IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1151/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd June 2010

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS plc

Appellant

– v –

OFFICE OF COMMUNICATION

Respondent

- AND -

TMOBILE (UK) LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMTED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners

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HEARING (DAY ONE)

APPEARANCES

Mr. Graham Read QC, Miss Maya Lester and Richard Eschwege (instructed by BT Legal) appeared for the Appellant.

Mr. Javan Herberg and Mr. Ewan West (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for Vodafone Limited.

Mr. Meredith Pickford (instructed by T-Mobile (UK) Limited and Orange Personal Communications Services Limited) appeared for T-Mobile (UK) Limited and Orange Personal Communications Services Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for Telefónica O2 UK Limited

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G Limited

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THE CHAIRMAN: Good morning.

MR. HERBERG: Good morning. I appear with Ewan West for Ofcom in this application and I will introduce the serried ranks on my right. Graham Read QC with Maya Lester appear for British Telecom. Robert O'Donoghue appears for Telefónica O2, Meredith Pickford appears for T-Mobile and Orange. Tim Ward appears for Vodafone and Brian Kennelly for H3G.

THE CHAIRMAN: Thank you.

MR. HERBERG: This is Ofcom's deemed application to exclude certain parts of BT's evidence in support of this notice of appeal pursuant to the Tribunal's order of 13th May this year. It was referred to as a deemed application because, as I apprehend it the Tribunal was indicating at the directions hearing that it was not then taking a substantive view as to whether or not this application should in truth be viewed as an issue of the exclusion of evidence which was otherwise admissible under Rule 22 of the Tribunal Rules or whether, on its true interpretation of the jurisdiction of the Tribunal whether it should be regarded as a case where the evidence was inadmissible subject to any application to admit it under the Rules. The Tribunal was not taking a view on that as one of the fundamental issues before you, but it was effectively providing the parties with helpful directions, which is a consequence apart from anything else, means that it falls to me to make the application and therefore to go first on this hearing.

MR. READ: Sir, That is exactly right.

THE CHAIRMAN: I wanted to cut the Gordian Knot about who stood up first. Can I just raise the question about who stands up after you?

MR. HERBERG: This is what I propose to you next, sir, having talked to the parties. It seems to us that it would be sensible for the interveners in whatever order they so choose to follow me and then BT to respond to everyone together because the interveners with varying degrees of enthusiasm are supporting points that I make and indeed are advancing further points of their own tending in the same direction and it would then make sense for BT then to respond and need to respond to everyone together rather than having to get up twice.

THE CHAIRMAN: I see Mr. Read nodding, and that was certainly our view. Do the interveners have a batting order.

MR. WARD: I we at least have a partial batting order. I think the idea was that perhaps myself and Mr. Kennelly, on behalf of Vodafone and H3G would follow Mr. Herberg, because our submissions are somewhat similar to his and O2 and T-Mobile make some distinctive points

of their own pursuant to their own applications, and I think Mr. Pickford had indicated he was willing and able to go last.

THE CHAIRMAN: So we have H3G, Vodafone, O2 and T-Mobile

MR. WARD: Or Vodafone, H3G as the case may be.

THE CHAIRMAN: In that case I think we can go on to the substance.

MR. HERBERG: Sir, yes. There is another point which I was going to raise at the very outset as to the nature of this application. You may have seen it being referred to sometimes as a preliminary issue which BT profess some mystification and sometimes there is an application to exclude evidence. From our perspective we say there is no magic in the description and I am absolutely content as I indicated to you at the case management conference for it to be treated in form as an application to exclude evidence. We say, sir, that there is an important point underlying this, which is that the determination of the application we say turns not primarily on the Tribunal's exercise of its discretion to exclude evidence under Rule 22, the question of discretionary exercise of a power which you undoubtedly have to exclude evidence, although that may have a part to play. We say rather the determination of this application should depend on something much more fundamental, namely, the nature and ambit of the substantive appeal under s.192 of the Communications Act from a s.185 determination. At the heart of this application is effectively the question as to whether the appeal which you are determining is in the nature of a *de novo* hearing on the merits as BT contends or is something much more limited, an appeal on the merits from Ofcom's decision which falls, we say, to be judged not only against Ofcom's reasoning in the decision but also as against the arguments and evidence which were before Ofcom at the time, having been put before it by parties or having been found by itself. That is the basis on which the appeal on the merits falls to be judged, absent of course some good reason for a party to be permitted to make a fresh argument or to adduce fresh evidence pursuant to Rule 22.

We say that the true scope of the appeal is clearly crucial for a determination of this application. I will need to address that scope very carefully and I think perhaps I can anticipate it by saying that it may not simply be a choice between two different formulations, as I sketched out, the BT position and our position. There are a number of different gradations, we say, on a closer analysis, a number of different ways of characterising the scope which you will have to consider. We say that the true ambit can be derived from the Communications Act itself, from the empowering of the European Framework, to give the Framework Directive, and it is borne out also by the Rules. What I

propose to do is to deal with the principle at the outset before going anywhere near the determinations in this case or the evidence or anything of the sort.

Sir, I should indicate that we received the Tribunal's letter of 17th June, drawing attention, in that context, to s.192(3) to (6) and Rule 8. I had already referred to s.192 and we do say that is removal and in due course address that as being relevant to the nature of the jurisdiction.

One of the reasons, sir, why we say there was some appropriateness at least in phrasing this a preliminary issue, although the form does not matter, as I say, is that the Tribunal's decision is likely to have an impact beyond the immediate question of whether the particular evidence to which we object is admissible or not. It will have an effect, both in this case and of course potentially in other cases as well, on the nature of the arguments which can be brought to bear in seeking to overturn the Ofcom determination. Whether those arguments should be limited to arguments which are attacking Ofcom's decision by reference to what went on at the proceedings below, or whether an applicant can range wider without any constraint on what was argued below, and effectively open a *de novo* case as to why the decision should be different from the decision that Ofcom took. In this connection, sir, we have not sought on this application to attack BT's grounds of appeal. We have limited our formal application to the exclusion of evidence, because it appeared to us unnecessary to launch a separate attack to, as it were, strike out paragraphs of the notice of appeal. By far the greater part of the notice of appeal, of what is a very considerable document indeed, we say is a perfectly proper appeal from Ofcom's reasoning and from Ofcom's decision based on the evidence that was before Ofcom at the time, relying on material and arguments that were put to Ofcom by the parties.

There is a particular section of the grounds of appeal which you will no doubt have seen at s.116 to s.126 which clearly and distinctly goes much further than that, and it might be helpful at the outset, sir, just to turn that up. It is in bundle 1, the very first document, the notice of appeal. I will not at this stage go into the detail of it. It is in tab 1, it starts at p.52 of the notice of appeal. This is in the context – I will come back to the notice of appeal later – of an attack on Ofcom's Principle 2. What one there sees at the end of para.116:

> "Without prejudice to BT's contentions set out in sub-section (b) above that this placed an unfair on burden on BT, BT contends that Ofcom's analysis is flawed."

Then we have a heading "Benefit to consumers", and then is introduced a whole shaft of what is fresh evidence and indeed what is referred to as category two fresh evidence, evidence that was never before Ofcom at all at the time of the hearing below – never put to

Ofcom. What one sees at this stage is simply the introduction to this new evidence in para.118:

> "Each of these economists analyses the benefit to consumers from a different perspective. From each of these different perspectives, the answer is the same. NCCN 956 …"

this is the charge notice which introduced the disputed charges –

> "… far from being likely to increase the price that the 2G/3G MNOs charges callers to 080 numbers has in fact a clear incentive the 2G/3G MNOs to reduce their charges to 080 callers. The evidence analyses the issue in great depth and from many angles; but which ever way one looks at it through the prism of economic analysis NCCN 956 has an incentive to benefit consumers, and Ofcom's analysis cannot stand. BT will not seek to précis the details of their respective evidence on which BT fully relies, but will simply draw attention to one or two matters and then there follows the drawing attention to one or two matters …"

`in the other paragraphs in the notice of appeal which are, if I can put it this way, problematical. Leaving aside for now the question of whether this is a properly formulated grounds of appeal in those terms, and that is a point which the interveners are, as it were, taking the lead on and we see and agree with what is there said, but I am not going to develop that independently, my preoccupation is with the issue of principle. We agree it is not satisfactory but we have taken the practical position that if the evidence upon which this section of the notice of appeal relies is excluded then for practical purposes is going to fall too. That is perhaps so for two reasons, partly because of course there would simply be no evidence to support he argumentation in the notice of appeal, but also perhaps more fundamentally because it would, on our case, constitute an impermissible argument, it would be seeking to erect a ground of appeal against Ofcom's decision which was not based on what went on below – to put it crudely – and would be an impermissible ground of appeal.

That is perhaps an illustration of how the Tribunal's decision on this application is likely to have consequences beyond exclusion or admission of the evidence alone, and on the strength of that I would invite the Tribunal to ignore any siren voices which it may hear in the course of various parties' submissions that the Tribunal might want to, as it were, duck the issue of principle and determine whether the evidence should be admitted or excluded simply on the basis of particular factual reasons such as BT could not have got its act together earlier, it ought to be admitted on that sort of ground. Even if you are attracted by

such reasoning, and I will make submissions as to why you should not be, but even if you were we would still invite you to determine the issue of principle as to the nature of the jurisdiction. Apart from anything else it will, I anticipate, return to haunt you at the beginning of the substantive appeal because the first issue will be: what are the permissible grounds upon which BT can indeed attack Ofcom's decision? We say it is not going to be a question that goes away on this appeal.

There is one other issue which I wish to highlight at the outset. As you are well aware, and as indeed the parties' submissions highlight, an appeal from the determination of a dispute under s.185 to 191 of the Communications Act is only one of the decisions which feed into the appeal jurisdiction under s.192 to 195. I will come to the statutory provisions in due course, but just dealing with it as an issue of principle at this stage, there are a number of decisions which feed into that appeal process, and this raises the issue of whether your decision as to what is meant by an "appeal on the merits", which are really the crucial words in s.195(2)(5), whether that has implications far beyond appeals from Ofcom determinations and whether you should therefore be considering this question against a much broader backcloth than appeals from determinations.

Indeed, a similar question arises to the extent that you are considering the issue as an exercise of discretion to admit or exclude under Rule 22, because there there is of course an even wider range of decisions which feed into that discretion because, of course, Competition Act and other forms of appeal which have their own appeal routes will all be governed by the Tribunal Rules, and will therefore be susceptible to the same exercise of discretion.

Sir, for our part we invite the Tribunal to focus and say it is legitimate to focus simply on appeals from dispute determinations for present purposes. We do not accept that even where the wording is the same the ambit of an appeal will necessarily be the same in other cases; it may be but it will not necessarily be the same, still less appeals under quite different statutory framework such as those under the Competition Act, even if the formal rubric of the wording "appeal on the merits" is the same. There may well be arguments as to why the same wording "appeal on the merits" can have different content in different circumstances, and I will in due course take the Tribunal to both the European Framework Directive which emphasises that point where it refers to the requirement for the appeal to duly take into account the merit – it is a context dependent test we say. We say that there are particular factors applicable to dispute determinations and again I will be coming on to this, in particular a legislative intention that there be a speedy streamlined dispute resolution

procedure to be determined by the frontline regulator in a time limited period. There are those features which make it particularly desirable and important that that process is not to be subverted or frustrated by *de novo* extended appeal process.

There is a huge importance, we say, in not turning appeals from this limited speedy process into major trials where, even in a case like this one can see we, and the interveners potentially, would have to commission new expert evidence, address new arguments and effectively expand the ambit well beyond the ambit as it was at the time of the determination below. For those reasons we submit that there are potentially distinctions between the appeal under this statutory provision and appeals from other determinations. The Tribunal does not, we say, have to be concerned – provided it makes its views clear – that there will be unintentional consequences for other types of appeal. It will be for another day for the Tribunal potentially to consider the extent to which what it finds to be the true ambit in this case is applicable in those other cases as well.

We will say, again to pre-figure what is coming, that cases under, for example, the Competition Act are really of little relevance or use here at all because the statutory context is so different. We will, of course, refer to some decisions which relate to appeals from other Ofcom decisions because the dicta there may be of relevance here because we say we are likely to be *a fortiori* because the case is strongest, we say, on dispute determination appeal because of the nature of the process below, because of the speedy process; there is an added importance in not subverting that process, and therefore it is the strongest case for arguing for a limited merits appeal. So if we can rely on other cases from other decisions where the same point is put, or there are helpful dicta that is of relevance from our point of view. It works in that direction, it does not work the other way, we do not say: "This decision determines those jurisdictions".

Sir, you expressed a hope at the case management conference that it might be possible to address the issue of principle only possibly therefore, as it were, leaving it to the parties to determine what flows from that in terms of admissibility. We agree that the issue of principle is primary, clearly, and will provide we hope important guidance as helpful guidance as to the ambit of the permissible evidence both in this case and in other cases where there is certainly a need for it. But notwithstanding that, we do apprehend that it is necessary to look at the facts, in other words at the nature of the evidence and the circumstances in which it came to be adduced in order to address various arguments which BT makes as to why, even if in principle the appeal jurisdiction is limited as Ofcom contend, nevertheless the evidence in this case, or some of it, ought to admitted for specific

admissibility reasons. Although this is an application to exclude, if we reach that stage, effectively we are looking at reasons for admission because on the hypothesis that we are right about the appeal jurisdiction this would, in principle, be evidence which was outside, irrelevant, not to be included, but BT would contend that there are specific reasons why evidence in support in these circumstances be admitted. As you will have seen, for example, BT contend that they could not have anticipated that the issues to which the evidence goes were in play until a late stage. They could not have put it in time. Ofcom ought to have perhaps extended time to allow the evidence to be admitted, the category 1 material at least. Certain evidence was only appreciated to be relevant even when the final decision was promulgated.

We do not accept the case that BT makes as to any of those propositions on the facts, but we do accept that in principle those might – might – be good reasons for the Tribunal to exercise its Rule 22 power to admit fresh evidence. We do not have a fundamentalist attitude that once the bar is down we have never put our case this way. Once the bar is down at the end of Ofcom's process, there can under no circumstances ever be the admission of new evidence. What we say is that the grounds for admission of new evidence in those circumstances will look very like the normal court grounds on a normal appeal, *Ladd v. Marshall* type grounds. If there is genuinely new evidence which a party could not, with reasonable diligence, have put in below, something they were genuinely taken by surprise in the final decision that had never been revealed, or something which they knew about so late that they simply could not get it together, or if there was a wrong decision by Ofcom not to find exceptional circumstances and to extend time, then all those might, in an appropriate case, we accept be grounds for allowing fresh evidence on an appeal.

So, conscious as I am of the danger of being sucked into a minute dissection of the evidence itself, which I shall not even attempt, nevertheless I have to address to some extent the nature of the procedure during this determination, what took place, what happened and when, and you will have seen there are two statements now, one from Mr. Buckley on behalf of Ofcom, and one from Mr. Fitzakerly on behalf of British Telecom about procedural issues, and I will need to address those shortly. What I will seek to do is to identify what we say are clear grounds on which BT's arguments fail. I am not going to take every single point that has been canvassed in the evidence. I am going to try and deal with it relatively briefly when I reach that stage.

Our case will be, just to prefigure that stage, that BT knew from, at the latest, the date of the draft determination, as indeed they accept, that the scope of Ofcom's determination, what

Ofcom was proposing to determine, included the fairness and reasonableness of BT's actual charges, as set out in NTCN 956, and from that time at the very least, even if not before, BT knew that it could be relevant if it chose to adduce specific evidence to make specific arguments as to the impact of those charges. We say it could have done so within the time that Ofcom allowed it, the extended time that Ofcom allowed it, for submissions and for adducing evidence. It did not do so, it put in some very limited evidence two days before the final determination which Ofcom was right to exclude or not to accept. It put in further evidence only on this appeal, which was, we say, too late. It could have been done earlier. That is the basis on which, on the facts essentially, we will be saying that the evidence should be excluded, should not be admitted.

That is a relatively, as it were, lengthy introduction, but I thought it might be helpful to let the Tribunal know, as it were, where I was going and the ambit of the arguments as we see them.

Can I turn, against that background to the legislative framework. What I was going to do is address the legislative framework, both domestic and European, first and make my submissions on that before, later on this morning, turning to the facts of the particular case.

The starting point, and you will no doubt already have seen this and I will take it relatively briefly, is the dispute provisions in s.185 to 191 of the Communications Act, which is in the first volume of the authorities bundle at tab 3, or indeed the handbook if you prefer that source. The starting point is s.185, which is at the beginning of Chapter 3 dealing with disputes. What one sees there at 185(1) is that this section applies to a number of disputes, but in particular it applies to disputes between different communications providers, which may be referred to Ofcom where they relate to a provision of network access. It is common ground that the appeal falls within 185(1), that this is a dispute under that provision.

Section 186 provides that on a referral Ofcom's first task is to determine whether it is appropriate for it to handle the dispute at the state of jurisdiction stage.

Then 187, legal disputes about referred disputes, makes plain that the referral of a dispute does not oust legal remedies. If ordered, Ofcom must stay its dispute resolution procedure in accordance with a court order, 187(3), but subject to that Ofcom's procedure continues subject to court orders staying the proceeding.

When Ofcom accept the dispute, it is then resolved in accordance with the procedure set out in s.188, "Procedure for resolving disputes". The section applies where it has been accepted that it be referred back. Sub-section (2):

> "OFCOM must –

(a) consider the dispute; and

(b) make a determination for resolving it."

So it is a mandatory jurisdiction for Ofcom to determine. Then (3):

"The procedure for the consideration and determination of the dispute is to be the procedure that Ofcom considers appropriate."

This is a provision that I will come back to, but it obviously, on its face, gives a very wide and untrammelled discretion to Ofcom as to the appropriate procedure to follow in these particular cases, and it is a theme of the dispute resolution procedures that both under the domestic and, even more so, as we will see under the European legislation, Ofcom must give an absolutely wide discretion as to what procedures it follows.

Then importantly sub-section (5):

"Except in exceptional circumstances and subject to section 187(3), OFCOM must make their determination in no more than four months after following day …"

Effectively here we are dealing with a date under (a), the date on which Ofcom decides a dispute is admissible. There is a four month, except in exceptional circumstances, which is the phrase, time limit and sub-section (6) makes plain that even that time limit is a long-stop:

"Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable."

There is an obligation to get on with it as fast as possible, subject to a long-stop of four months, a very tight and demanding timetable in many cases.

The power is available to Ofcom in determining how referred disputes should be resolved are limited to those contained in s.190.

"(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section."

Then under sub-section (2) the main power in most cases, except in spectrum cases, are the powers set out under 2(a) to (d), they can make declarations, give directions fixing terms and conditions, give directions imposing obligations:

"… enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and (d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge [which has already been paid] to give a direction enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment."

So wide powers affecting potentially very important commercial interests of the parties to the dispute.

Further, under (6) it may also that costs and expenses be paid by one party to another incurred by the party in connection with the dispute. Ofcom, under sub-section (7), cannot recover its own costs save where the reference of the dispute was frivolous or vexatious, or the party has otherwise abused the right of reference.

The determination made by Ofcom, under sub-section (8) binds all the parties to the dispute.

Section 191, which I do not need to take you through in detail, sets out Ofcom's power to acquire information in connection with the dispute from the parties or indeed from third parties.

Then we reach 192, which is the right of appeal which, if I may, I will come back to in due course. I am going to address, first of all, the nature of the determination process before coming to the appeal from the determination.

