for the Carphone Warehouse global business, then that might not be such a problem because they would not glean from this information the kind of detail that would be useful in that kind of overview role, whereas Mr. Heaney's role is particularly in relation to these products, and that is why the information, it is said, would be useful to him in the development of these products - not, "Where are we going more generally in the telecoms sector?" sort of approach.

MR. PICKFORD: Madam, in my submission it is very difficult to make that differentiation between group level strategy and strategy lower down the line. Ultimately, strategy is strategy. By its nature it is not concerned with the absolute level of detail. It is concerned with what kinds of business strategies; what kind of product should be developed. It is highly revealing that in relation to BT itself members of the BT group are able to see that kind of information, notwithstanding that they will have, one would hope, an absolutely essential role in shaping the strategies of the constituent parts of BT because if they do not, then it would be very perplexing what particular role they carry out in that function. It is not possible to draw the sort of clear dividing line that Mr. Williams attempts to do. Indeed, he does not advance a submission that the group strategy personnel do not have that kind of role. He simply says, "Well, look, they are group strategy".

Turning to the point about the need that we have for the information, we have been highly specific about this - as specific as we can be - in a combination of the evidence of Mr. Heaney at para. 27 and correspondence leading up to it. The point that is taken against us is one where, in my submission, Mr. Williams really tries to have his cake and eat it, because he says on the one hand, "Look what you have done. You have done these things. You did not need Mr. Heaney to have access to whatever you have done. But, whatever you have not done so far, well, that is clearly totally speculative". It goes without saying that we obviously cannot know what we currently do not know. We cannot know precisely what it

is that Mr. Heaney may, or may not, discover in relation to that. What we do know, and what we are quite clear about, is that Mr. Heaney has considerably more expertise and is considerably more able to engage with these types of issues than the particular consultants on which he relies. That is the best we can really say.

THE CHAIRMAN: Those are two very different approaches, Mr. Pickford. In the correspondence that we have seen, and in the 17th November letter there are three (what are called) examples put forward as to concrete instances where the experts who have seen the model have been hampered, you say, because they cannot discuss what they think they have unearthed with Mr. Heaney. Then, in para. 27 there is another example - the fault rates point. Now, are you saying that Mr. Heaney wants to have access to these models so that where particular points are identified by the experts that they need to have his input on, they can ask him those questions and he can see the models for that purpose? Or, are you saying, "No, he wants to see the models because he, going through them all, might see all sorts of things that even the experts have not noticed, and might throw up a whole extra lot of points which they, despite their professed expertise, have not been able to identify"? Now, those are two very different exercises which Mr. Heaney might do. Which are you saying is ----?

MR. PICKFORD: Both - and other reasons as well. We rely on both of those points, but we also rely on other respects. It is not so much always that the experts themselves have been inhibited in what they can do, but, overall, Carphone Warehouse has been inhibited in its ability to prosecute -- to carry forward its case in the way that it would like to.

The ancillary services point is an illustration of a different kind of difficulty, which is that we had to take a decision about whether to continue with a particular point or not. One of the issues is: Was it really likely to be material? Mr. Heaney was not able to see the models or to see actually what numbers we were talking about. He had to rely on a value judgment of his experts, about whether they thought that it might be material. That was one of the considerations that informed whether we would continue with that point or not. But, Mr. Heaney was never able to form his own view about whether he thought it was material because he could not see that. So, that is an illustration of a different type of point where, when a key decision-maker who is also integrally involved in the Carphone Warehouse team does not have access to the same sort of information. Those problems of course are in addition to the problems that you, madam, identified as well.

There are two further concerns. There is the logistical difficulty that Mr. Heaney was the primary person who set out the analysis on, for instance, efficiency costs. The situation has now moved on, essentially, since he did his original witness statement. We know, to some

extent, he was aiming at a slightly false target. Now, he cannot update that himself. We are now reliant. We have done the best we can because we need to pursue this appeal to the best of our ability. But, we have now had to switch horses to someone who did not carry out that primary analysis, who does not have the same expertise as Mr. Heaney, and can now only do their part of the story. So, when we then come to deal with that issue in the Competition Commission we are going to have this very uncomfortable situation where part of it will potentially still be Mr. Heaney's domain, and then other aspects of it will be issues where Mr. Heaney has to leave the room. It is in relation to that that we say we encounter a real practical difficulty. It is also in relation to the point that I made about getting access even to non-confidential versions of materials from BT. The point we made was not merely context setting; it was that there are genuine difficulties when someone as central to our case as Mr. Heaney is exclude because we can find that weeks - not to say months - go by before he is given access to even non-confidential versions of what everyone else can see.