Sir, as you will no doubt also have seen, this dispute resolution procedure which I have outlined in s.185 to 191 is the domestic implementation of certain obligations contained the Framework Directive, which is of course the principal directive of the Common Regulatory Framework. Can I take you briefly to those obligations which were clearly being implemented by way of that dispute resolution procedure.

The Framework Directive is at tab 6 in the first authorities bundle. It is worth noting – I do not need to take you to the recitals – Article 1, para.1, the scope and aim:

> "The Directive establishes a harmonised framework for the regulation of electronic communications services … It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community."

Article 3 sets out requirements relating to the national regulatory authorities themselves, to which I do not need to take you. I am going to go straight forward to Article 20 a few pages further on which refers to "Dispute resolution between undertakings, and provides:

> "In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in

> exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority."

So we have there precisely the self-same requirements for a four month determination as the long stop, faster than that if possible, except in exceptional circumstances, translated right through to the domestic legislation.

In Article 20(2) the Member States are allowed to make provision for the national regulatory authorities to decline to resolve a dispute through a binding decision only in the specific circumstances, and one sees at the end of that paragraph where it comes back the requirement to resolve in the shortest possible time frame and in any event within four months.

Article 20(3):

> "In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives."

There is a requirement to give a statement of reasons in paragraph 4.

Article 8 I do not need to take you to in detail, but it includes the list of policy objectives and regulatory principles, I do not think they directly arise on this application. What I should show you is Article 6, this is headed "Consultation and transparency mechanism": "Except in cases falling within Articles 7(6), 20 or 21", so it accepts the dispute resolution procedure that we have just been looking at does not apply to that.

> "Except in such cases … Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives which have a significant impact on the relevant market they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure that the establishment of a single information point through which all current consultations can be accessed."

So what is significant and what the parties in their skeletons have drawn attention to is that the mandated dispute resolution procedure contained in 185 to 191 is not subject to any community procedural requirements as to the obligation to consult interested parties at all within a reasonable period or at all. We say that that reinforces the nature of this procedure (s.185 to s.195 procedure) as being a time limited expeditious process under both

Community law and domestic law, it is an unusual procedure, one that has to be carried through, not only within a particular time frame, but we say therefore has consequences for the nature of the process which Ofcom can legitimately follow in making its determination. I should make it absolutely clear at this stage we do not say that Ofcom either does or could decide on the strength or the absence of Community obligation to offer no procedural rights whatsoever to parties to a dispute determination. That is obviously not the case and we will see in due course the nature of the consultations which took place in this case, including the provision of a draft determination for parties to comment on. There might well be real problems from other quarters were Ofcom to decide that it could happily simply make its determinations without consulting the parties at all, there might even be Article 6 problems if there is an Article 6 procedure. There could in domestic terms be procedural fairness allegations, and Ofcom has got well established procedures for ensuring the parties are consulted and are properly consulted in relation to dispute resolution procedures. The point which BT seek to make on the strength of that provision which is that if there are no procedural guarantees given, or guaranteed by the Directive in respect of Ofcom procedure, there must be extra super procedural guarantees at the appeal stage because otherwise there is going to be a terrible injustice. We say that simply does not bite, and the point is very much in the opposite direction. The point is that the legislation is defying any mandatory obligations in respect of the Ofcom procedure, because it is meant to be a short, time-limited fast procedure, and that procedure will be entirely subverted, I am going to be submitting to you, were there to be the availability of a *de novo* appeal, which effectively rendered nugatory the first instance procedure, the parties could wait until appeal before setting out their case and arguing at length on appeal with no time limits, with no restrictions as to how far they could venture in terms of their argument. It would subvert the procedure which is laid down and guaranteed in the Directive.

BT's argument that here must be a strong right of appeal because there is the absence of procedural safeguards at first instance simply does not operate because even within the principles which I say should apply, the scope of the appeal which I say should apply, there is always scope for fresh evidence to be admitted, or fresh arguments to be permitted to be made, if the justice of the case demands it, and one of the examples I have already given is a case where a party is genuinely and seriously substantially adversely taken by surprise by something which emerges in a final determination which they have not had a right to be consulted on. *Ex hypothesi* if you had a situation where there was no consultation at all that may well be a case where, in the exercise of discretion the Tribunal would want to admit

fresh evidence. There is no need to change the nature of the appeal jurisdiction to be wider in order to accommodate that sort of concern.

THE CHAIRMAN: You may be coming to it, Mr. Herberg, but how would the Tribunal on your approach deal with the situation where one has for instance the Buckley statement saying one thing and the Fitzakerly statement saying another about "I was taken by surprise" to take BT's point, there is obviously a dispute of fact there. How would that be resolved in order to determine whether exceptional circumstances exist to admit the evidence?

MR. HERBERG: I hope that I will be able to, as it were, sidestep actual differences of fact in what I am going to invite you to rely on to proceed on, but if necessary the Tribunal has to look at what passed between the parties to decide whether BT was indeed taken by surprise or not. There is an issue as to the extent to which BT was at certain stages taken by surprise, and what the Tribunal can do is look at what BT was told, what it was notified of and make an independent decision as to whether or not it was properly taken by surprise or not. It is not this case but there might be a case where there was an allegation there was a factual conflict of something that was told orally and theoretically there would actually be, as it were, a primary dispute between two witnesses but that is going to be very unusual. Normally it is going to be a question of submission as to whether or not the Tribunal is satisfied that a party was taken by surprise or not, and that will be part of the basis for the exercise of, we say, a Rule 22 discretion whether or not to admit or to exclude evidence, because that discretion has to be exercised on the basis of fact which are confined, if there is a dispute as to fact there may well be a need for factual adjudication. The way I have directed myself, sir, the way Ofcom is going to put its case to you is that it is trying to identify clear grounds on which the evidence should not be admitted. I am not going to pursue uphill and down dale every dispute and as I will develop a little later there are some aspects on which I am going to say give BT the benefit of the doubt, and in particular I am going to say that for the purposes of this hearing – not for the full Tribunal – let us assume that until the state of the draft determination was sent to BT it did not have proper notice about the scope, so there is some argumentation in my skeleton which I am not going to pursue in the light of BT's skeleton and the witness evidence it has served claiming that it did not know about the scope, and indeed there is a substantive issue as to the fourth ground of appeal, that may well be an issue at the full Tribunal. I am not going to invite the Tribunal to pre-judge that full ground of appeal and to launch into a minute investigation of what it knew before the draft determination, I am going to try and anchor my case for

exclusion on a stage when it is absolutely clear that they did know what Ofcom was proposing to do and therefore could have responded to it.

THE CHAIRMAN: Thank you.

MR. HERBERG: Sir, the Tribunal has previously considered the nature of the dispute resolution procedure and the requirements of the Framework Directive in this regard. In the decision in the case of *T-Mobile v Ofcom* the TRD judgment, can I take you briefly to that judgment, it is in the second bundle of authorities at tab 23. I do not need, for present purposes, to take you to the facts, I think you are probably well aware of that judgment, I am sure it has been cited to you on a recent occasion. What I will do is take you straight to the relevant passage which is at para. 105 of the judgment on p.47. In essence here the Tribunal is considering, it was not asked to resolve the matter which is now before you, sir, but effectively here the Tribunal is commenting on the dispute resolution procedure:

> "The Tribunal recognises that there is a risk that although all the appellants accepted that the dispute resolution procedure is meant to provide a quick answer to the dispute, parties to the dispute may be tempted to swamp Ofcom with the same level of economic and accountancy information that they generally provide in market reviews. This could prevent Ofcom from complying with a time limit set for the exercise of this function. There are a number of answers to such a concern."

Then the Chairman goes through some of those answers, which are not relevant here, but towards the end of the paragraph she comments:

> "The need to avoid Ofcom getting bogged down in arguments about how to measure costs was raised by the Tribunal with the parties during the hearing. The Tribunal expects parties to future disputes to behave responsibly and be realistic in their expectations. Similarly, we expect Ofcom to adopt a firm stance with the parties as regards the information it seeks and receives during the course of the investigation."

We accept that a firm stance is what we took in this case in not accepting information received just before the four month deadline, two days before the four month deadline from BT, namely the Category 1 material, and excluding it. And we say that, obviously, exceptional circumstances have to be considered, the exceptional circumstances have to be exceptional; and it is absolutely vital, as the Tribunal recognised in the TRD judgment, that those types of measures are applied where appropriate in order to avoid the Ofcom being swamped and the procedure being bogged down.

Indeed, in that case all the parties on the TRD appeal, who of course included all the parties to this appeal, all agreed that the s.185 procedure was intended to provide a relatively swift and certain solution to disputes between the participants in this sector -- that is at para.81 of the judgment, we do not need to go to it, but the agreement is there recorded – a relatively swift and certain solution to disputes between the participants in this section. Indeed, BT itself recently conceded that the procedure was not merely meant to be a swift procedure but a basic procedure. This is an even more recent decision of the Tribunal which you, Mr. Chairman, were hearing in the partial private circuits' preliminary decision, BT and Ofcom. That is, if I can very briefly again just take you to the relevant paragraph to save time, is in tab.29.

MR. READ: If it helps my learned friend, we do not in any way derogate from that submission in this case either, so he can take you to whatever authority he wants, but I would not want anyone thinking that BT is changing its position in this appeal in this application.

THE CHAIRMAN: No, I did not think BT were. But it may enable you to take it more quickly Mr. Herberg.

MR. HERBERG: I am grateful. It will be a fairly rapid change given the reasons that they were, and it is simply BT contended that the dispute resolution procedure was intended to be a swift and basic procedure not suited to certain types of disputes, particularly historical disputes, and of course the debate there was whether historical disputes were included or not, and that is not relevant here. But there was the recognition that it is not only a swift procedure, but it is also a basic procedure, and "basic" has, can have a number of different attributes, but one attribute we say it does involve is that there is a certain measure of streamlining and a certain measure of the parties having to focus on the absolute necessities and essentials; and deal, also deal, with points put to them in the same spirit. As long as the parties are aware of what the fundamental matters of concern are when they were there they were expected to deal with that fast, rapidly, and come back with arguments and indeed evidence, in a timescale that might be rather shorter than they might be comfortable with, or might ordinarily be used to in other forms of litigation, and that is we say what was perhaps missing from BT's approach in this case. But I will come on to that when I come on to the facts. So, we say that it is clear that the objective of what is a rapid and procedurally informal dispute resolution procedure was not predicated on the assumption that all of these disputes would be small or straightforward. This was not a procedure which was meant to be simply fitting easy cases. It is obvious that such decisions, as in this

case, will frequently be complex ones and, of course, of very considerable commercial interest to the parties involved.

We suggest that notwithstanding that, the community legislature appreciated the over-riding importance of a speedy procedure and was prepared to sacrifice full extended procedural and indeed participatory rights to that end. Consequently, we say Ofcom's procedures must be designed to fit within the contemplated timescales. It affects not merely the depth of scrutiny investigation, but it affects the – by way of substantial constraints – the parties' to file arguments and evidence. As I have already said, it is not the case the parties are without procedural rights, but they are rights to be exercised expeditiously and, importantly and specifically, it is significant the time can only be extended in exceptional circumstances; and we say that a case is not exceptional merely because it is complicated. There are likely to be a lot of cases, a majority of cases, under this procedure which are complicated cases, be true of many or most cases. The requirement of exceptionality, which is a mandatory requirement in the Directive as well as in the Act, is looking for something, is permitting Ofcom to extend the time for four months only where there is something genuinely significant which requires that to happen, which will not be true in most cases.

So, even before examining the appeal provisions, we say it is obvious that a general and unrestricted right of appeal de novo, without time limits, would utterly undercut this tightly drawn scheme. There would be simply no point in placing limitations both on procedural entitlements of the parties and on timing at the Ofcom stage if a party could simply in effect cock a snook at that entire process and develop a new case with new evidence or with new arguments on the appeal. If they could do so, it would clearly have the effect of making the Tribunal the primary decision maker, and it would have the effect, we say, of rendering meaningless Ofcom's expedited investigative procedure. And we say also there is a strong argument that it would frustrate Ofcom's obligations as the national regulatory authority under Article 20, because as you recall, there is an obligation to ensure a speedy and effective dispute resolution procedure, and a dispute resolution procedure which had an untrammelled appeal right which clearly did not begin to, as it were, adopt the same approach as the decision below, which effectively allowed a new de novo hearing without any of the time limits or restrictions below would be undercutting that Article 20 obligation.

So, we say before we even get to, reach or look at the appeal provisions, it would be very surprising indeed to find that what is allowed is a wide right of appeal de novo or semi de novo allowing new evidence, new arguments without time limits. It would be surprising to find that this was required by the framework Directive or to find that it was permitted or

required by the Communications Act; and of course we say that it is not and we turn to the rights of appeal.

Can I then turn to those rights of appeal to address that directly. That means going back to the Act itself and to s.192 in tab.3 if one is working from the Act. Section 192 is headed "Appeal against decisions by OFCOM, the Secretary of State etc". A decision applies to the following decisions, a number of decisions, will include:

"(a) a decision by OFCOM under this Part", and that is obviously the dispute resolution procedure.

> "(2) A person affected by a decision to which this section applies may appeal against it to the Tribunal. (3) The means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules".

So, it is mandatory that the means is by the notice of appeal.

> "(4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules".

So one sees immediately a linkage in (4) between the notice of appeal specified, I am sorry, in relation – I am sorry, I think that is a bad point, this is purely a timing point, in relation to the decision appealed against in those rules in setting up the time for appealing. But:

> (5) The notice of appeal must set out –
>
> (a) the provision under which the decision appealed against was taken; and
>
> (b) the grounds of appeal.

And subsection (6) elaborates the grounds of appeal:

> "(6) The grounds of appeal must be set out in sufficient detail to indicate –
>
> (a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and
>
> (b) to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM, by the Secretary of State or by another person".

And I will come back in a moment, if I may, to (6) we do say that is a relatively significant provision in seeking to elucidate the nature of the appeal.

THE CHAIRMAN: Are you going to be dealing with the words in subparagraph (3) in accordance with Tribunal rules, that seem to add additional meaning to the words "A notice of appeal"?

MR. HERBERG: Yes. What it requires, as I apprehend it, it is that the note that the substance of the notice of appeal, what can be included in the notice of appeal may be determined in the rules, and I will in due course come to the rules in a moment as to what they do require in

this case. But, perhaps as a matter of principle it is – you are right to draw my attention to it, and we would submit that it is perhaps noticeable that the Act envisages giving a power in the rules to, as it were, condition the notice of appeal and, as it were, the ambit of therefore what may be appealed against.

THE CHAIRMAN: Yes indeed. You mentioned a couple of times the absence of time limits, but it struck me, looking at the Tribunal rules, and particularly rule 8, that there was a time limit on the notice of appeal contained in the 2003 Tribunal rules, namely the two month limitation on when a notice of appeal needs to be filed here after a decision has been promulgated.

MR. HERBERG: So, yes, so there is – that time limit is there. I mean, it is quite clear the appeal, the length of the appeal process, is going to be longer than, put it that way, than the length of the determination below, because that is two months to get the thing on the road, as it were. There were then no time limits as to what happens thereafter. So, it is absolutely clear that, as it were, the appeal process is not going to be as speedy as the decision below. But what that does not do is go to the substance of what is required, as it were, what the decision is permitted to re-open on the appeal; and that is, we say, the central question. So, I accept that there is indeed that time limit in the Tribunal rules, and indeed there could potentially be, as it were, different time limits. It is left by the Act to the rules to specify that.

And then, of course, importantly, if I can turn to s.195 and come closer to the centre of what the issue on this preliminary issue:

> "The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
>
> (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.
>
> (3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
>
> (4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision".

And, of course, the central decision is, 195(2) is the extent of the Tribunal's obligation to decide the appeal on the merits.

Can I, sir, turn to the community right which is being here implemented again, and take you shortly back to the framework Directive which is Article 4 of the framework Directive, again, back in tab.6. Article 4 provides that:

> "1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise".

I draw attention to the reference to the "effective mechanisms" in the opening words, ensuring that effective mechanisms exist at national level and an effective appeal mechanism thereafter in the last part of that paragraph. I suggest that effectiveness must be measured not purely by reference to the appeal process considered in the abstract, but also by reference to the entire decision making process. So that an appeal process which stultified or rendered meaningless or otiose the decision making process from which it constituted an appeal would not be one which was effective. So this is an obligation which, of itself, it requires one to look at the process overall.

The second significant feature of this requirement is that the merits are to be duly taken into account, and again we say the word "duly" is significant. Due account of the merits is not necessarily a full rehearing of the merits. "Due" means to the extent appropriate in the circumstances. We say the extent to which the appeal body should take account of the merits must therefore be influenced by wider considerations most obviously to ensure that overall the objectives of the decision making process, as laid down by the Framework Directive are respected.

The Tribunal has noted the use of the word "due" and interpreted it, we say, in that way in a Tribunal case, *T-Mobile v Ofcom* and *Telefónica v Ofcom* [2008] CAT 15, which I think is tab 24 in the bundle, if I can take you shortly to that, sir. This was a challenge to the auction of spectrum bands. The issue was that the jurisdiction of CAT to hear the appeal or whether judicial review was the appropriate route. At para. 75 the Tribunal commented on the Article 4(1) requirements:

> "There are many different kinds of decisions taken by a national regulatory authority under the Community Directives. Ofcom argued, and we agree, that the fact that Article 4(1) requires the merits to be "**duly** taken into account" indicates that the level of scrutiny required may not be the same for all decisions covered by the Article. Thus Ofcom did not put their case so high has to argue that the right to judicial review would have been an adequate implementation for all decisions covered by Article 4 (although they did not concede that it would not be). Mr. Pannick, for O2 accepted that the degree of scrutiny involved in an appeal on the merits might also have some flexibility so that not all appeals to the Tribunal from decisions falling within Article 4 would necessarily be treated in the same way. The difference between the parties is that the appellants maintain there would be a substantial and important difference between the test applied in the review by the Administrative Court and an appeal on the merits before the Tribunal. Ofcom contends that given the nature of the decision under challenge there would in effect be little difference between an appeal conducted in the Administrative Court adopting a flexible judicial review standard and an appeal conducted by the Tribunal adopting an appeal on the merits which accorded with the appropriate margin of appreciation to the regulator."

Furthermore at going back to para. 72 – I should have read this first, I apologise:

> "Similarly we do not agree that the requirement that the appellate body must take the merits of the case duly into account should be interpreted as indicating that only an appeal on the merits of a kind conducted by this Tribunal is adequate. It is not right, however, to use those words in Article 4 as conferring a right to a full merits appeal."

So this case went on appeal to the Court of Appeal and for a different purpose I will refer to the Court of Appeal decision in a moment, but this part of the decision was not called into question.

As I read it, there was a faint suggestion in BT's skeleton that the right of appeal under domestic law might be wider than that required by the Framework Directive, even if the Framework Directive requires the merits only duly to be taken into account may be the domestic law position is, in a sense, gold plated, that an appeal under s.195 is more far reaching, gives wider discretion than is required by the Directive. I am not going to deal with that in any detail now, I will wait to see if it is, in fact, suggested. If it is we do say that it is a submission that cannot be right. First of all, there is simply no evidence that

there was any intention to gold plate the Community requirements, this was an exercise of transposition, but we say it is worse than that. If what s.195 did was to allow a full *de novo* merits appeal that would, as I have already suggested, actually conflict with the obligations under the Framework Directive, it would prevent an effective mechanism; it is not a case of "gold plating" it would actually bring the domestic legislation into opposition with the Directive.

Also, any such suggestion would be contrary to the view of the Tribunal in *T-Mobile v Ofcom* [2008] CAT 12 at para. 81. Again, I think I can take you straight to the passage in the case where the Tribunal dealt with this issue, which is at para. 81 of that decision in tab 23 of the second authorities bundle. Picking it up perhaps at para. 80:

> "Ofcom accepts, as it must, that the Tribunal's jurisdiction in this appeal is to determine the issues 'on the merits' in accordance with s.192 of the 2003 Act. However, they argue it is inappropriate for the Tribunal to allow a complete opening up of the subject matter of the disputes going beyond the confines of the matters that have been raised by the parties in the course of Ofcom's investigations of these disputes. Moreover, Ofcom says, the Tribunal should be 'slow to interfere' where errors of appreciation are alleged as opposed to errors of fact or law."

Sir, you will see the first of those two submissions, before the "Moreover" is very close if not the same as the issue that is being ventilated here today. Sadly, there is no clear decision in this prior case, the issue was not effectively resolved. The second question is slightly different, the question of slowness to interfere where areas of appreciation are opposed. What one does see at para. 81:

> "The Tribunal notes that its jurisdiction to consider these appeals on the merits is conferred by the statute in order to implement the requirements imposed on the United Kingdom by Article 4 of the Framework Directive that there should be an effective appeal mechanism against decisions by Ofcom. The Tribunal recognises – and indeed this was common ground among the parties – that the s.185 procedure is intended to provide a relatively swift and certain solution to disputes between the parties in this sector."

So the Tribunal there was recognising that this was simply an imitation of Article 4 of the Framework Directive. We say that any suggestion that s.185 or s.192 should be interpreted in some way as given differently and more extensive appeal rights than was contemplated by the narrative.

Sir, Article 4 of the Directive was also examined by the Court of Appeal in a perhaps significant commentary in the *T-Mobile v Ofcom* appeal from the spectrum decision which I referred to you some moments ago, and that is in tab 28 of vol.2 of the authorities. The issue here, as I say, was whether judicial review could provide the necessary appeal rights where the merits of the case are duly taken into account in Article 4, whether it complied with that obligation. So it is a different issue from the issue for this Tribunal. In the course of finding that judicial review could, indeed, fulfil the necessary requirements of the Article, Lord Justice Jacobs, speaking for the Court of Appeal, commented more widely on Article 4. One sees in particular his comments at Article 31 which have been widely quoted in various parties' skeletons, which we do attach weight to. He said:

> "After all, it is inconceivable that Article 4 in requiring an appeal, which can duly take into account the merits requires Member States to have in effect a fully duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator has something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision."

It is true, as British Telecom points out, that the decision in that case did not involve the dissemination of a dispute, so it was not focussing on the same line of appeal as we have in this case in looking at Article 4, but we say that it is clear that the Court of Appeal's words were of general application. Indeed, we say they were of specific application to the s.185 jurisdiction because if there is one area above all where the warning against a fully equipped duplicate regulatory body should resound loudest, it is in relation to the speedy and basic procedure required by Article 20 and implemented by s.185 and s.191. So the point that this was not a determination case while true does not assist BT. It is absolutely clear that the interest and the importance of Article 4 not requiring that appeal, applies, if it applies anywhere, in precisely this situation.

THE CHAIRMAN: But was not Lord Justice Jacob here looking at what others term "the margin of appreciation"? In other words, when one is looking at an appeal from a Regulator, one should not seek to, as it were reinvent the wheel, leaving that to the Regulator. What one needs to do is apply a broader brush, and is that not what he means when he is saying that one should not have a duplicate regulatory body in the wings?

MR. HERBERG: Sir, I would say it goes beyond that. I say that that is certainly one of the consequences of the fact that one should not have a duplicate body in the wings, this is

meant to be an appeal body and no more. One of the consequences is that there will be limitations on, as he then says in the last sentence of the passage, "the overall value judgment based on competing commercial considerations may be very hard to attack". That is one of the consequences of there being an appeal body which is not hearing *de novo* appeals and is not a duplicate regulatory body waiting in the wings. But, I do say, that the point is a freestanding point and will have other consequences other than the intensity of review, it will have effect for the width of review, what issues should be taken on the appeal. We say that in the same way as if you allowed overall value judgments to be retaken without any constraints it would lead down that slippery slope towards a fully duplicate regulatory body second guessing the first instance decision maker. In the same way if you allow new arguments and new evidence to be put on the appeal which have not been put below unconstrained then again you will go inevitably down this slope to a fully eclipsed duplicate regulatory body because parties will know that they do not have to put arguments at first instance, they can raise them for the first time on appeal. You will effectively become a primary decision maker. You will clearly be a primary decision maker in respect of those arguments that were not put below and you, therefore, we would say, fall into the position that Lord Justice Jacob was deprecating. So we say his words are clearly capable. Obviously, what he may have had in mind, the particular vice that he had in mind was the question of whether judicial review or appeal was the correct remedy which was the intensity of review, but the point is of general application.

PROFESSOR STONEMAN: Can I take you back a little way? There is clearly guidance on how long a disputes resolution procedure should take – four months?

MR. HERBERG: Yes.

PROFESSOR STONEMAN: Is there any guidance as to the resources that should be put into that procedure? So, for example, one might expect that if more resources are put in then the draft determination would arrive earlier than if less resources were put in. So can you give us any guidance on that?

MR. HERBERG: Sir, there is certainly no formal guidance. Clearly, given the importance of these matters I am instructed they are treated as a priority and because Ofcom is required under the statute to complete the task within four months and is indeed required to do it quicker than four months if it is practicable to do so – "practicable" being a strong word. Ofcom has to deploy adequate resources to ensure it is discharging those heavy obligations upon it, so that would inevitably mean that when a dispute resolution comes in Ofcom has to, as it were, if necessary drop other tasks and resource this task because it is not a task that

can be put off. It would not be exceptional circumstances I would venture to suggest, for Ofcom to say: "We are rather busy at the moment, we cannot do this one but in four months we will take longer over it." So they are given a high priority I am instructed and that would be, I would say, consistent with the statutory framework which requires not only this four months, but requires it to be done faster than that if it is practicable. There is no formal encapsulation of that. It will be difficult in a way for it to be encapsulated because every case will depend on the merits as to how big it is, as to how much resources are needed.

PROFESSOR STONEMAN: So basically it is an administrative decision ----

MR. HERBERG: Sir, yes.

PROFESSOR STONEMAN: -- as to how it is resourced?

MR. HERBERG: Yes, and I say that is effectively inevitable, yes, sir. Coming back from the requirements of the Framework Directive to the domestic legislation we say that the requirements in s.195(2) that the appeal be decided on the merits is not to be interpreted purely by reference to concepts of domestic law, but rather purposively to accord with the scheme of review that the UK is required to implement pursuant to Article 4(1) of the Directive. The Tribunal must take account of the merits but are not required to conduct a full merits review.

We say further that in any event sections 192 to 195 themselves support a limited conception of the appeal on the merits. The Tribunal is required to determine the appeal by reference to the grounds of appeal set out in the notice of appeal (s.195(2)) and the latter part of that limb is, we say, in part an expression of a procedural requirement, namely that the Tribunal can only take into account matters that are set out in the notice of appeal. It has another significance. It is clear that the notice of appeal is intended to be directed, we say, to the determination made by Ofcom and therefore to the alleged flaws in Ofcom's reasoning and conclusions. Section 195(2) makes clear that the appeal is not free-standing but inexorably linked to the determination made by Ofcom, and this we say is made abundantly clear by s.192(6) to which I took you some moments ago, the provision setting out very specifically what the notice of appeal must contain. It must be set out in sufficient detail to include, you will recall, to what extent if any the appellant considers the decision appealed against was based on error of fact, or was wrong in law, or both, and to what extent, if any, the appellant is appealing against the exercise of a discretion by Ofcom, We say that it makes it clear that the nature of the appeal is not merely one from the decision taken by Ofcom, it does not just simply derive from the decision by Ofcom, but it is directly concerned with the reasoning of Ofcom in that decision. The appellant must specify what

he alleges by way of errors of fact, errors of law, or the discretionary decision which is being appealed against. We say, if necessary, that those are not merely optional extras, they are either/or, they are constitutive of the grounds of appeal. The grounds of appeal are therefore required to identify to the extent that the appellant is making the submission the flaws in the reasoning process. So even in a case which was challenging a discretion of Ofcom the Tribunal must, on the strength of that, the way the requirement in the notice of appeal is set out, be concerned with what Ofcom did in taking the decision on the material before it rather than with what the Tribunal would now do in its discretion, in effect acting as though it were the primary decision maker. We say that that must follow from the fact that the notice of appeal is required, where one is attacking the decision on discretionary grounds, to identify what is wrong with the discretionary exercise by Ofcom of its decision. If it were the case that one could attack a discretion purely by reference to entirely new factors, new evidence, new argument, that would not be looking in any real sense at the discretion that Ofcom was exercising in taking the decision below. It would be inviting a new exercise of discretion by the Tribunal on the appeal.

THE CHAIRMAN: Well let us take something which is a little less nuanced then, let us take an error of fact, which again has to be specified in a notice of appeal. What, in the 2003 Act precludes an error of fact being exposed by, as it were, evidence that was not before the original decision maker? In other words, there is an error of fact alleged in the decision of Ofcom, but that is pointed out and made good by reference to evidence that comes into being after the decision was made.

MR. HERBERG: In principle, we would say it is illegitimate for a part to call into question facts which it had awareness of at the hearing below, which it knew Ofcom was proposing to rely on, for example, it had set out in a draft determination. It did not question those facts, did not argue that those facts were erroneous, but then chose for the first time on the appeal to say: "We disagree with those facts. We say those facts are erroneous and therefore we are going to have to bring new evidence, which we could have brought below but we chose to ignore because we did not want to engage with the Ofcom process, we are going to bring in for the first time on the appeal. We would say that is illegitimate, and there is nothing in the requirement for the Tribunal to indicate to what extent they contend that it is based on error of fact. It does not go so far as to say that therefore you are entitled to allege any error of fact, even if you have not engaged with that below. I would maintain that it is inherent in those grounds, it is most obvious perhaps on the discretionary case, but it is true also of errors of fact or, indeed, errors of law, that what the section was not doing was giving

authorisation to someone to decline to participate, decline to take an opportunity to make submissions as to what the facts are, or indeed what the law is below, and simply keep its powder dry and lays it out for the first time on the appeal.

THE CHAIRMAN: Let us take an example a little closer to home then. A party does not keep its powder dry but makes a point that the facts are X rather than Y, and that point is rejected by the decision maker for its own reasons – perfectly good, maybe – and on appeal the party appealing seeks to put in additional evidence simply to magnify and make the point even stronger, is your answer the same that that is an illegitimate approach?

MR. HERBERG: Sir, it is in principle. I have to be careful because there is a genuine discretion under s.22 which must always be exercised on the facts of the case. In principle, where a party could have put in evidence below, which Ofcom could then have considered as to what the facts are, and chooses not to do so without good reason and then wanted to deploy that on the appeal then that, we would say, is illegitimate, it is going beyond the scope of the appeal and should not be allowed. But it might be a case for the exercise of new evidence where, for example, the parties say: "We did not realise until the final decision how Ofcom was going to put its decision on the facts, we now see, given the final decision, we just need to explain what we meant, before Ofcom did not understand us." There are good reasons to put in some additional explanation which is an evidenced explanation as to why it is they have gone wrong. That might be a perfectly permissible case for new evidence and, indeed, Ofcom would be unlikely to object in that sort of case. What one is generally doing is elucidating a point that was an existing point. It would be formally outwith, we say. if it is admissible it is not admissible because that is part of the jurisdiction to allow in fresh evidence willy-nilly, it is admissible because Rule 22 is a flexible rule which gives the Tribunal a discretion in an appropriate case to allow in new evidence in that sort of case. That, we say, is the safety valve which is precisely the way new evidence should be allowed in in such cases; it is not a function of jurisdiction, it is not allowed in because you can, as a general proposition put in new evidence, it is allowed in because there are particular features of the decision which make it appropriate.

I do say that when one is looking at subsection 6 the consideration of the challenge to discretion is an illuminating one for the reason I gave before – I will not repeat it, but effectively it does not make sense to talk about challenging a discretion of Ofcom if the nature of the appeal is such that you are simply putting in new considerations and really invite the Tribunal to retake the decision within its own discretion unrelated to Ofcom's decision.

I do not think I need to take you to rule 8(4) of the Tribunal Rules, but it effectively does the same thing. The rules are in the same terms in relation to the notice of appeal and the requirements for what should be in the notice. Subject to anything the Tribunal wishes to put to me I did not have a distinct point on the rules.

THE CHAIRMAN: I did then have one point in that case, I wonder if we can turn back to this point, it is Rule 8(4), the requirement of the notice of appeal. Rule 8(4) has a list of other requirements, and then Rule 8(6) stipulates what has to be annexed to the notice of appeal and what concerns me is Rule 8(6)(b) because what that is saying is that as far as practicable you put in a copy of every document on which the applicant relies, including the witness statements of fact and expert witnesses if any. The statutory provisions in the 2003 Act simply refer to the notice of appeal in accordance with the Tribunal Rules, and make no limiting suggestion as to what can be attached to the notice of appeal. Is your answer simply that that is a question of the notice having to be appropriate to the decision that is being appealed in the appeal process.

MR. HERBERG: That would certainly be part of my answer. The reference to witness statements of witnesses of fact or expert witnesses does not address the question of whether those same statements were before Ofcom. One may attach to the notice of appeal statements that were made before one had submitted to Ofcom when one made the decision, and that is indeed what happened in this case. The first report of the two witnesses was submitted under this provision with the notice of appeal. This provision does not, in any event, we say indicate that new witness statements of fact, or new expert witnesses are necessarily going to be included.

THE CHAIRMAN: Absolutely. Obviously one can attach statements that were used before but the question is whether it goes the other way, whether there is an exclusion on new evidence.

MR. HERBERG: I would say it is certainly not an exclusion, it is obviously catering for the possibility that there will also be new evidence permissible, either admitted under Rule 22, or one wants to admit it under Rule 22 so one attaches it to the notice of appeal, if it is fresh evidence no doubt with an explanation as to why it was not tendered below. What we do not say the rule could do, because it is only rule, obviously it could not alter the meaning of a statute, but we do not say it is in any sense inconsistent with a statute, it is catering procedurally for the possibility that there will be cases potentially, although it does not say so, but I would accept that it caters for the situation where the witness statement of fact or expert witnesses are new material because a party contends it is entitled to adduce them.

There is also of course the point that these rules apply well beyond s.192 determinations and they are catering across the whole field, and there may well be appeals, for example, under the Competition Act where, as clearly is the position, there is a much wider right of appeal – not merely wider right of appeal, but wider entitlement to adduce fresh evidence on the appeal, to which these rules must of course also cater. So one certainly cannot assume from the procedural availability of being able to attach things that therefore it must all be allowed in.

Finally on the law, there is a trio of somewhat helpful Tribunal cases that I am not going to refer to because they are dealt with in the skeleton argument of H3G, I think it is –you're your note it is paras. 11 to 14, the relevant passages are dealt with there and it may be that Mr. Kennelly will be dealing with in due course. They also overlap with my skeleton, they are dealt with in the skeleton but I do not think there is any need, given the speed at which time is passing, I am limited to less than four months and I am conscious of that! I will not deal with those in my submissions.

THE CHAIRMAN: We will certainly re-read those paragraphs.

MR. HERBERG: Against that analysis can I turn briefly to the way, or perhaps the different ways, in which BT has sought to express the Tribunal's jurisdiction on this appeal and our response to that.

The first place one sees their position set out with admirable clarity is at the very beginning of the notice of appeal, para. 1 of the notice of appeal, which is in tab 1 of the first volume. It states in terms: "Pursuant to s.195 of the Act this is a full *de novo* appeal on the merits." That is backed up at the end of para. 32, I do not need to turn to it:

> "Accordingly it is important that the Tribunal fully reviews this case on the merits and closely scrutinises Ofcom's approach in the final determination."

We have no argument with closely scrutinising Ofcom's approach in the final determination, that is indeed the Tribunal's role, but we submit that the suggestion that the Tribunal must fully review the case on the merits, that it is a *de novo* appeal on the merits is simply unsustainable on the basis of the Act and the Directive and, indeed, the authorities to which I have taken you. It effectively means, I suggest, that the whole of the third issue, i.e. the dispute as to T-Mobile, must be decided over again by the Tribunal if it is a full *de novo* appeal on the merits, unconstrained by the ambit of Ofcom, or by their submissions made to Ofcom, or by the evidence that was before it. We say it is clearly contrary to the act and the Directive, and we do note that BT has not attempted, as the Tribunal Rules require it to, to seek to identify which of its grounds amount to a challenge to a discretion which amount to

an error of law, or which amount to an error of fact. That is not generally found in its notice of appeal. In fact, we say that may be partly because the grounds are incapable of being bounded by such classification as they ought to be. The format of the notice of appeal is a point which interveners will make and I am not going to pursue, but I do draw attention to the fact that there are certain grounds, particularly in the part I took you to earlier which are simply not capable of being classified in that way.

BT's case is perhaps put a little differently in its written submissions for the case management conference and indeed in the skeleton. It is contended, as I understand it, that what the tribunal is concerned with here is the correctness of Ofcom's decision at the time it is before the tribunal. At first sight, sir, that is an improvement, at least because it does focus on the Ofcom decision itself. It focuses on the correctness of Ofcom's decision which is under appeal, and takes the correctness of that decision as the starting point, but we say it ultimately has the same flaw because BT envisages no constraint as to the nature of the merits arguments which can be employed to attack Ofcom's decision, other than that such arguments must be made by reference to the grounds in the notice of appeal, it being a liberty to decide what those grounds are. Those grounds may be entirely distinct from and unrelated to arguments which were advanced to Ofcom below.

By allowing the decision to be questioned at the time it is before the Tribunal, rather than on the basis of the material that was before Ofcom, we say that effectively one moves back into what is akin to a *de novo* hearing, albeit framed by reference to the correctness of Ofcom's decision. An applicant can, on that argument, adduce whatever evidence it considers necessary to support its case on the appeal, regardless of whether the evidence was adduced below. We say that that is equally contrary to the Act and Directive. It would be meaningless, for example, to seek to appeal against a discretion exercise by Ofcom, by reference to arguments and evidence not made or placed before Ofcom. That would, as I have already made the point, be to invite to a new exercise of discretion by the Tribunal untrammelled by Ofcom's decision. More widely, an appeal of this nature would turn the tribunal into the primary decision maker in precisely the way that Lord Justice Jacob cautioned against in the Court of Appeal decision.

We say by contrast, the decision of the Tribunal in the appeal is to scrutinise. The task of the Tribunal on the appeal is to scrutinise the decision of Ofcom on the basis of the material that was before it at the time, arguments and evidence. That is what makes sense of an enterprise of seeking to detect errors of fact, law or erroneous exercise of discretion. It also

respects the speedy and the basic process before Ofcom avoiding the perils of substituting a new process on appeal.

Sir, I should perhaps highlight that we, of course, fully accept that the scrutiny of the Ofcom decision may involve, in the words of one of the Tribunals, "profound and rigorous scrutiny of Ofcom's regulatory decisions". This is not primarily an argument about intensity of appeal or intensity of scrutiny in this case. It will not necessarily involve profound and rigorous scrutiny in all cases, as the Tribunal has emphasised and as we have already seen. In cases where there is no single right to answer or it is an evaluative or policy decision it may well be there is a much lesser degree of scrutiny of Ofcom. There may well be also decisions where a powerful degree of scrutiny, or aspects of a decision where a powerful aspect of scrutiny is called for. That is a separate question. The Tribunal is not here concerned with the intensity of a view. It is concerned with a more fundamental question of whether the standpoint from which it considers the appeal, absent special circumstances, it is the question of whether Ofcom was right or wrong on the basis of arguments put to it at the time.