Madam, I am nearing the end, but progressing through the points Mr. Williams took against me.

The next one was in relation to para. 27(f) of Mr. Heaney's statement. It was said that if all we are going to get is the structure of CF Final, that will not help us with the difficulty that we identify at 27(f). My clear instruction is that we think it will help us. It is, to some extent, our look-out. If, ultimately, that is what we get out of this hearing, and we are not assisted by it, then we will have to live with that. Mr. Williams raises the spectre that we will be coming back continually to apply for more and more disclosure. But, we would do so very advisedly because whilst I cannot say exactly what may or may not happen in the future, we are well aware that if we continue to come back again and again for further disclosure we would almost certainly try the Tribunal's patience. So, that is a matter that is raised interorem but, it is not, we say, something which should influence the Tribunal's decision on this particular application. Those applications, should they ever occur, which is unlikely, but who knows, are a matter for another day.

Madam, a point that came up again, but I think I have made it already, is that Mr. Williams addressed later in his submissions again the point that it is said the changes we want to make are straightforward, but they do not know that they are. As I have said, we will do that.

A final point. BT says, "We cannot necessarily say exactly today what our view is on the anonymisation that you suggest in relation to CF Final". That would certainly not be a good reason for dismissing this application if that is their position. The only implication of that,

we say, would be that the Tribunal should make our order conditional upon -- or potentially provisional upon the parties engaging to seek to agree the types of redactions that would be satisfactory in this case.

One final point that Mr. Heaney would like me to emphasise is in relation to his role within the Talk Talk group. There are a number of units within the Talk Talk group, including a business called Opal, which is, to some extent, like BT Global Services. There is a residential business within the Talk Talk group which deals with residential customers. There is a wholesale business that is like BT Wholesale. There are a number of quite large and disparate parts of the Talk Talk group. Mr. Heaney's role is as Strategy Director in relation to all of them. He does not have the sort of day-to-day precise role that is being suggested in relation to particular businesses. He is group Strategy Director across all of those different aspects of the Talk Talk group.

THE CHAIRMAN: This point about the randomisation of the figures in the Carphone final spreadsheet - whether you are envisaging that only the cells for which BT can properly assert confidentiality should be randomised rather than everything in the tabs should be randomised? What do you say about that?

MR. PICKFORD: What we say about that is that we are not probably talking about sales so much as cost categories - because it is very unlikely that there is going to be an argument about this year's sell as opposed to next year's sell if we are generally agreed in relation to costs. Indeed, whole costs categories are something that we say, with sensible co-operation on both sides, could almost certainly be agreed. Indeed, our starting position is that we are happy to allow BT to say what costs categories it says are confidential because our key concern in relation to that particular model is to be able to analyse its structure.

Now, we cannot obviously commit ourselves to ruling out that there might be some disagreement between us about whether something is properly confidential or not, but we do not anticipate currently that we are going to be returning to the Tribunal in relation to that because we would hope it would be something that, with goodwill on both sides, could be accommodated - because we accept the principle that we are not going to see everything in relation to that spreadsheet.

Now, I do not think I can really commit Carphone Warehouse beyond that, other than that we do consider that this is something that is capable of being worked out sensibly and agreed between the parties - or at least between their experts possibly with the advantage of not having lawyers present. That might be conducive to reaching some sort of agreement.

Madam, unless I can assist any further?

THE CHAIRMAN: Than you very much, Mr. Pickford.

MR. WILLIAMS: Madam, there is one thing I should have said in my submissions. It is a very small point and a very short one. I have no right of reply.

THE CHAIRMAN: Speedily, Mr. Williams.

MR. WILLIAMS: The first point I should have made in connection with the undertakings is that when ... drew attention to the possibility of BT being in breach of the undertakings, I should have made the point on that which is that BT's concern is that in the absence of ...