Sir, can I make two final points before coming to the actual decision in this case and the facts. One point is that BT has sought to rely heavily in its skeleton on decisions under the Competition Act, in particular the *Freeserve.com* decision and *Napp Pharmaceuticals*.

Sir, both Vodafone and particularly H3G in their skeleton arguments, which had the advantage of being served after the BT skeleton so they could respond to it, whereas mine was served simultaneously, have both set out clear, and we say convincing, reasons as to why reliance on that jurisdiction, on the Competition Act, is wholly misplaced. Sir, I cannot improve on that I will therefore adopt the submissions of H3G at paras.18 to 28 and Vodafone at paras.10 to 14, subject to any response which I may have to BT's oral submissions. We say that sets out why Competition Act cases are of no assistance here at all.

The second point is one that perhaps I have already made, but I do so shortly: we are not arguing, as the BT skeleton suggested at one or two points, that there is effectively either a complete prohibition on fresh evidence or indeed fresh argument, or that that right is exiguous or only to be exercised in extreme cases. I simply repeat that Rule 22 of the Tribunal Rules makes it clear that there is a discretion to admit and it is not difficult, we say, to identify the sort of situations in which the Tribunal may be minded to exercise that discretion to admit fresh evidence. You have already put some to me, sir, for example, where there is a point in Ofcom's determination which is genuinely new, has not been

foreshadowed in the dispute resolution process, where significant evidence could not with reasonable diligence have been adduced during the process below, having regard to the time limits and the need for a swift process, perhaps also why Ofcom wrongly decided not to extend time to allow the consideration of certain evidence, wrongly found there were no exceptional circumstances. In those types of cases, sir, we fully accept that Rule 22 is available.

Sir, can I then turn to the application to the case, and I am going to try and deal with this as quickly as I can, but to some extent I am going to need to take you to actual factual background which is not uncomplex. It might be helpful at first to take you very briefly through the main steps of the dispute resolution procedure. I am not going to go through all the interchanges. They are set out at paras.21 to 42 of my skeleton argument in more detail as to the procedure.

The process commenced with the network charge change notice of BT of 1st July 2009 levying specified charges for terminating 080 calls on its network when they originated from a non-BT fixed mobile network. The notice itself is at tab 23 of the third bundle, but I am not going to, unless you wish me to, take you to the detail of what that says.

THE CHAIRMAN: No, that will not be necessary.

MR. HERBERG: The change, as you know, was resisted by the mobile operators. On 16th September 2009 Ofcom receive a submission from T-Mobile pursuant to s.185 requiring Ofcom to consider and determine a dispute, and a non-confidential copy was sent to BT on the same day. Again, I do not think I need to take you to it, but I just wanted to check, sir, there have been some relatively late additions to the bundles, where you had the two witness statements. There is an additional bundle called "BT skeleton argument" bundle, and it may be that it should have been ----

MR. READ: I hope it has made it into a tab D at the back of that, which contains the two witness statements.

MR. HERBERG: I am grateful to my learned friend. It should also then contain the exhibits to those witness statements, I presume.

MR. READ: If it helps my learned friend, basically there is a series of tabs going from D1, which is Mr. Buckley's statement, through to D14, which is the end of his exhibit bundle, and then at D15 there should be the first statement of Mr. Fitzakerly, with D16, 17 and 18 being his exhibits. I hope that helps.

MR. HERBERG: I am grateful to my learned friend. I am afraid I do not have the exactly tab numbers on my home produced version.

THE CHAIRMAN: I think we probably have them. I think you can spare yourself the tab references, but obviously give us the paragraph references.

MR. HERBERG: That may be the way I can do it. Just for your reference, the copy of the reference being sent to British Telecom on the same day appears from the covering letter, which is NB3, the third exhibit to Mr. Buckley's witness statement. BT effectively had the complaint from 16th September 2009, the T-Mobile complaint.

On 6th October 2009 Ofcom accepted the dispute and set a four month target date – in other words, it set the maximum period, subject only to its exceptional circumstances power to amend. It did not think it was practicable to deal with it in less than four months.

Then Vodafone, O2 and Orange all made similar referrals to Ofcom on 9th, 26th and 30th October respectively. Those references are in the first bundle at tabs 4, 5 and 6 respectively, and again I will not take you to those. They were accepted by Ofcom and they were joined to the existing dispute referred by T-Mobile.

Sir, I should interpose at this stage, I am not sure whether it is going to be suggested, but merely by joining the other disputes to the T-Mobile dispute and dealing with them together, that had no effect on the time limit in the T-Mobile case. The T-Mobile window was, as required by statute, four months from the date on which Ofcom accepted that it had jurisdiction in relation to the T-Mobile dispute. That four months did not change by virtue by being joined on to later requests. Of course it might be a matter which would be relevant if there was an extension of time, if the later reports had complicated things or if there was need for additional time. That is the only way in which the joinder could come to be relevant. In fact, in this case, since the later disputes which were joined did not materially increase the scope of the investigation at all, they were effectively identical complaints about the same decision by BT, there was really no consequence from the joinder. It did not affect the date by which the T-Mobile determination had to be made.

BT then responded to the T-Mobile complaint on 29th October 2009, and that is not something which is in the appeal bundle, but it is at NB8. The eighth exhibit to Mr. Buckley's statement gives a copy of the BT response which at that stage ran to some 14 pages.

The response was October and then Ofcom worked on the case and the draft determination was published on 23rd December 2009. That draft determination is at tab 7 of the first volume.

Then on 12th January, which was the deadline given to it, BT provided its response to the draft determination, which is at tab 8 of the first volume. That response, together with those

from other consultees, was considered by Ofcom. In providing its response BT indicated that it had also commissioned independent expert evidence and will be aiming to share it as much as appropriate with Ofcom in the next few days.

I should perhaps just show you that, sir, it is the covering letter with the response, and it appears at tab 12, section D, of the BT bundle, or wherever you have it if you have it separately.

THE CHAIRMAN: Which exhibit to Mr. Buckley is it?

MR. HERBERG: It is 11.

THE CHAIRMAN: Yes, we have got that, thank you.

MR. HERBERG: The situation, sir, was the draft determination had been served, uncomfortably, just before Christmas on 23rd December. BT's response was due, and was provided indeed, on 12th January. You will see the email here which attached the response, the bottom email of the page:

> "Attached is BT's response to Ofcom's draft Determination on the 080 dispute. Please treat this information as confidential …
>
> BT has also commissioned independent economic advice and we will aiming to share as much as is appropriate with Ofcom in the next few days."

You will see Ofcom responding at the top of the page, acknowledging receipt:

> "… useful to receive any further information you wish to submit as soon as possible.
>
> Given the timing we are working to we will have a diminishing ability to fully take into account any further material."

What we do not see there – I shall be submitting it a bit later, but I say it now – is complaint at that stage that there was simply no time to produce a proper response to the draft determination or that more time was needed or that time ought to be extended. There was simply a statement that there would be some economic evidence to the extent thought appropriate in the next few days.

There was not any evidence in the next few days but on 27th January, some two weeks later, there was then a further submission, and that is at tab 10 of the first bundle, which included papers written by Professor Dobbs and Dr. Maldoom – Dobbs 1 and Maldoom 1, as they have come to be known in the papers. That is when they were provided, on 27th January. Ofcom did indeed consider and take into account those two papers in its final determination, notwithstanding that that was obviously early February that that was provided, so it was a relatively short period. They managed to take into account both of those reports. That

material was thus provided over a month after BT had received the draft determination, 23rd December to 27th January. Of course, it included Christmas but BT, we say, was well aware in advance that its response would be called for over that period, and indeed it actually made preparations to have relevant staff engaged over that period to cover it, as can be seen by an email at exhibit 9 to Mr. Buckley's statement. There is an email there from BT saying:

> "I believe good progress is being made by your team in finalising the 080 termination dispute draft determination and wondered if it would be possible for Ofcom to publish it a day earlier – 22nd December or at the latest am on the 23rd. The reason I am asking is that this would give me a change to engage a number of key BT people before they disappear on the Christmas break.
>
> Could you let me know either way so I can make any necessary arrangements at this end."

It was not possible to publish it on the 22nd, and I am not sure what time it was released on the 23rd – if necessary I can take evidence – but the point is a more fundamental one, that BT was quite rightly being geared up to having to do what it probably did not want to do – it probably did not want to do it over the Christmas – which was to deal with the draft determination and to get its response in in early January. It knew it was coming, it saw it was coming and it was getting itself into a position to deal with it and to respond.

Again, what there was not in the submission on 27th January, when the expert evidence which was put before Ofcom was received, was any suggestion then that the timetable was impossible, that there was more vital evidence, fundamentally different evidence, which needed to be put in, which could not be put in and an extension was needed. Instead, what happened was that on 3rd February, which was two days before the four month deadline for the final determination, BT sought to provide further evidence to Ofcom in the form of two further papers from Professor Dobbs and Dr. Maldoom. The covering letter is in the first volume of the material, appeal bundle, BT 1, tab 12.1. What one sees there is the email attaching the two reports:

> "In my email to you last week, I indicated that we would be giving further consideration to the economic principles and implication of NCCN 956. I am pleased to send you revised, more complete reports from Professor Ian Dobbs and Dr. Maldoom …"

These were effectively updated versions of the earlier reports. They have got additional inserts, they are not entirely separate:

> "… which draw on each other and find similar conclusions to the draft Reports. These presentations allow for more realistic assumptions on market conditions to demonstrate that NCCN 956 will likely induce no increase and quite possibly a reduction in retail charges. Specifically, it assumes that each MNO may choose to market 080 calls in different ways but that they share similar costs of origination. The evidence which supports this is well documented and indeed largely corroborated in the Draft Determination."

I say that is significant for two reasons: one, for what it does not contain. What it does not contain is an assertion that there was a quite different stream of expert evidence of type of expert evidence, namely specific evidence positively analysing the pricing proposals or the pricing rates in NCCN 956, which needed to be analysed economically to produce a positive case as to the impact on consumer welfare, and so on. They had not been able to do that, that Ofcom should be extending its time to allow. There was no submission whatsoever that there should be any extension of time except implicitly to consider this material. Of course, this material was being provided two days before the deadline, and it was going to be, for practical purposes, necessary for Ofcom to extend time if it was going to consider it fully and take it into account in the report it had presumably almost finished writing by this stage.

First of all, there is no suggestion of anything further. There is no request to extend time for other reasons other than implicitly to take this into account.

Secondly, it is helpful just to note the way BT rightly described this material. They allowed for more realistic assumptions on market conditions to demonstrate that the charge control notice 956 will likely induce no increase and quite possibly a reduction in retail charges. I just draw attention to that in advance, because this is showing that the scope of the expert evidence in the second report, like the first reports, was very general. It was looking, as it were, theoretically at the possible effect of this charge control notice in general terms. It was not until the third report that one saw something quite different and much more specific, which was the specific economic analysis from the quartet of experts as to the actual implications, specific implications, of the pricing changes.

Sir, Mr. Buckley explains, and you will note it is paras.38 to 41, what Ofcom did on receipt of these papers. They considered the material that they had been sent to establish whether it might constitute the exceptional circumstances necessary for an extension to the four month statutory timetable. Of course, it was not going to be able to take it into account in the final report unless it did that. It considered the reports, as it were, *de bene esse*, or for the limited

purpose of saying, "Is there something in these reports for which we really extend the timetable?" It came to the conclusion that there was not for the reasons it explains. Ofcom did not therefore take Dobbs 2 or Maldoom 2 into account in its final determination. It considered in essence that there was nothing substantially new or dramatically different in these reports, and I do not understand BT's suggestion to the contrary. It was the later reports that made the big change. These reports were extensions and developments, as the covering letter described it, of the existing reports. We say, therefore, that Ofcom took a proper, legitimate, proportionate and correct decision not to extend the four month period. There were not exceptional circumstances requiring the process to be lengthened and for the reports to be considered and for the decision deferred. That was, we say, an entirely proper decision by Ofcom.

Then two days later, on 5th February, it issued the final determination just within the statutory four month deadline.

Sir, I was considering to what extent it would be necessary to actually show you the final determination, and it may be that members of the Tribunal have already had an opportunity to read it. If it was appropriate, I could take you through the summary paragraphs at the outset, but it would simply be repeating what is in it, and if you are happy that ----

THE CHAIRMAN: No, tell us what to read and we will re-read it, but we have all read it.

MR. HERBERG: Sir, I am grateful, I thought you would have done. The particular parts to read to get an overall summary of the decision is effectively section 1, the summary of the analysis, starting at para.1.17, setting out the three principles which Ofcom adopted and employed; and then from para.1.22 setting out the final conclusions through to para.1.29. That decision, as I say, was issued on 5th February.

One then has, to finish the procedural description, BT's notice of appeal, which was dated 6th April, which must have been just within the two months – it sounds like two months and a day, but I am sure nothing turns out. I am told there was a Bank Holiday, so it was within the two month period. That, of course, attaches what has been labelled the category 2 reports, namely the third report of Professor Dobbs and Dr. Maldoom and the reports of Richards, Reid and Kilburn as well, the category 2 material.

Sir, as to the notice of appeal, again I am sure it is unnecessary to take you through it in any detail, but it might be helpful just to look at the summary at the beginning, para.13, the summary of the grounds of appeal, so I can make some submissions on that. It is in tab 1 of the bundle, p.8. BT has effectively broken down its grounds of appeal into four, although as it rightly says there is a degree of overlap between the various grounds of appeal. I look at

para.13 just to identify how much is not in dispute as to the proper scope of the appeal. If one looks at ground A:

> "In applying its Dispute Resolution powers under ss.185-191 of the Act, Ofcom failed to consider the true merits of the context in which NCCN 956 was introduce, and failed to do so in a manner that was fair, reasonable, proportionate and consistent with the two underlying concepts outlined in para.3 … For example, Ofcom should have recognised the simple fact that if MNOs were making profits from calls to 080 numbers, it cannot in principle be 'fair' or 'reasonable' for 2G/3G MNOs to be exempted from sharing part of those profits with the party that onward conveys those calls. Ofcom simply undertook a formulaic analysis without assessing or weighing the true overall merits of the issues in dispute. Further, as a separate ground in its own right, Ofcom failed to carry out any proper analysis of proportionality before ordering BT to reverse the NCCN 956 and repay the contractual monies paid. Ofcom's failures were exacerbated by Ofcom imposing the burden, not upon the parties raising the dispute with Ofcom (the 2G/3G), but upon BT."

Sir, in principle, that is an attack on Ofcom's process and reasoning and as such is a legitimate ground of appeal. It is perhaps without prejudice to the way any submissions may be made as to drafting. In principle, this is an attack on processes and reasoning and does not, on its face, rely on any new material that was not in existence and was not considered by Ofcom.

The same is then true of the attack on Ofcom Principle 1, which follows in ground 2. There is, if I may put it this way, a rather faint attack on the principle itself, the principle is doubtful as a general principle, but in any event it was applied in an unjust fashion and clearly the sting of the attack is in the way Principle 1 was applied – not self-evidently correct, failed to consider other relevant factors when enunciating the principle, lacks proper legal basis, in any event, the way in which the principle was applied was incorrect. In particular, there was clear that the 2G/3G MNOs would recover their costs of originating calls under the pricing structure in 956. Moreover, there was strong *prima facie* evidence that the MNOs retail prices were at a significantly higher level and that they were, in fact, making a substantial profit. Ofcom relied on the MNOs apparent refusal to provide detailed figures as justification for rejecting the charges. That was not only wrong and unfair as a matter of principle, but also in parts a very bad regulatory signal.

Pausing there, the attack is clearly and self-avowedly on the material that was before Ofcom, Ofcom is said to have ignored a strong *prima facie* case which effectively pointed in favour of BT's position and not reacted as it should have done to the MNO's apparent refusal to provide detailed figures. Again, a legitimate line of attack. It is fortunately all I have got to say about it, but again it focuses on the material that was before Ofcom at the time and it is legitimate on that basis.

Principle 2, as summarised here, is also legitimate. This is C:

> "In applying Principle 2 (that charges should provide benefits to consumers and avoid a material distortion of competition), Ofcom (a) placed an unlawful onus BT to demonstrate clearly a positive benefit to consumers and no detriment to competition, and (b) failed to conduct a proper analysis of the effects on consumers and competition, the analysis being superficial and seriously flawed."

On its face, that is an attack on what Ofcom did at the time on its reasoning and on its analysis, and that again is a legitimate ground of appeal.

Then ground D is an argument that Ofcom wrongly changed the scope and was unjustified and therefore the remedy was unjustified on that basis. Again that is a legitimate ground.

What one sees, as it were, in the over-arching summary is not a matter of objection. The difficulty, as you have already seen, is the section of the attack on Principle 2 from paras.116 to 126 that rely, without being very specific as to how they are to be relied on, on all the new evidence and the new material.

Ofcom says it does not seek to précis the detail on which it relies but will simply draw attention to one or two matters in para.118. I am not going to this to make submissions on the formulation of the notice of appeal but I am, as it were, seeking to draw out the extent to which the arguments which BT wish to make are reliant on the new evidence. They are relatively limited in that they are part of the attack on Principle 2.

Sir, I do not think it is necessary for me to take you through the detailed expert evidence which is attached to the grounds of appeal. Our objective is not to minimise that evidence. What is conspicuous about the Category 2 material, the material annexed to the notice of appeal is that, when taken together, its essential point is that it forms a detailed attack on the specific charging principles contained in NCCN956. Ofcom's previous expert evidence had been directed to considering at a theoretical level how a wholesale tariff structure could be linked to the retail price of the call to an 0-8-0 number terminating on its network in such a way as to incentivise the mobile operators to maintain or reduce their prices. So, there was

a difference in nature, we say, between what had been done in the submissions made to Ofcom before the determination, and in the evidence put to Ofcom before the determination, and what was then attempted in the category 2 material which was detailed submissions on the specific charging principles.

It is true that there was some discussion of NCCN956 in s.3 of 1 Maldoom 2, but it was relatively brief and it was at a high level. That material was referred to in Dobbs 1 and 2, but it is perhaps noticeable that Professor Maldoom noted, and the reference is in his first report, p.5, the last sentence of the second paragraph as he said, at least in the most relevant range for likely retail price is composed of post-termination charge schedule has the correct general structure to create an incentive for lower retail prices. Sir, I am conscious of the danger of taking this out of context, but effectively his submissions (this is tab.19 of the bundle) and what, it is the second bundle.

THE CHAIRMAN: BT2.

MR. HERBERG: It is BT2 yes, sir. It might be helpful actually, I am trying to do it fast, but taking it out of context is perhaps dangerous. What one sees on the fifth page, the pages are unfortunately un-numbered, but if one goes to the fifth page what one sees is the conclusion: "Therefore, at least in the most relevant range for the likely retail prices" ----

THE CHAIRMAN: I am sorry, Mr. Herberg, we are not with you.

MR. HERBERG: I am sorry.

THE CHAIRMAN: Is No.5 the one with the table in?

MR. HERBERG: It is tab.19, there is a table on that page, yes. So, it is the fifth page of the report, which is un-numbered.

THE CHAIRMAN: And, where are you at?

MR. HERBERG: I am reading the second paragraph. The second paragraph starts, "Over the most relevant range".

THE CHAIRMAN: I think we have it.

MR. HERBERG: This is effectively his summation of where he has reached in the argument in more detail above. He says:

> "Therefore, at least in the most relevant range for likely retail prices (0 to 27.5ppm), the proposed termination charge schedule has the correct general structure to create an incentive for lower retail prices".

His conclusion was therefore in other words limited to the observation – and this is the entire focus of the first round reports – that the specific tariffs implemented by NCCN956 appeared to be of the right kind to incentive MNOs to lower their retail prices for charges to

0800 numbers. What he did not do was to provide evidence or give evidence by way of any analysis of the specific details of the tariff structure that the actual charges imposed by NCCN956 would necessarily have the effect for which he contends.

And it was not until the submissions of Messrs Read, Richards and then Dobbs 3 and Maldoom 3 that BT for the first time put forward any in depth analysis to explain why in its submission that specific charging structure would act in a way so as to incentivise MNOs to lower their retail prices. So, what one sees then is Mr. Read, first of all, deriving a sufficient condition under which an increase in the wholesale price rather than leading to an increase in the retail prices, we actually create an incentive in the MNOs to reduce the prices; and from that basis Mr. Read then analyses the specific detail of the charging proposals in NCCN956 to demonstrate they meet the condition that he has defined. That report of Mr. Read then turns into an important building block for the Richards report and then Maldoom 3.

Sir, I have set out in more detail at paras.100-111 of the skeleton argument ----

THE CHAIRMAN: I am sorry to interrupt, but before you put the passage from Dr. Maldoom's report away, I think it would be helpful also just to see the final paragraph as well on that page.

MR. HERBERG: On that page.

THE CHAIRMAN: On that page, just below the table. (We will read it ourselves).

MR. HERBERG: Yes, I would submit that that bottom paragraph is entirely of a piece with what is written above. The conclusion is that the general structure:

> "It is one thing for the NCCN956 charges to have the right general structure to create retail price moderating incentives. However, is this incentive strong enough to overwhelm the increase in the level of termination charges at retail prices in the range typically set by MNOs prior to NCCN956? [And he says] "This cannot be answered about without more detailed information about how demand changes as the retail price changes. However, for any given demand structure, it is certainly the case that retail prices could fall providing termination charges increase sufficiently rapidly with price".

So, as I suggested, what there is here is a theoretical in principle endorsement that BT's charging structure could be one which could promote the incentivisation which it contends. What it does not do is have a specific analysis of what the charges actually were and conclude that in fact they do so on the specific charges by reference to the sort of enterprise

which Reid and then Richards and Maldoom do in the final report which is through the mathematical and algebraic exercise which they perform.

THE CHAIRMAN: Yes, so you could say they fill the gap that is adverted to in this last paragraph.

MR. HERBERG: Yes, it has effectively set up the possibility, it is accepting as a possibility, and then what they are doing is actually providing – they are actually then providing the argument itself to fulfil what he sees as a theoretical possibility, they are saying "and it is not just theoretical, it actually works when you actually analyse what the charges are".

THE CHAIRMAN: Thank you, that is very helpful.

MR. HERBERG: Sir, I set out at paras.100-111 of the skeleton a more detailed survey of the category 2 evidence, but I do not propose to repeat that in submissions. It is not necessary. What is incontestably clear is that it all amounts to fresh evidence and the substance of it, the evidence, all this argument, all this analysis, was not before Ofcom doing the dispute resolution procedure. It represents in short, we say, a significant expansion of BT's case, their development of the case. Sir, if, and we say if we are right as to our submissions as to the ambit of the appeal from a dispute resolution determination, then we say it is clear that the material should not be permitted by reference to the scope of an appeal unless there is some specific reason for the Tribunal to exercise its discretion so as to permit the material to be excluded – to include it.

And what I then need to turn to is the question of whether there is such a specific reason in this case which should induce you to exercise your discretion under s.22. Although theoretically this is still our application to exclude, by this stage of the analysis if you were with me on the jurisdiction, effectively what we are looking at is whether there are reasons to admit, exceptional reasons to admit, the evidence or specific reasons to admit the evidence. Now, the most obvious reason which BT rely on is simply that it was unable to adduce the material below because it did not have sufficient time to do so, and as part of that submission it contends that it was not generally speaking until the draft determination on 23rd December that it was aware of the course, the reasoning course, that Ofcom was proposing to take, and that thereafter there was insufficient time to compile and adduce the material whether or not the process.

Sir, that is a general statement of BT's position, and it is borne out what Mr. Fitzakerly says at para.15 of his statement:

"It was only upon production of the Draft Determination that BT could see for the first time the approach which Ofcom was adopting and that its analysis was, in BT's view, superficial and flawed".

So there is a general acceptance that from the time of the draft determination, BT could then see the approach that Ofcom was adopting. That is subject to some specific perceptions that I will have to address. There is at least one specific aspect where BT says that it was unaware until the final determination of at least one aspect of its reasoning to which the evidence goes to, and I am afraid I will have to address that separately, but as a general proposition it was aware from the time of the draft determination.

You will have seen, sir, from the skeletons and from the witness statements, that there is of course an issue as to whether BT should have known from the outset, in other words, from well before the draft determination, that evidence as to the specific effects of the pricing structure of NCCN956 was relevant. And BT in response, in Mr. Fitzakely's statement has made the argument about the scope changing, the scope changing, that it was not able to appreciate until the draft determination, it was not until that stage that it was aware that the issue of the specific charges in 956 was being considered by Ofcom at all. That also forms the fourth substantive ground of appeal. Sir, what we are not going to seek to do for the purposes of this hearing is to anticipate that substantive ground of appeal and to ask you to determine that issue now. It is effectively too complicated and will involve a detailed trawl through the evidence in the first part of the determination procedure. We are content to assume, obviously for the purposes of this hearing only, that BT are right in their claim that it was not until the draft determination that they were aware of the scope of the investigation so that they were aware, we would say, from that date, of the need for the Category 1 and the Category 2 material if they so chose to put it in. Our point on that basis, sir, is a simple and a short one, and it is that they had an adequate opportunity to address in evidence what they chose during the period of over a month between 23rd December and 27th January. It is a tight period, given the Christmas break, but in a context of an overall four month period, dispute resolution period, it was a wholly adequate period in which to adduce evidence and submissions as they chose. BT, in filing its response on 12th January, indicated, as I have already drawn attention, that it has commissioned independent economic advice and will be aiming to share as much as is appropriate with Ofcom in the next few days. There was no suggestion then or subsequently that they would not be able to manage to adduce what was necessary within that timescale. What ultimately happened was that the Category 1 material was not set until two days before the deadline forcing Ofcom to decide in a very short

compass whether or not there was a case for extending the four month period, whether there were exceptional circumstances, and I have made my submissions that it was precisely because that evidence was not so significant, was not so exceptional that there were no reasons for doing so. But, the crucial point perhaps is that there was no invitation even to Ofcom to extend the period for more substantial reasons. There was no suggestion, although it must have been known at this stage that further evidence was in the course of preparation and further evidence which was markedly different from the evidence which had been produced to Ofcom, which went to a wholly different line of argument as to the specific effect of the charges, and there was no invitation to Ofcom to extend its statutory deadline so that that evidence could be provided.

We say that Ofcom is entitled to take a rigorous view as to whether exceptional circumstances are present or not, indeed it has to do so if a party could, by serving evidence at a late stage with a high prospect of success simply say there is an exceptional circumstance because there is new evidence at a late stage, then determinations will be derailed and the swift procedure would be undermined.

What we say therefore is that it does not lie with BT to complain about the inability to put in the Category 2 material within the appropriate time when they did not even ask Ofcom to extend time on that basis. If they had explained what the evidence was going to go to, what it was going to cover, and why it was exceptional and why the time should be extended, then Ofcom would have had to consider that, and if it had refused it might be something BT could complain about. If you were persuaded that Ofcom had wrongly decided there were no exceptional circumstances, then that might form a basis on which it would be proper to exercise the Rule 22 discretion to admit evidence. But where the matter was not even put to Ofcom, with BT effectively saying: "We will leave all the further evidence to the appeal, we will put in what we have, which is Muldoom 2, and Dobbs 2, and we will leave the rest for the appeal." We say that is not a proper approach, and there are no grounds therefore on the basis of lack of ability to adduce the material below to include it now.

Sir, I referred a little while before to the fact that there is one aspect of the evidence which is an exception to BT's general acceptance that it knew Ofcom's approach at the time of the draft determination. As I understand it, it is suggested they did not know Ofcom's approach until the final determination, and this appears, albeit in a footnote in BT's skeleton argument, at p.18, footnote 42. I refer to this but, of course, at least logically, this must present an independent reason for allowing at least some of the evidence in if it were borne out. Footnote 42 says that this is footnoting a proposition that Ofcom's case to the Tribunal

must proceed on the limited material before Ofcom, even where it has led Ofcom to manifestly err in its conclusion. The footnote says:

> "By way of one more example, as indicated in BT's letter of 21 May 2010 part of the evidence BT adduces is in direct response to new matters raised in the Final Determination. For example …"

and although this is given as an example, I do not see any other examples raised –

> "… as BT notes in paragraph 111 of its Notice of Appeal, Ofcom placed heavy reliance on the '*step function'* within NCCN 956 in its Final Determination. This BT contends, is a misunderstanding of Professor Dobbs' evidence. Professor Dobbs comments on this at paragraphs 22 to 27 of Dobbs 3 and refutes Ofcom's interpretation of his earlier evidence."

What I do not need, I hope, to be involved in is the question of the nature of the attack on Ofcom's understanding of Dobbs 1 and Dobbs 3. What is significant, if it is alleged that this is a matter which simply BT did not realise was in issue until the final determination then that could potentially provide a ground for allowing new evidence in the Tribunal's discretion. We say that that is self-evidently and simply not the case on the facts.

We say that the issue of the step function, as it is referred to, was addressed in the draft determination and due consideration was given to Professor Dobbs' comments in coming to the final determination. We do not accept that we misunderstood the evidence in Dobbs 1, but that is perhaps a separate matter. The important point is that Ofcom's treatment of what Professor Dobbs had said was clear from the draft determination and BT could respond as it saw fit.

Can I see to make good that overall proposition shortly by reference to the evidence? The step function can perhaps be seen by looking at the table in s.3.5 of the draft determination which is at tab 7, p.19 of the main bundle. This simply sets out – it appears in a number of places – an "Extract of the charging table and explanatory notes in NCCN 956". One sees there that BT is proposing different fixed wholesale charges, depending whether the call was made during the day, evening or weekends cause specific bands of retail prices, and one sees that from the notes to the table. If the retail charge is a certain amount, within a certain band, then a certain fixed wholesale rate applies. So, for example, if one just takes note 3 at random: if the retail charge payable is 8.5 ppm but less than 12.5 ppm within that band then there is a wholesale charge of 2ppm. The consequence of that is that if a retail charge increases at the borderline by just 0.1p and takes you into a new band for wholesale charges then the wholesale charge in some cases more than doubles, for example, from 8.5 to 12.5,

17.5, 22.5 – less than doubles but increases by a substantial amount. That is what is meant by the step function. In other words, the wholesale charging machine does not link single wholesale prices with single retail prices, but single wholesale prices with a range of retail prices.

So this step function is, we say, clearly addressed in the draft determination. I have marked it up in the form of the draft determination as it appears and is annexed to the final determination, which is then in tab 2 of the bundle. Annex 3 copies the provisional determination as you will have seen and relies on it as part of the final determination. If one turns to para. A3.66 in Annex 3 one there sees Ofcom in the draft determination analysing direct consumer benefits, and noting in particular an argument of T-Mobile.

> "T-Mobile noted that:
>
> > 'under the wholesale charging structure in NCCN 956, a call which is charged at 22 ppm at the retail level would incur a wholesale charge of 7ppm from BT (a difference of 15ppm) whereas a call which is charged at 23 ppm at the retail level would incur a wholesale charge of 10ppm (a difference of only 13ppm). It would be more profitable therefore, for the originating network operator to ensure that its retail charges were aligned to the top end of each of BT's wholesale charging bands rather than the bottom of the next charging band'."

The suggestion is that there is an incentive, contrary to BT's case to increase retail prices along the step up until you get to the point of the next rise, because you have the free win by increasing the price without any increase in the wholesale price until you reach the edge of the step.

3.67:

> "In response to our Informal Information Request, Vodafone also raised this point and said that the price bands in BT's charging structure have the potential to act as a focal point encouraging OCPs to converge on particular retail pricing points e.g. at the top of a particular price band, which will likely dampen retail price competition."

So that is a slightly different point, it might dampen competition as well as encouraging people to move along the step to the highest price on the step.

Ofcom considered that argument, and if I move down to para. A3.70, Ofcom's views on the direct consumer benefits:

> "Figure 7 below shows that OCPS retention from an 080 call in ppm terms (i.e. the retail price minus the termination rate) under NCCN 956 and the OCP's retail price (in ppm terms) The horizontal axis shows the OCP's retail price of 080 calls and the vertical axis shows the ppm amount left over for the OCP once it has paid the TCP."

Just going over the page for a moment one sees there is the stepped approach of that borne out on the graph.

Back to A3.71 one sees Ofcom's analysis:

> "As can be observed from Figure 7, if an OCP's price of call origination increases from 17.45 ppm to 17.50 ppm then the termination rate jumps from 4.5ppm to 7.ppm. The amount remaining for the OCP thus falls from 12.985 ppm to 10.50 ppm. However, as the retail price increases, the MNO retains the full amount of that additional revenue (i.e. the whole of a further 1 ppm price rise is retained by the CP once the top of BT's tiered bands is reached). So, while there are exceptions in the region of the thresholds between different levels of BT's termination charge, there is a general tendency for the OCP's retention to be larger the higher the retail price. This is consistent with T-Mobile's view."

Then A3.73 finally on this:

> "In essence therefore, we consider that the current NCCN 956 structure of termination charges is likely to provide an incentive for MNOs to increase the 080 call price, because the incentive to increase retention is likely to outweigh the disincentive of reducing the volume of calls. Our provisional conclusion is that there is likely to be a negative Direct effect on consumers arising from NCCN 956."

A3.74:

> "We note though that a structure of termination charges different from NCCN 956 might have a positive Direct effect on consumers."

What Ofcom is there in A3.71 is that there is a general tendency for an MNOs retention to be larger the higher its retail price, in part in reliance on the step function reasoning. It must have been clear to BT from the draft determination that Ofcom was proposing to rely on its analysis of the step function and the step function argument put by T-Mobile and Vodafone at least to support, to be part of its conclusion that there was likely to be a direct negative effect on consumers arising from charges.

We say it was clear, therefore, that the draft determination gave BT an opportunity to comment on that proposal and it was indeed taken up. Both Dobbs 1 and Maldoom 1 picked up on the issue and referred to it in their reports on behalf of BT, and it is perhaps illumination to see what Maldoom 1 said about it. This requires one to go back to the second volume. Perhaps I can make this point before breaking. Dr. Maldoom in his first report, this is tab 19 in bundle BT2 at the bottom of p.4, says:

> "In NCCN 956,the dependency of the termination charge on the retail price is implemented as steps. This complicates the analysis."

It complicates it from the position where there was simply a smooth line with no steps.

> "Nevertheless, we can treat the steps as an approximate implementation of a smooth pricing relationship (as Dobbs suggests). Further, in practice one might expect that MNOs price at the top of the steps (i.e. just before triggering a termination charge increase), so we can focus on these points."

So he is effectively accepting there that MNOs have an incentive to price at the top of a step, in other words, accepting that the very effect that T-Mobile and Vodafone were contending for. Now, of course, BT's case overall, and indeed Maldoom's case is that that is not the only thing you need to look at, there may be an incentive to move up the step, but there may also be an incentive to move down a step. If you move the other way you go over a cliff and you reduce your charge. Their argument ultimately was that one effect might outweigh the other so it was not necessarily the case that the pricing effect which Vodafone and T-Mobile contended for was the motivating one or the determining one. My more limited point is simply that this was absolutely and clearly an issue which was in play at the time of the draft determination and was pursued thereafter by BT through Muldoom and, indeed Dobbs – if I can just give you the reference. It is also referred to at some length in Dobbs' first report and the reference is tab 16 at section 4. He also deals with the same point and addresses it at some length.

It is a point where BT may well have a criticism of Ofcom's reasoning and on the appeal want to challenge the way the point was dealt with, but it cannot be said to be a point which arose for the first time in the final determination and which was well in play at the draft determination stage.

Sir, I am fairly close to finishing, I should not be more than another few minutes, I think.

THE CHAIRMAN: If there is a prospect of finishing before the sort adjournment we would encourage you to do that, so if it is five or ten minutes then we will crack on.

MR. HERBERG: I think I can do that. There is one more, again slightly technical point which BT made which could at least in principle give grounds for admission of fresh evidence under Rule 22 if it were made out, and this is the suggestion that BT made, crudely: "Never mind what we put to you, you, Ofcom yourself ought to have done an algebraic analysis. Your decision is defective for that reason." We are entitled in our appeal effectively to draw attention to that defect by whatever means we want including new evidence.

We say that that cannot be right in circumstances where it was not put to Ofcom, it was not suggested to Ofcom by BT that they ought to do that analysis, there was no clear submission to Ofcom, and if my learned friend says there is one we will deal with it. We say that there was no suggestion emanating from BT that Ofcom ought to have performed the sort of detailed price control analysis which they then supplied in April in the material annexed to the grounds of appeal.

BT alleges (para. 19 of Mr. Fitzakerly) that Mr. Reid's algebraic investigations were only started in the latter part of January 2010 after Professor Dobbs and Dr. Maldoom had both flagged up that Ofcom had not attempted any sort of algebraic analysis which would demonstrate the likely effect on prices, and indeed, commenced their own analysis in their respective reports of 27th January 2010.

Whether or not it was reasonable for Mr. Reid's algebraic investigations to wait until the latter part of 2010 is one issue, we say it plainly was not, it had the draft determination from 23rd December, and there was no reason within a short period of that if, as they say, there was a substantial lack, or an absence from that draft determination, that they would not have immediately moved to supply the gap.

Be that as it may, we do not accept the proposition that it would be for Ofcom in any event, of its own initiative, to undertake the sort of complex algebraic analysis which BT have provided in the notice of appeal. It is true that Ofcom did not undertake an algebraic analysis but it is important to understand what BT means by the term in that context. It does not, we say, simply mean using algebra. What it means effectively is developing a new economic theory using algebraic analysis to assess the impact of the pricing structure, and to that effect we note from the report of Mr. Richards (tab 13, p. 4, footnote 1) where he states that there appears to be no published economic literature on this topic, hence the unusual requirement to develop the economic model so extensively.

Sir, I am instructed that Ofcom cannot recall any occasion on which it has been said that it ought to have developed a new economic theory using algebraic analysis in the context of a dispute determination. It is something which it is legitimate for BT to put to Ofcom for

consideration, but we say it is not something which it would be appropriate or incumbent on Ofcom itself to develop in the way in which BT appears to contend, and the short point is that in any event if there was a criticism of the draft determination to be made on that basis it was a criticism which ought to have been fairly and squarely put, indeed, probably ought to have formed part of an argument for exceptional circumstances as to why Ofcom ought not to determine in the four months but ought to wait until BT were able to produce that extended analysis which was necessary for the decision. But, as we know, there was no such submission made to Ofcom.

Sir, for your note, there is one other matter which I have not addressed which is Mr. Kilburn's statement. Mr. Kilburn is not a man who has featured very greatly, although his evidence is objected to in part. Can I just give you a reference, it is also in my skeleton argument, because even there I referred back to our objections to Mr. Kilburn which are covered, I think, by one of the interveners in potentially more length anyway, are set out in a letter in BT skeleton bundle, tab B17, p1. There is a letter from Ofcom to BT requesting clarification from BT with the paragraphs of Kilburn to which objection is taken, and the reasons why objection is taken. It is set out there clearly, I do not think I need to address that orally, sir.