THE CHAIRMAN: I understand.

MR. WILLIAMS: So, in terms of this application that is a consideration. I should make that point.

The other three points I wanted to make -- The first is in relation to the Annex 2 point. Just for clarity, I did mean to say - and I thought I did say - that it is the role of BT group to micro-manage BT Retail and BT Wholesale.

THE CHAIRMAN: I think we understand what your point is on that, and what Mr. Pickford's response is.

MR. WILLIAMS: The other very short point that I should have made is that it is not a satisfactory proposal as far as BT are concerned, for Carphone Warehouse's experts to take this away and sort the problem out. That is a point that I should have made.

Finally, in relation to the redacted version of the Output ... what I meant to say about that is that it was an issue which had somewhat fallen between two stools. We accepted that we ought to have dealt with it by now. We will take it away and make sure that we deal with it.

THE CHAIRMAN: Thank you very much.

I had hoped when we started out this morning that we would be able to deal with this today in terms of telling you what the result is. But, it has got rather late, and I think it is therefore unlikely that we are going to be able to do that.

But, there are other matters of a case management sort that we need to refer to. The first is, as I understand it, that we are in the process here of drawing up the order granting permission for the amendments to be made to the notice of appeal. There is also, as I understand it, a timetable around for the hearing of the non-price control matters. As far as dates are concerned, the Tribunal is considering fixing it for the week that was suggested - so, Thursday and Friday, 25th and 26th March with a possible date in reserve on 29th, although we would not be able to sit long into the afternoon on 29th. But, it is going to be that end of the week rather than the front end of that week.

Are there any other case management issues?

MR. PICKFORD: Madam, that reminds me. I think there is one outstanding issue in relation to the service by Carphone Warehouse of its reply on the legal framework for the appeal going forward to the Competition Commission. It is possible that we do not even necessarily have to serve such a reply any more because the Commission have said, "We would like skeleton arguments on the legal framework to be served in the New Year". We are quite happy to deal with it on that basis, to incorporate whatever we would say in reply in those skeleton arguments. Alternatively, we can still serve a reply in these proceedings, but I am not sure that any particular purpose is served in relation to that.

THE CHAIRMAN: Is it now the situation that Ofcom are content for you to serve a reply on the non-price control matters, because originally that was disputed as to whether that was appropriate?

MR. PICKFORD: In relation to non-price control, I am afraid I am not entirely sure what Ofcom's outstanding position is on that. My submissions were directed towards the price control reply where what we had proposed originally was that we would serve ----

THE CHAIRMAN: Yes. If you do not want to include that -- if you want to deal with that in your skeleton before the Competition Commission, that seems to make eminent sense. The question then is: if you are not lodging a reply in the Tribunal for the price control matters, is there anything that you want to lodge for non-price control?

MR. PICKFORD: Yes On non-price control matters we had proposed in the joint letter -- It came from Ofcom, but it was after Ofcom and Carphone Warehouse and, indeed, BT and Sky had liaised with one another. We proposed a timetable there in relation to the non-price control matters.

THE CHAIRMAN: Yes. So, 26th February CPW to file and serve a reply and accompanying evidence on the non-price control matters.

MR. PICKFORD: Yes. My apologies, madam. I had implicitly taken it from the approval of the hearing date that the steps leading up to that were also considered to be appropriate, but those are the steps that all of the parties propose in relation to non price-control matters.

THE CHAIRMAN: We will make an order in those terms. The dates that we will fix for the hearing of the non-price control matters will be 25th and 26th March, and at least the morning of 29th in reserve.

MR. PICKFORD: I am grateful, madam.

THE CHAIRMAN: One final point. Is it agreed, or have the parties had an opportunity to turn their minds, as to whether there is anything in the amendments to the notice of appeal that needs to tweak the questions that have been sent to the Competition Commission?

MR. PICKFORD: Madam, we sent a letter to the Tribunal, I think at the end of last week, saying that there were no amendments that were required. As I believe it, so did Ofcom.

THE CHAIRMAN: Good. Thank you very much everybody. We will be in touch in due course when we have made up our minds.