He falls into a rather different category, the objection is not so much in general terms that he is producing new expert evidence, a lot of it is said to be irrelevant in terms of the commentary but there are specific objections to specific paragraphs there.

THE CHAIRMAN: Yes.

MR. HERBERG: Sir, I should just make plain my position in relation to the objections to Reid and Richards as experts. This is a point raised by interveners, we do not have a separate independent objection to them being expert witnesses if you were disposed to admit their evidence on the basis of their employment by BT, although we do say that the report ought to be properly put in as expert evidence with appropriate expert declarations and the like.

The final point is that there are submissions as to the form of the notice of appeal by the interveners, and again I will leave that to them, we see the force of their points but I will leave that to them.

THE CHAIRMAN: I am grateful, thank you very much, Mr. Herberg. Do I hear from Three or Vodafone next after the short adjournment?

MR. WARD: If Mr. Kennelly will allow I will go next for Vodafone and I hope I can be fairly short in the light of Mr. Herberg's submissions, 20 or, at the most, 30 minutes.

THE CHAIRMAN: I am grateful, because I am getting a little concerned about timing, given where we have got to now.

MR. READ: Sir, can I just hand up a complete index of the bundle which we have called the "BT skeleton argument bundle", which of course should contain all the material that has arisen subsequently, and that includes the two witness statements as well. If you have the index hopefully it will make clearer what should and should not be in that bundle.

THE CHAIRMAN: Thank you very much. Shall we say five past two.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Ward.

MR. WARD: Thank you, sir. Vodafone supports Ofcom's position on this application, although its legal analysis is slightly different. And I will make submissions on two points. Firstly, as to the nature of the Tribunal's discretion and then, secondly, and, of course, relatedly, as to the statutory context. We make no submissions on either O2 or T-Mobile's applications.

Our first and most fundamental point is that the question whether to admit the evidence is one of discretion. And Vodafone submits that the Tribunal should be very slow indeed to adopt any hard and fast rules. But it does not follow that the Tribunal's discretion is untrammelled. The starting point is, of course, that the wording of Rule 22 is broad, and this is for two reasons. Firstly, the overall question of whether to admit evidence is one of procedural fairness. That is recognised in the Tribunal's guide to the proceedings. And, perhaps just for the note, that is at authorities bundle 2, tab.35 p.45 para.12.1.

But, secondly – and this is a point that Mr. Herberg adverted to this morning – Rule 22 applies to a range of different kinds of appeal where different considerations arise. Without adumbrating them in any detail, of course one can see the difference between on the one hand judicial review under the Enterprise Act, where the rules are very limited indeed as to what may be permissible on judicial review principles, but then at the other end of the spectrum there are damages actions, follow-on damages actions under the Competition Act, where a quite different approach to evidence might arise. And, sir, we would say the same thing about Rule 8-6 that you raised in argument this morning. That is also a rule that general applications, so nothing can be inferred from its overall breadth as to the approach in any particular case. The reality is the Tribunal has to deal with a very wide range of different types of appeal.

Sir, in each case what it must do is exercise its discretion in the light of two essential considerations: firstly, the statutory context and, secondly, the facts of a particular case.

And I am now going to turn to the question of statutory context. I will take this briefly

because Mr. Herberg has covered much of the same ground, albeit in a context of a slightly different analysis. It is, of course, common ground that this is an appeal on the merits, but it does not follow that the appellant has the right to adduce whatever evidence they think fit. We rely on four points in particular. Firstly, we strongly associate ourselves with Mr. Herberg's remarks to the effect that this is not an appeal de novo. One sees that from the T-Mobile case, and we agree that that approach applies a fortiori in this case, because this is an appeal from a dispute, and that is our second point.

In the particular context of dispute resolution, there is every reason for circumspection in admitting new evidence, even if we say this is not a strict and an out and out rule. You have already seen the case law this morning to the effect that dispute resolution is supposed to be relatively swift and certain and to provide a quick answer in order to comply with the obligations that come from Article 20 of the framework Directive. But there is a very important point here that we would emphasise. It is quite different from a full scale regulatory inquiry such as where Ofcom sets a regulated price on a wholesale telecoms product – the kind of case that itself often finds its way to the Tribunal. But one must step back and look at the type of exercise that would be involved in that kind of case. There, Ofcom typically engages in an extensive and prolonged evidence gathering and economic analysis exercise. It frequently takes a couple of years, with the best will in the world and best endeavours, and often repeated public consultations. That is entirely different from the kind of exercise involved in a dispute which is essentially bilateral.

Now, BT's skeleton argument does seek to blur this point. It says that even dispute resolution can have wider implications, and it says – and I will just quote you one sentence from the skeleton argument at para.26 – there is no need to turn it up, it is very short:

> "Ofcom's investigation involves a much wider regulatory appraisal that may raise issues and principles never previously contemplated by the parties".

Now, that is true, but only to a point, and that point could very easily be over-stated. The dispute resolution function is about a speedy resolution to a dispute between two commercial parties. It is true that Ofcom does not act wholly as a private arbitrator, because it must still maintain sight of its regulatory functions. And this is explained by the Tribunal in the termination rate dispute case, and I would ask you, if I may, to just turn that up briefly in bundle 2 of the authorities, it is at tab.23 [2008] CAT 12. At pp.74-75 of the transcript the Tribunal is looking at "Dispute resolution [powers] generally". That heading appears above para.177. For present purposes I want to show you para.180, although we will come back to this for a different purpose. Paragraph 180:

> "Given Ofcom's role as a regulator, even if it decides that the arguments put forward by one side of the dispute are misconceived, OFCOM must still check [and I emphasise that word] whether the position that would be arrived at by fully accepting one or other side's arguments will accord with the regulatory objectives. This is not to say that OFCOM must, as a matter of course, consider afresh the totality of the terms and conditions each time a dispute is referred, regardless of how wide or narrow the actual area of dispute is between the parties. However, it is always appropriate for OFCOM to ask itself whether there are grounds which would justify it exercising other powers under the 2003 Act ...".

So what is required is a regulatory check on the outcome of the private dispute. But that is not the same as saying that OFCOM must conduct a sort of comprehensive public law regulatory exercise when faced with a dispute and, without repeating the detailed submissions of Mr. Herberg, we would agree that any other approach would defeat the speedy resolution procedure that the Directive requires.

Our third point on context is that this is quite different from a penalty under the Competition Act. Now, Mr. Kennelly is going to deal with this 4-3 in part, so I will deal with this very briefly and leave the argument to him. The essential point is this – the competition penalty is also an appeal on the merits. We know that from the Competition Act, schedule 8, para.3, and the Tribunal has interpreted that as giving rise to a right of appeal de novo. So there you really do have a full re-hearing, with oral evidence and it is open to the parties, subject to the penalty, to put forward the evidence it thinks will support its case. But the critical point is that there what you have is the determination of a criminal charge in terms of Article 6 of the Human Rights Convention. And the party who is subject to the penalty has the rights of defence arising from Article 6 including, of course, the presumption of innocence. As a result, in the case of a penalty under the Competition Act the competition authority, whether it be the OFT or Ofcom bears the burden of proof and must discharge it on strong and compelling evidence. So, it is against that background that what one has in effect is the hearing of – in European Convention terms – a criminal trial that one accepts that the appeal must be heard de novo. But that simply could not be more different to what we have in this case which is an appeal from a dispute between two private parties.

Our fourth and final point about the context is that, as the Tribunal has interpreted it, the context placed the burden on BT during the complaint to make good the case for the new contractual condition. And for that we go back to the termination rate case which is at tab.23 of bundle 2, p.75 again, it is at the top of p.75, the last five lines of para.177:

"The onus lies on the party proposing the variation to provide to the other party and to OFCOM the justification for the change in the terms upon which the parties have hitherto been prepared to do business. This would be the position in any situation where one party to a binding contract proposes a variation of that contract".

And, of course, you will recall that BT itself was a party to the termination rate dispute. So, it was clear therefore that the onus in this case lay on BT and it is against that context that one must decide whether it has made out a case for adducing this fresh evidence.

There is a rather surprising comment upon this in Mr. Fitzakely's evidence which is in the BT hearing bundle at tab.D15.

This is the most recent witness statement filed by BT for the purpose of today's hearing.

I do not propose to delve into the facts, but you will see at p.5 of 10, para.14.

Mr. Fitzakerly says:

"I also would point out that BT did not anticipate that the onus would be so firmly placed upon BT by Ofcom for BT to provide economic evidence, particularly given the way that Ofcom had rejected an enquiry into the specific charges"

But there was no doubt at all on the case law that the Tribunal has analysed the statutory framework the party that has proposed the change, in this case BT, bears the burden of demonstrating that the change can be sustained. Now, in discharging that burden, of course the parties are mindful of the regulatory objectives placed upon Ofcom by the legislation; and those objectives are set out in s.3 of the Communications Act. May I just take you to those very briefly, that is in the first authorities bundle at tab.3. Now, s.3 of the Communications Act for present purposes, which is p.3 of the print-out, and the starting point is these are "The general duties of Ofcom", and I am just going to read you two of the sub-sections. At 3:

"(1) It shall be the principal duty of OFCOM, in carrying out their functions –

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition".

That was always going to be the regulatory benchmark by which Ofcom would approach this. And then at 3, sub-paragraph (5) puts a little bit more flesh on the bones on the next page.

"(5) In performing their duty under this section of furthering the interests of consumers, Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money".

So, in a dispute such as this, the party that has imposed the term must satisfy Ofcom as to it being fair and reasonable against the context of the statutory objectives. Sir, there is argument in the papers that between BT and Ofcom about what was or was not apparent to BT before Ofcom issued its provisional determination, but it was very obvious from the outset that this was one of the matters which BT would have to satisfy on if BT was going to discharge the burden on to it.

Now, I propose not to address the question of the facts of this case more generally, but I do want to delve into them very slightly for this purpose – one of the issues here obviously is, was BT somehow unfairly taken by surprise, or did it really not have enough time to advance this argument on benefit to consumers. And Mr. Herberg focused on the one month period between the draft determination and the final determination. We respectfully submit that one can afford to step back a little bit further than that, because NCCN956 was issued by BT on 3rd June with effect from 1st July. So even though the dispute process only took four months, BT had a very long time indeed to think about what its justification might be in terms of Ofcom's overall statutory objectives. Now, this was a unilaterally imposed financial burden placed upon the MNOs, and it is quite a significant burden. Sir, it can hardly have come as a surprise to BT that it was ultimately disputed by the MNOs. There is, as this Tribunal will know very well, plenty of litigation in this area. So, one might have thought that BT would have done some advance thinking as to whether or not the change would be of overall benefit to consumers, firstly, in order to be satisfied itself that it was proper to do so; but, secondly, to be comfortable that the change would be sustainable in the face of a dispute, should one arise.

Sir, it is quite really wrong to see this as an application that really focuses on what could or could not have been done over Christmas given the no doubt limited availability of at least external experts.

We do not propose to say any more than that about the facts and, just by way of conclusion, we say this is a matter for the discretion of the Tribunal. That discretion should be exercised with circumspection in the context of an appeal against a dispute resolution, and that, really for the factual reasons Ofcom has given, we submit that there is no justification for the exercise of that discretion in this case.

Unless I can assist further, those are the submissions for Vodafone.

THE CHAIRMAN: No. Mr. Ward, that was extremely helpful, thank you very much.

MR. KENNELLY: As Mr. Ward said, and I concur, we associate ourselves with Ofcom's submissions, and as I said in my skeleton H3G will not address any of the issues going to the content of the evidence in dispute or the manner in which it came to be served. I will confine myself, as I said in the skeleton, to the issues of legal process, and in particular the principles governing the admissibility of evidence in s.192 appeals, and in particular, the principles governing the admissibility of evidence where the appeal is against a determination of a dispute by Ofcom under s.188 of the 2003 Act.

THE CHAIRMAN: Right. Thank you, Mr. Kennelly, that will be very helpful.

MR. KENNELLY: And we support Ofcom's request in their skeleton at para.9 that the Tribunal take this opportunity to address the question of principle and, if possible, provide some guidance as to how these questions should be addressed in future. It is important at the outset to identify the issue between the parties because it is no part of our case that there is a rule of law requiring the disputed evidence to be excluded. We entirely accept that there is no automatic bar, it is a question of discretion. The question is the proper approach of the Tribunal to the admission of evidence in s.192 appeals which was not before Ofcom at the time of the decision, either because it was not provided to Ofcom or not provided in time pursuant to the procedural requirements imposed by Ofcom.

We submit that the right to adduce evidence in support of the s.192 appeal is not unconstrained as BT contend. The starting point must be that the appellant relies on material which Ofcom had or ought to have had at the time of the decision, and there must be good reason to adduce further material, but there may be good reasons, for example, it was not possible to adduce it earlier, or it has some particular probative quality. In cases where the appeal is against a dispute determination -- for reasons which I shall develop – an appellant should be confined to the material which Ofcom had or ought to have had absent exceptional circumstances because of the particular nature of that jurisdiction.

Turning to the legal questions, and before I look at s.192 of the Communications Act, it is necessary to reflect once more on Article 4 of the Framework Directive, because in our submission there is no doubt that the purpose of s.192 is to implement Article 4 of the Framework Directive. Mr. Herbert touched on this, and he said if BT disagree, he will deal with it in his reply. He gave you the reference in the *TRD* appeal, that is at tab.23 of the authorities bundle. It is also made plain in the sequencing decision of this Tribunal (that is at tab.24 para.33) and that quite helpfully refers to the notes or the explanatory notes accompanying the Communications Act which explain in crystal clear terms that the

purpose of s.192 is to implement Article 4 of the Framework Directive, and it was also made clear in the H3G appeal, the 2005 appeal, and that is at tab.18, para.25.

The question then is what is meant by taking account of the merits? And the leading case on that, as we know, is the judgment of the Court of Appeal in the *T-Mobile* case and in particular the judgment of Jacob LJ. You have already seen that, so I will not take you to it again. I would add, though, some paragraph references to those given to you by Mr. Herberg. He referred to para.31 and that is an important paragraph. But it is also useful, in my submission, to look at paras.28-30 because what Jacob LJ made plain in those paragraphs was, first of all, judicial review would suffice to provide an Article 4 appeal. More than suffice, he said, because judicial review principles can provide full merits appeals with consideration of facts *ab initio*, and he said Article 4 does not even go that far. It simply requires that the merits be taken into account – duly taken into account – which can vary depending on the circumstances, as Mr. Herberg said. Significantly, Jacob LJ said that the standard for success for whether the appeal went to the CAT or the way of judicial review was the same. He also said in both situations a fresh hearing, a de novo hearing, was not required. That is important because it tells you the scope of Article 4 which this appeal provision in the Act implements, and therefore it must construed consistently with the EU law provision.

In summary, therefore, s.192 appeals provide the Tribunal with an appellate function, not a de novo function. And the focus, as Mr. Herberg said, is on the correctness of the decision. And, as this Tribunal made plain, the *Vodafone* judgment (again I shall not take you to the case, it is at tab.25 of the authorities bundle) the *Vodafone* judgment this Tribunal makes plain the focus of the appeal must be on the decision. That is the adequacy of the inputs, Ofcom's inputs, in the decision, the manner in which the decision was reached and the conclusions; and any evidence in an appeal must be directed to those matters; and evidence must not create fresh lines of enquiry which have not benefit canvassed with Ofcom before, absent good reasons or, in dispute determination cases, exceptional circumstances. Otherwise, as we have said, there is a risk that this Tribunal will be converted into a second tier regulator, that is the practical consequence of conducting a de novo appeal.

Now BT, in seeking to contradict these submissions, relies very heavily on cases decided under the Competition Act. There is a very important distinction between appeals under s.192 and appeals under the Competition Act. Under the Competition Act there is an effectively unconstrained right to produce evidence, particularly where there is an

infringement decision imposing a penalty, and there are very good reasons for that which do not arise in s.192 appeals.

First of all, and this may not be a consideration of enormous significance, but it is important, the statutory provisions are different. As Mr. Herberg showed you this morning when he referred you to s.195 of the Communications Act, this Tribunal in a s.192 appeal cannot take a decision itself as to the substance. You must form your view ultimately, and then remit the matter to Ofcom for Ofcom to take its decision under the Competition Act, and that is para.3-2(3) of schedule 8. The Tribunal has jurisdiction to take the whole decision itself. It can take any decision that the competition authority would have taken.

Secondly, and most importantly, the Competition Act was intended for an entirely different purpose, and the appeal provisions are for a different purpose. They do not have the limited nature of the Article 4 appeals provided for under the Framework Directive. They require a full power of a re-hearing because, among other things, it was conceded by the OFT and properly conceded, that Competition Act proceedings are criminal proceedings for the purposes of the European Convention on Human Rights, and the reference for that is *Napp,* it is at tab.14 of the authorities bundle, para.98, and if I could ask the Tribunal actually to turn to that authority. As I said, it is at tab.14 of the first volume of authorities and in particular, as I said, para.98. The Tribunal sees that the Tribunal held that as they had already held in their interim judgment of 8th August, the proceedings were "criminal", and

> "That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect".

Nothing like that arises in the context of appeals for s.192.

Now, if you could just keep *Napp* open, or at least stick a pen or something in to keep it there, because we will come back to it in a second, and then go back to tab.17, or forwards to tab.17, which is another case relied on by BT, the *JJB Sports* appeal. This was an infringement decision appeal and para.284 is the relevant paragraph in a section relied upon by BT. It describes how new evidence is treated by the Tribunal in appeals against infringement decisions under the Competition Act.

> "The Tribunal sees [at para.284] that the Tribunal [in the *JJB Sports* case] has now heard a great deal of evidence, much of which is not referred to in the decision. Such a situation is a common occurrence in appeals to the Tribunal which are appeals 'on the merits' and effectively take the form of a new hearing ... Indeed, as the Tribunal observed *Napp* ... it is virtually inevitable that, at the appeal stage,

matters will be gone into in considerably more detail than was the case at the administrative stage".

And the Tribunal there sets out how in this context the Tribunal goes into matters in a great deal of detail, and they explain how, provided each party has a proper opportunity to answer allegations made, may determine the appeal on the basis of all the material before them at the time of the appeal hearing.

Going back to *Napp Pharmaceuticals*, we get clarification as to why that approach is adopted. In particular at paras.117 and 118 – *Napp Pharmaceuticals* is at tab 14 – p.28, the Tribunal says:

"If and when a matter moves to the judicial stage before this Tribunal …"

that is an appeal against an infringement decision –

"… what was previously an administrative procedure, in which the Director combines the roles of 'prosecutor' and 'decision maker', becomes a judicial proceeding."

The words there, "prosecutor" and "decision maker" are significant. They refer to the nature of infringement decisions under the Competition Act. There is no analogue in the Communications Act at all.

"There is at that stage no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional role of judicial review but is required by paragraph 3(1) … [to] 'make any other decision which he Director could have made' …"

That is the reference to para.3(2)(e), which I have given you. It describes then in the rest of the paragraph the powers of the Tribunal.

In the next paragraph, para.118, they refer to a statement made in the House of Commons by the then Minister for Competition and Consumer Affairs describing the purpose of the Competition Act appeals. There the Minister said:

"It is our intention that the Tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the Tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the Tribunal to decide a case on the facts before it,

> even where there has been a procedural error, and to avoid remitting the case to the director general."

The plain intention of Parliament was that in Competition Act appeals this Tribunal would decide everything and not remit matters, quite unlike the procedure under s.192 of the Communications Act.

It is also important to recognise that even under the 1998 Act, even under Competition Act which, as I have said, requires a much more liberal approach to the admission of evidence than under the Communications Act, even there the ability of an appellant to adduce evidence is not unconstrained as BT contends.

Could I ask the Tribunal to turn to the *Freeserve* judgment at 19 at the first volume of authorities, para.111, p.38. This appeal, *Freeserve*, was an appeal under s.47(6) of the Competition Act. As you are no doubt aware, under the Competition Act it is possible to challenge infringement and non-infringement decisions. A complainant whose complaint has been rejected can appeal and ask the Tribunal to effectively take the decision that the OFT, for example, has refused to take. So even in this context it is in theory open to the Tribunal to take a full infringement decision itself, although the practice is not to do so.

Turning to para.111, the Tribunal has referred to the fact that it has the infringement and non-infringement jurisdiction, and then it says:

> "However, the way in which the Tribunal exercises its jurisdiction is, in our view, likely to be affected by the particular circumstances."

Then it refers to the Tribunal's judgment in *Bettercare*, and it says:

> "'Nonetheless, in our view this Tribunal is essentially an appellate Tribunal, not a Tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did.'"

We say that is, of course, in the context where there is a more liberal approach to the admission of evidence, and yet even there the Tribunal is adopting a more strict approach than that contended for by BT.

> "Similarly, in *Aberden Journals* … in relation to a suggestion that it should be admit as evidence material not put to the defendant in the course of the administrative procedure …"

and the Tribunal sees how it was described there, and I shall not read that but leave that to the Tribunal to read.

Going on to para.113, the Tribunal refers to both *Aberdeen Journals* and *Bettercare* and in the middle of that paragraph the Tribunal says:

> "Everything will depend on what is necessary to meet the justice of the individual case, bearing in mind both the overriding need for fairness, and the need for expedition and saving costs. In some complainants' cases – of which, as will be seen, the present case is one example – the Tribunal's appellate control will, in practice, largely focus on the adequacy of the Director's reasons and the investigation he undertook."

Turning over the page, para.116 – and of course the Tribunal recalls that this is a judgment relied upon by BT – the Tribunal finds that it is:

> "… difficult to justify a rule of law to the effect that a complainant may not submit new material to the Tribunal that was not before the Director."

We concur in our context. The Tribunal sees the first half of that paragraph, but I would like to direct your attention to the second half of the paragraph:

> "We accept, however, the Director's basic argument that, in principle, the original complaint sets the framework within which the correctness of the Director's decision is to be judged, taking account of the material that he had or ought reasonably to have obtained. An appeal is not an occasion to launch what is in effect a new complaint and then expect the Director and the Tribunal to deal with the matter on an entirely new basis."

For the reasons I have given, we say that is *a fortiori* in appeals under s.192, but even more *a fortiori* in decisions where the appeal is against a dispute determination under s.188 of the Communications Act. As the Tribunal has seen, and I will not take you to the authorities because you have seen them, Article 20 of the Framework Directive effectively sets out three main matters. First of all, Article 20 sets out a four month long-stop that an obligation on, in our case, Ofcom to determine the dispute as quickly as possible. Secondly, it must accept the disputes unless there is a rapid alternative, and a decision as to its acceptance or not must be communicated rapidly. There is a very strong emphasis in Article 20 on the rapidity with which Ofcom must make these decisions. Then, finally, the point that Mr. Herberg made that procedural protections are sacrificed by the Community legislature in favour of rapidity, because the consultation requirement under Article 6 is dropped for Article 20 matters.

The result is implemented in ss.186 to 188(3) of the Communications Act. Under those provisions Ofcom must accept the dispute. It has a mandatory jurisdiction and it must do so rapidly. It has a very limited discretion to extend time. For Ofcom the trade-off is, under Article 20 and under s.188(3) of the Act, a wide discretion as to the procedure which it employs in handling disputes. There are good practical reasons for this because Ofcom is burdened with this very onerous obligation. The cases are complex, inevitably, and there are inevitably large numbers of interveners in this industry and yet Ofcom must do its work within a very short timetable. Professor Stoneman asked about the commitment of resources and in that instance, although here it is really for Mr. Herberg, I would direct you to para.22 of Mr. Buckley's witness statement which describes how quickly Ofcom committed resources, as it always does, in these dispute cases. In a very short timetable a large team of individuals is committed to something and they work very hard and very rapidly, as you can see from Mr. Buckley's evidence, to comply with the deadlines.

In that context, it is crucial that Ofcom has a free hand in its procedure and the Tribunal accepted this in the *TRD* appeal. Mr. Herberg took you to the reference at tab 23 of the authorities bundle, para.105. The Tribunal will recall that the Tribunal said there that Ofcom was entitled to take a firm stand in relation to what is admissible in these dispute determinations. The Tribunal referred specifically to what Ofcom could decide to receive. It could be firm in terms of what it decided to receive and that is precisely, we say, the proper approach and what Ofcom did in this case.

What does BT say to all of this? They set out their stall at para.51 of the skeleton argument, and in that they refer to an unconstrained right to admit evidence and new materials in an appeal under s.192 against a dispute determination. They refer to, and rely on, *Napp Pharmaceuticals* and a textbook called **Competition Litigation UK Practice and Procedure**, which says that there is no inhibition on the appellant attacking the disputed decision on the ground of new evidence or any other ground whether or not that evidence or ground was or could have been put before the decision maker before the decision was taken. They rely entirely on the competition procedure, and in particular on the fact that the decision maker acts in a dual role of prosecutor and decision maker which makes a lengthy appeal with the right to put in the large amounts of evidence necessary. We say that is entirely unsustainable in view of the differences between the two statutory schemes.

Finally, the Tribunal raised the point (I think it was the Chairman) about appeals, because we have clear guidance in the Directive and in the statute as to how quickly disputes must

be determined but what appeals, the legislation is silent? The rules provide for a two month limitation period as it does for everything else.

First of all, I would say that two months is a short time; and secondly, in our submission, it would cut across the objectives of the Directive if the Tribunal was to take a liberal approach to the admission of evidence in appeals against dispute determinations. The purpose, the objective, of Article 20 is to resolve disputes rapidly, and it would run counter to that objective if appeals were allowed to drag on because of a liberal approach to the admission of evidence, in our submission to act consistently with the objectives of the Directive it is necessary to take a strict approach on appeals as well as under the dispute determinations themselves.

Unless I can be of any further assistance those are our submissions.

THE CHAIRMAN: No, thank you very much, that was very helpful. Mr. O'Donoghue?

MR. O'DONOGHUE: (without microphone) Sir, on behalf of Telefónica O2 we wish to address three topics very briefly. Sir, first in about 90 seconds to clarify O2's position on the submissions made by Ofcom, which we support; second, the evidence of Mr. Richards and Mr. Reid, to which O2 has a specific objection; thirdly, the evidence of Mr. Kilburn which has raised somewhat different considerations.

Sir, as regards the Ofcom submissions, Mr. Herberg quite rightly alluded to siren calls for perhaps a discretionary approach to this case rather than one purely of principle, and if he intended that reference to be in a classical sense it may be that my looks precludes me from saying anything.

Sir, we would caution against an unduly legalistic approach to issues of this kind. It is quite plain from the sheer breadth of the dispute resolution procedure and appeals from that procedure that an enormous range of different types of disputes may be presented to Ofcom at any point in time. They may range from simple contractual construction issues to very, very complex disputes against the backdrop of SMP conditions with very, very detailed underlying economic and other evidence. As you observed this morning, sir, it may also be that there are factual issues that over time become less clear, open to question, may evolve. Suppose, for example, sir, that there was a finding in a dispute resolution decision that prices at a given point in time had increased, decreased or stabilised, but there was a suggestion that over time the trend might be different. Of course, in that context, the factual evidence as to how prices subsequently evolved may, of course, be relevant to the appeal situation. In that context, we think that there are grave dangers in having undue rigidity in the scope of the appeal process. We submit that each case necessarily needs to be looked at

on its own facts. Sir, that of course will create additional work for the Tribunal, but it seems to us a necessary evil, or at least the lesser of two evils.

THE CHAIRMAN: It is less the unnecessary work, but more the concern that one might have a debate like this every time there is a dispute resolution by Ofcom with the result that the potential for grappling with the substantive matter is put off whilst the parties haggle about what evidence should be used at the hearing, which builds in a delay in its own right.

MR. O'DONOGHUE: Sir, we certainly see that concern, but it is worth noting that, to my knowledge, this is really the first case in a dispute resolution context which has raised this issue in such a pointed way. Sir, no doubt guidance from the Tribunal, even on a matter of discretion, may nip a lot of these disputes in the bud.

Turning to the evidence of Mr. Reid and Mr. Richards, Telefónica O2 has three points to make: Sir, the first point is that on the basis of the material before the Tribunal there is zero confidence that these two experts were aware, or are aware, of their duty of independence to the Tribunal. If that is correct, sir, it is dispositive.

Second, on the basis of the material before the Tribunal, there are reasons to doubt that these two experts have the objectivity necessary to be proper experts for the purposes of these proceedings. I will take the Tribunal to specific passages in their statements that, in our submission, compromise, or risk compromising, the objectivity.

Third, even if I am wrong on those two points, as a matter of proportionality in a situation where we have no less than six expert reports addressing exactly the same issue, there is no possible justification for having two more identifying the same themes.

THE CHAIRMAN: It may be though that if the third reports of Maldoom and Dobbs were admitted the first two might fall away and maybe Mr. Read can help in due course.

MR. READ: If I can make the point absolutely clear, because this is a point I will make in due course, there are three reports each of Maldoom and Dobbs. They are effectively an extension of the evidence they have given in the first report. If both the third reports go in then we are not going to end up looking in any detail at the first and second, other than somebody may at the end of the day want to cross-examine them on something inconsistent, if that is what is said about it. They are there really for the context of the third reports. They are not there to be independent reports in their own right.

THE CHAIRMAN: Thank you.

MR. O'DONOGHUE: Sir, we will address that, and the point is that it does not cut across what I am saying.

Sir, on the first point, the material before the Tribunal provides no confidence to this Tribunal that the two experts in question have been advised, or were otherwise aware, of the important duties that experts have in proceedings of this kind.

Sir, can I take you to the *Field* case, which is at tab 12 of the first authorities bundle, in particular para.26, Lord Justice Waller. I will not go into the facts because I am not sure they matter very much for present purposes. There Lord Justice Waller says:

> "The question whether someone should be able to give expert evidence should depend on whether, (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence."

There is no dispute for the purposes of today on limb one, but, sir, we say it is manifest on limb two that there is nothing for the Tribunal today which can give it any confidence that these two witnesses were or are aware of the solemn duties of experts to the Tribunal.

Sir, earlier in the case Lord Woolf outlines some of the ways in which one can be satisfied that the expert is aware of his or her primary duty. At para.19 he says:

> "In the future I would encourage, if a person such as [the expert in that case] is to give evidence, the authority concerned provides some training for such a person to which they can point to show that he has the necessary awareness of the difficult role of an expert, particularly in relation to claims such as these."

The Tribunal will see in para.20 that in that particular case there simply was not time to do that.

At para.16 the Master of the Rolls said:

> "… there can obviously be advantages in having an expert who is not employed [by the party in question]."

Sir, if we then turn to tab 15, the *SPE* case, this was a judgment by Mr. Justice Rimer, as he then was, in a copyright and infringement case where the issue of expertise concerned the quantum of loss. Again, the detailed facts do not particularly matter for present purposes. If the Tribunal can turn to para.71 of the judgment it says that Mr. Dean, the expert in that case:

> "… made no note of the instructions he was given, because he said there was no need – he said he had a fairly good memory. There is no record of any instructions he was ever given, and he said he did not make one because no one told him he should do so."

If you read on later in the paragraph:

> "It is probably because Mr. Dean is wholly inexperienced in Court procedure, and received insufficient guidance from the legal advisers … he had never heard of, let alone read, Part 35 of the CPR. Beyond being told that he should try to be impartial and fair, he received no guidance from anyone as to what was required or expected of him as an expert. As a result, he approached and performed his task with manifest incompetence."

Sir, in the present case, there is absolutely no evidence on the basis of the material before the Tribunal that the two experts in question received any instructions, let alone any proper instructions. There is no evidence before the Tribunal that they received any training or were even informed of the basic principles of Part 35 of the CPR, the protocol that attaches thereto, or even in a colloquial sense of their duties of overriding impartiality and objectivity towards the Tribunal.

In the intervening period of course BT could and should have provided evidence to the Tribunal that the necessary measures were taken to perfect what purported to be expert economic evidence. Again, having been given a second bite of the cherry there is not a shred of evidence before the Tribunal that the proper procedure was followed.

What BT says in its skeleton is, if O2 is being pernickety they are happy to backfill these obligations, these solemn responsibilities, with whatever form of wording would make O2 happy. With respect, this misses the point. The point is that before the expert undertakes the evidence in question he or she must focus their mind on the overriding duty, the unique duty, towards the Tribunal as an expert. It is a different duty to a mere witness of fact, because it overrides any obligation to any of the parties. These formalities – and they are formalities – have fundamental underlying import that, in our submission, cannot simply be backfilled.

I want to come to nail in that coffin which is that even had those formalities been complied with retroactively, there are specific problems with the way in which this evidence has been approached that, in our submission, risk compromising the objectivity of the witnesses in question.

Starting with the statement of Mr. Richards, I do not know if the Tribunal has his statement to hand, at para.6 – this is the over-arching statement introducing the expert evidence – he says:

"My primary purpose for making this statement is to set out, from an economist's perspective, what BT considers to be a number of serious flaws in Ofcom's Determination."

Sir, in our submission, it is obvious from his use of the words "what BT considers to be flaws in Ofcom's case", that this sets out to be a form of special pleading.

Sir, if we read on at para.13, Mr. Richards accepts, as he must, that the BT charges in this case were a commercial proposition for British Telecom.

Then at para.28 he sets out what, in our view, is something that really betrays the real purpose of his evidence because what he does quite clearly is to introduce or posit a new fact that was never found or even addressed by Ofcom. He says that MNOs were making high profits which he claims were 15p per minute – para.28.

Plainly this is no part of the Ofcom determination because the other point that BT appeals is indeed that Ofcom failed to get evidence from the mobile operators as to the profitability and margins, and yet here in this statement he says gratuitously that MNOs were making high profits.

An expert, properly instructed, would not stray outside the remit of the facts as found. Not only does he do this, but he introduces what, in our view, is an entirely improper unfounded allegation as a central plank for his purportedly expert evidence. We say that this compromises objectivity and it is something that he, properly instructed, should not have engaged in.

Mr. Reid, in our submission, is guilty of the same sin. If the Tribunal can turn to his evidence, he too engages in special pleading. He says that BT has very strong evidence on mobile operators' costs. Again, this is plainly not something that forms part of any finding in the determination under appeal. As indicated, it is one of the very findings, or absence of findings, that BT is appealing. BT complains that Ofcom should have asked the operators for their cost information and should have made experts' findings in this regard.

THE CHAIRMAN: I am sorry to interrupt, but of course BT eschewed the expert formulation for these documents, and again no doubt I will hear from Mr. Read, and quite deliberately formulated them as statements of fact. Normally, one expects the distinction between a factual statement and an expert report to be pretty clear. The point has been made today with some force, and we will need to think about it, that it is for BT to justify to Ofcom the variation that it proposes. In a sense, that involves, one would imagine, elements of policy which, could it be, straddle the factual expert divide, and could it be said that these statements are not expert statements but factual statements explaining why it is that BT is

pushing forth, hence the NCCN 956? Do not answer that now if you do not want to, but I would be grateful to have your submissions on that point when you get there.

MR. O'DONOGHUE: Sir, I will think about it, but in a sense the BT argument in so far as I understand it is that it is going to be policy based, but these multi million pound additional termination charges are to be regarded as benign because they may incentivise retail pricing to be at a lower level relative to what it is today. On any view, that is not something inherently factual. It is an economic policy argument. It is, of course, highly counter-intuitive that the multi-million pound cost increase would have a positive effect on prices, but that is for another day. It seems to us that the central thesis of this expert evidence is no sense factual, it is an economic, or perhaps even social, policy argument.

Sir, finally, very briefly on the issue of proportionality, I accept that if the six reports are reduced to two following reflection it may look a bit better, but the point I am trying to make in terms of proportionality, it is not simply a numbers game, it is that the expert evidence of the in-house employees or economists duplicates matters that are already covered by the external evidence. We can see that in a number of ways quite expressly from the statements and from the notice of appeal. If, for example, you look at Mr. Reid's statement, para.7, he is very candid that his so-called basic model largely repeats the approach presented by Professor Dobbs. It is pure duplication.

In the notice of appeal, para.118, BT says that the four economics reports, two external and two internal, analyse the same issue from a different perspective. Sir, Ofcom will, if this evidence is admitted, have to consider responding in kind. There are four other interveners in this case who may have to consider their position. In our submission, this type of unnecessary duplication or difference in perspective is entirely disproportionate. The function of an appeal process is not to allow people to dust down their PhD or their latest pet theory, they need to think long and hard about the proportionality, the added value of evidence, and this has not been done in the present case. It has been dumped in an uncritical fashion into a shopping list of expert reports and the proper thought process has simply not been gone through, in our submission.

Sir, those are our submissions on the Reid and Richards evidence. Very briefly on Mr. Kilburn, it is a very simple and self-contained point, and it is set out in detail in the letter of 26th May 2010 from Ofcom where the specific passages in that evidence are identified. The objection is very simple. Within the CAT guide, Rule 12, a witness of fact simply should not engage in argument or *quasi* legal submission. We say that if you look at the sections of Mr. Kilburn's statement identified, parts of section 3, all of section 4 and

sections 5 and 6 in full, it is clear that he has crossed that line by some distance and that it is entirely improper. We accept that in the earlier sections 1 and 2 he does provide some description of the background of the NTS regime. We do not agree with that description but it may be useful in so far as it goes. In particular, in section 4, in so far as he sets out the MNOs's arguments, BT's arguments, it is something that properly features in a skeleton argument and is not evidence of fact in any conventional sense. We say that the Tribunal should reiterate this important distinction in the Rules between fact and submission.

Sir, those are our submissions, unless I can help further.

THE CHAIRMAN: Thank you very much.

PROFESSOR STONEMAN: Can I raise a question: a nice black and white submission, they are in or they are out. What about the argument that we, as a Tribunal, can put what we consider the appropriate weight on the arguments and that is for the Tribunal to decide?

MR. O'DONOGHUE: Sir, BT has made that point, that it is a question of weight and not admissibility. In our submission, that might well be true but for the fact that the witnesses in question have, in our submission, compromised their objectivity by introducing what they present as facts, despite the fact that none of those findings form any part of the determination. An expert witness properly advised of his or her responsibilities would stick to the findings made by Ofcom and not try to bring in by the back door prejudicial findings of fact which do not form part of any of the documents under appeal. We say that they have crossed that line, but it simply is not a case of taking a principled objection just because somebody is an employee. There are plus factors in this case which mean that they have crossed the line and become special pleading witnesses for British Telecom.

THE CHAIRMAN: Thank you. Mr. Pickford?

MR. PICKFORD: Thank you, sir, members of the Tribunal; there were two areas that we canvassed in our skeleton argument. Those were the adequacy of the notice of appeal in respect of evidence referred to at para.117; and also the admissibility of certain parts of the evidence of Mr. Kilburn. As regards the latter of those points, we are happy to adopt the submissions of Ofcom and O2 and I make no further submissions today save to draw your attention to paras.22 to 25 of our skeleton argument. Our main focus today is on the point that we made about the adequacy of the notice of appeal. However, before going into that we should explain the basis for our silence on the issue raised by Ofcom about the submission of new evidence. We relied specifically on a point made in terms by Ofcom in its skeleton argument at para.115, and it was that the admissibility of evidence is a case specific matter. They say: "The issue is not what approach has been taken in previous

cases, but what approach should be taken in this case in the light of the procedure that was followed during the determination of the specific dispute referred".

So long as the case is to be decided on that basis, we saw no need to wade in to the deluge of submissions that you already have on this particular issue. However, we noted with some degree of alarm at the outset of Mr. Herberg's submissions today that he appeared to be inviting the Tribunal to lay down some wider principles of general applicability. He then qualified that fairly soon after and said that his focus was really only on dispute determinations, and that was a welcome qualification. So far as his submissions appear to go more widely, it is appropriate for us just to make two short points in relation to them. The first concerns the T-Mobile case to which he referred and the comments relied upon of Lord Justice Jacob. If the Tribunal could turn very briefly to the judgment of the Tribunal, which is at tab 24 of the second authorities bundle, you were taken by Mr. Herberg to para.72, and I would like just to very briefly take you back to it because we draw a very different inference from what the Tribunal is saying there to the one drawn by Mr. Herberg. The Tribunal said at para.72:

> "Similarly, we do not agree that the requirement that the appellate body must take the merits of the case duly into account should be interpreted as indicating that only an appeal on the merits of the kind conducted by this Tribunal is adequate. It is not right to paraphrase those words in Article 4 as conferring a right to a full merits appeal."

What we draw from that is that the Tribunal were there drawing a distinction between a full appeal under s.192 and the minimum rights that are guaranteed by Article 4 in the Framework Directive. Article 4 is not imposing maximal rights on appellants, it is providing for minimum ones. If we pick up in the judgment of the Court of Appeal, which is at tab 28 of the same authorities bundle, we see at para.32, again a point you were taken to by Mr. Herberg, that judicial review does comply with Article 4. What the Court of Appeal was concerned with in that case was Article 4, and whether judicial review satisfied Article 4, not whether Article 4 and s.192 mean exactly the same thing. If one goes on para.45 in that judgment, one sees there that, as was applicable in that case, there are a number of exceptions to the ability to bring an appeal under s.192. They are contained specifically in schedule 8. If you happen to fall within the scope of schedule 8 the particular decisions laid out therein, the route of a challenge is by way of judicial review, not by way of a right of appeal under s.192. So there is, therefore, clearly a distinction between s.192

appeals and judicial review, both of which satisfy Article 4, but both of which are clearly different. The point of difference can be seen quite plainly.

Can I ask you to turn to your grey books, and in particular s.317 of the Communications Act, p.951 of the 5th edition. This provision concerns an entirely different part of the Communications Act, but the point I wish to rely on it for is this: what it makes clear is that there is a distinction in a Communications Act context between judicial review and full appeal on the merits. One sees at s.317(6):

> "A person affected by a decision by OFCOM to exercise any of their Broadcasting Act powers for a competition purpose may appeal to the Competition Appeal Tribunal against so much of that decision as relates to the exercise of that power for purposes.
>
> Section 192(3) to (8), 195 and 196 apply in the case of an appeal under subsection (6) as they apply in the case of an appeal under section 192(2)."

So that brings in the appeal mechanism. Then we see in sub-section (8):

> The jurisdiction of the Competition Appeal Tribunal on an appeal under subsection (6) excludes—
>
> (a) whether OFCOM have complied with subsection (2); and
>
> (b) whether any of OFCOM's Broadcasting Act powers have been exercised in contravention of subsection (3);
>
> and, accordingly, those decisions by OFCOM on those matters fall to be questioned only in proceedings for judicial review."

So again, making very clear that there is a difference between the two contemplated in the Communications Act.

THE CHAIRMAN: The difference may simply be which particular Tribunal hears the point, as opposed to the standard of the review.

MR. PICKFORD: It might, but it would be, we submit a very odd distinction to draw, given that there is no reason, if both tribunals were going to apply exactly the same approach, to send one particular set of challenges by way of appeal and using different words "Appeal" to this Tribunal and another set of challenges using a different formulation, "Judicial review" to the Administrative Court. We submit that would be a very odd way for Parliament to have framed the legislation if it did not intend there to be a difference between the two substantively.

The second point we make is that in so far as Ofcom is to be construed as making a point of general applicability across all s.192 appeals that there is some sort of general presumption

against the admission of new evidence not before Ofcom during the administrative stage, that too should be rejected.

We very much align ourselves with the position adopted by Vodafone that the issue is a case specific one. If one takes, for example, a unilateral regulatory decision, such as the setting of a price control, we say it would be quite wrong in that context to have a general presumption against the inclusion of new evidence. Firstly, it may not be proportionate or appropriate to submit during an administrative procedure the full evidence that might be submitted on an appeal in anticipation of a regulatory decision where you do not know its exact terms and you do not know which way it is going to go.

Secondly, given the far reaching public interest ramifications we would say of setting a price control, it would be quite legitimate, and indeed it is proper, to expect Ofcom to reach the correct answer. If Ofcom's initial answer can be shown to be wrong by reference to further evidence that was not before but is placed before the tribunal, we say it would be wrong to have a general principle presumption excluding that as well.

There is no support, we would say, for a wide ranging general exclusion of new evidence either in the case law or in the statutory framework, and indeed we say it would be a profound departure from the approach the tribunal has taken so far in cases particularly of that sort. Those are the only points we wish to make in relation to the point canvassed by Ofcom.

Turning then to our particular issue canvassed in our skeleton argument, which is the adequacy of the notice of appeal, we say that BT has failed to identify clearly and with sufficient particularity, as required by the relevant rules governing its appeal and also by the Tribunal's established practice, what its case is, both as a matter of fact and as a matter of argument, on the matters to which the evidence which it attaches to its notice of appeal and refers to at para.117 is purportedly relevant. In particular we say that BT has failed to make clear in each case the link between each aspect of its evidence and particular grounds of appeal. The submissions I wish to make on this fall broadly into four short parts. Firstly, I am going to address the general legal framework, then turn to BT's pleading, then address the points that are taken against us in BT's skeleton and then finally the question of relief.

Turning then to the law, one starts naturally from s.192, and I do not need to take you back to it, you have already been taken to it by Ofcom this morning, but the key provisions that we rely upon are s.192(6) which provides that:

` "The grounds of appeal must be set out in sufficient detail to indicate –

(a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was in wrong in law, or both; and

(b) to what extent, if any, the appellant is appealing against the exercise of a discretion by OFCOM, by the Secretary of State or by another person."

There is also then s.195(2) which provides that:

"The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

So it is clear from those provisions that the notice of appeal itself, we say, plays a crucial role in determining the scope of the tribunal's task.

The requirement in s.192(6) is picked up in the Tribunal's Rules, Rule 8(4), and it would be helpful, I think, just to turn very briefly to that. It is in the second authorities bundle at tab 34. Again, you were taken to this by Mr. Herberg, but given that it is fairly central to my submissions I think it would be helpful just to briefly remind the Tribunal of its terms. It is particularly sub-section (4) that we refer to and rely on:

"The notice of appeal shall contain –

(a) a concise statement of the facts;

(b) a summary of the grounds for contesting the decision identifying in particular:

(i) under which statutory provision the appeal is brought;

(ii) to what extent (if any) the appellant contends the disputed decision was based on an error of fact or was wrong in law;

(iii) to what extent (if any) the appellant is appealing against the respondent's exercise of his discretion in making the disputed decision;

(c) a succinct presentation of the arguments supporting each of the grounds of appeal."

Further relevant guidance is provided in the Tribunal's guide to proceedings and those are at the next tab, tab 35, and if we turn briefly to para. 6.19 we see that it is there stated:

"In accordance with Rule 8(4), the notice of appeal should contain not only the grounds relied on for the appeal, but a succinct presentation of each of the arguments supporting those grounds. The document initiating the appeal to the Tribunal should already contain a written development of each of the factual, legal or other grounds of appeal relied on, so that the Tribunal is seized in writing, from the outset, with the substance of the case advanced on the appeal."

It then goes on in 6.20 to note that sufficient time is provided to appellants so that they are able to prepare "a detailed written argument".

Then 6.21 notes that two important consequences flow from this particular approach. The first is that the appellants are expected to develop all the grounds of appeal relied on, together with any supporting documents in the initial notice and not adding new grounds of appeal in the course of proceedings. They go on to say that Rule 11(3) provides that the Tribunal may not give permission to amend the notice of appeal to add a new ground of appeal, and then it deals with the particular conditions relating to amendment.

So the key issue there is that an extremely important discipline is provided by the requirement to plead properly in a notice of appeal, because it avoids subsequent argument about the precise scope of an appeal and what is within and what is outwith.

The guidance goes on at 6.22:

> "The second consequence of this approach is that all the submissions before the Tribunal can normally be kept short."

If one then also turns over at 6.24 one sees emboldened:

> "The application should clearly identify which of the primary facts found by the OFT are contested by the appellant and upon what grounds."

and obviously Ofcom is to be substituted in that particular paragraph in this case.

Then, finally, at 6.25 we have a recapitulation that:

> "Each main ground of appeal should then be developed by a succinct presentation of the arguments in support of that ground avoiding repetition."

That is something that the guidance does not entirely do here, but it certainly emphasises the importance of this particular consideration.

That is the Tribunal's guidance. Finally, we have the assistance of the Tribunal's case law, and in particular we have the case of *Hutchison 3G v. Ofcom* [2008] CAT 10, which is at tab 21 of the authorities bundle, and if you could go, please, to para.82, we see there the particular paragraph with which the Tribunal was concerned, and it was an application in this particular context to have certain points that were being pleaded by Hutchison 3G ruled as inadmissible, and we see:

> "Paragraph 2.11(c) of the Supplemental Submissions states:
>
> > 'Retail prices are likely to be higher than they otherwise should be. See the third witness statement of Kevin Russell attached hereto'."

The Tribunal went on to hold that that argument was inadmissible. It first referred at para.84 to what it said in its previous ruling on a BT application for permission to amend, and I just quote that briefly:

> "'An appellant cannot, by including broadly worded summaries in the notice [of appeal], create an opening for a subsequent assertion that in fact that summary is a ground which goes wider than the later particular suggests and can encompass additional arguments which do not appear at all in those later particulars'."

Then over the page the Tribunal comments in the key passage at para.86 as follows:

> "Secondly, it is unsatisfactory for an appellant to plead an unparticularised statement such as that at para.2.11(c) of the Supplemental Submission and simply cross refer to a witness statement as particulars. The witness statement is intended to provide evidence in support of matters pleaded, it is not the pleading itself."

We draw from that statutory framework and the guidance and the case law the proposition that the notice of appeal should form a coherent, self-contained document from which the appellant's case can be clearly understood, and it is not satisfactory merely to cross-refer to witness evidence and require other parties to attempt to divine the relevant particulars from that evidence.

If we turn then to BT's pleading, appeal bundle BT1, and the paragraphs with which we are concerned start at para.116. What we see there is BT pleads as follows:

> "As explained in sub sections (a) and (c) above, Ofcom's conclusion that BT could not demonstrate that NCCN 956 would benefit consumers and avoid a distortion of competition is effectively based on two premises, namely (i) there was a risk that MNOs would put up the charges to the callers of 080 numbers."

That is the key point to which the evidence that they then develop is relevant. So we see that what is being posited is that Ofcom relied on a premise of a risk.

Then at para.117 BT refers to the various expert reports to which you have already been taken and also the purportedly factual evidence, however it is to be properly characterised. There are, in fact, by my calculations eight reports in total referred to, because of course there are the additional reports that are also cited in footnote 140.

Then at 118 BT appears to set out its case as far as I am able to discern on what it says was Ofcom's premise and it says:

"Each of these economists analyses the benefit to consumers from a different perspective. From each of these different perspectives, the answer is the same: NCCN 956 far from being likely to increase the price that the 2G/3G MNOs charges callers to 080 numbers, has in fact a clear incentive for the 2G/3G MNOs to reduce their charges to 080 callers."

Now it is not entirely clear how that is supposed to ----

MR. READ: Can we have the rest of that paragraph, please?

MR. PICKFORD: Yes, certainly:

"The evidence analyses the issue in great depth from many angles: but whichever way one looks at it through the prism of an economic analysis, NCCN 956 has the ***incentive*** to ***benefit*** consumers and Ofcom's analysis cannot stand. BT will not seek to précis the detail of their respective evidence upon which BT fully relies but will simply draw attention to one or two matters."

We say that that is not an adequate basis on which to plead to the particular criticisms that are made of Ofcom's decision. We do not actually see in that part of the statement any particular paragraphs of Ofcom's decision so far as I can see actually identified, and certainly it does not satisfy the requirements that we see imposed on BT to identify and explain precisely to what extent the disputed decision was based on an error of fact. In the grounds of appeal itself it does not contain at paras.119 to 124, which follow, a succinct presentation of each of the arguments supporting those grounds, because we see from the paragraph that I have just read that BT simply attempts to draw attention to one or two matters.

Moreover, it fails to make clear what the purpose of the eight different supporting witness statements truly is.

PROFESSOR STONEMAN: Could I just ask you there: as an economist sitting here, one of the things that has fascinated me over the years is a general inability of counsel to present an economic argument, especially an algebraic economic argument, in court. As much of this case is based on really quite detailed economic theory, not particularly difficult, but quite detailed and quite algebraic and mathematical, can you suggest a better way of presenting those arguments than is done here, which is by reference to expert documents?

MR. PICKFORD: Sir, yes, we would say that it is incumbent on BT, however difficult it might be for a lawyer to do so, in conjunction with its team of expert economists, to identify and particularise in the notice of appeal itself what the essence of each of the particular points of criticism of the Ofcom decision that are taken by it truly are. That does not mean a

paragraph by paragraph analysis of every single one of the expert reports that is attached, but what it does require is something we say goes beyond merely purporting to draw attention to one or two matters. It might be that if BT had attempted the exercise that it does in relation to certain specific issues, more comprehensively, so that it was not merely addressing one or two matters, but in the paragraphs that followed addressed all of the key issues on which it relied, then that might in an appropriate case satisfy the requirements of Rule 8(4) and s.192. We say that it is not sufficient merely to cross-refer to the witness evidence for the reasons that the tribunal gave in the *Hutchison 3G* case, because it leaves one insufficiently clearly apprised of the particular grounds that BT says that the appeal needs to be determined according to. One is liable to find oneself further down the line arguing about whether something is or is not a ground of appeal because one has to root around in the evidence to find out what BT's case is. We say that that is not a sufficient or satisfactory way of going about the pleading. Taking on board entirely, sir, your comment that it is not an easy task, it is something with which advocates need to grapple properly, we say.

So BT's response to these criticisms is set out in its skeleton argument at paras.84 and following, and it relies, firstly, on what it says are two fundamental points of objection. The first of those is that it says that a request for further and better particulars, as BT describes our application, was not an application ever contemplated for determination at this particular hearing. As to that, we make four short points in response. Firstly, and I do not need to take you, sir, to the transcript, you, sir, indicated that the CMC in respect of the exchange of letters for the hearing, and we say implicitly, therefore, the hearing itself, that in particular that should include O2's procedural preliminary issue but anything else that the interveners may have to say. That is our first point.

Secondly, we say that T-Mobile or Orange's point falls squarely within the scope of issues related to evidence which is what we understood this particular preliminary hearing to be about, albeit our own primary focus is on the inadequacy of Ofcom's notice of appeal in the manner in which it grapples with that evidence. No doubt, had we not raised this point at all and sought to raise it at some later stage, BT would have complained that the time had been and gone for such complaints and we had missed the boat. So we say that that is another reason why BT's point is a bad one.

Thirdly, BT did not challenge the admissibility of the objection that T-Mobile and Orange raised in correspondence. When we first raised it on 20th May 2010 it did not even acknowledge that we raised the point until a week later T-Mobile and Orange wrote to BT

to ascertain from them whether they had a particular position on it, because we thought that would be helpful for us to know. It was only at that point that BT indicated its general position, which is that it rejected the case that we were advancing. So we say it sits rather badly now to say that there is some sort of fundamental objection to this point being determined when it did not take that point before.

Finally, BT failed to articulate what prejudice it suffers from having the application heard today.

So BT's second fundamental point is that it says that, in reality, T-Mobile and Orange want to cite those paragraphs of the evidence which BT is relying upon in order to challenge any paragraphs which are not cited. We say in relation to that that even if that were our objective, it is difficult to discern why that should constitute a fundamental objection; and in any event that is not actually what our application seeks to do. We seek for BT to properly plead the arguments which are canvassed in evidence for the reasons I have explained.

BT then goes on to say at para.85 that if T-Mobile and Orange wish to make an application at the hearing to suggest that particular evidence should be excluded it is up to T-Mobile and Orange to identify which parts of the evidence should be excluded. We say that misunderstands the nature of our application. Our application is not directed specifically to excluding the evidence, certainly not yet, we say that it is incumbent upon BT to plead properly to that evidence and it has not done so.

BT then say at paras.86 and 87 that they are unable to deal with the application in the absence of further particularisation by us of why we critcise their notice of appeal, and we say in the circumstances that is a little ironic, but it is certainly unjustified. We have set out quite clearly why the notice of appeal is inadequate.

Then, finally, BT observes at para.88 that further particularisation of its case is a nonsense and it relies on the fact that the notice of appeal already runs to 61 pages. We make no comment on whether those 61 pages are fully justified in their length. It cannot be assumed that they are, but that is really beside the point. We are where we are, and if there is a deficiency in BT's pleading then that needs to be put right irrespective of whether the notice of appeal currently runs to 61 pages or not.

We say, secondly, it is also difficult to see how BT can really credibly advance this as a basis for failing to plead its case properly when it has sought, itself, to advance eight different witness statements which apparently all go to the same point. Our case, as I have

said, is that a proper pleading is required precisely in order to understand why that is appropriate and proportionate.

Finally, BT says it has included summaries in the expert evidence of Professor Dobbs and also Mr. Reid. Again, we say that does not meet the point. That may make those particular witness statements easier to understand, but it does not meet the point that we make about the adequacy of BT's notice of appeal.

Sir, finally, I turn to the question of relief. The relief we sought in our letter of 20th May was for BT to provide a document setting out in respect of each witness statement how the points of factual analysis contained in that statement are relevant to BT's pleaded case in the present proceedings, and in what respect it adds to BT's case in the light of the seven other witness statements provided on the same issue. We are not asking for a paragraph by paragraph analysis. We entirely understand that it needs to be something proportionate that thematically fills in the gap that we say exists in a pleading that falls some way short of the standards of Rule 8(4). What we have not asked for is a remedy asking for BT to re-plead this particular part of this case. That is for two reasons: one, it appears to us that that might actually be a more onerous obligation to impose on BT; and the second one is that that would appear potentially to raise serious difficulties of its own because, as I noted earlier, the Tribunal's rules on amendments, which are found in Rule 11, are very strict ones, and it would certainly be wrong to essentially permit amendments by the back door under the cover of being required to re-plead your case which might enable BT to raise new points in the notice of appeal which it had not previously raised before. To avoid that particular difficulty arising, we suggested a pragmatic alternative which we considered would address the particular deficiency that we consider exists in relation to the notice of appeal.

Unless there is anything further I can assist you with, those are my submissions.

THE CHAIRMAN: No, thank you very much, Mr. Pickford, that is very helpful. Mr. Read?

MR. READ: Sir, I see the time and I will try and get through as much as I can today, but I am afraid I am not going to finish.

THE CHAIRMAN: No, you are not going to finish, we are just debating whether we might extend time to 4.45, if that would help, or we could start at ten o'clock tomorrow.

MR. READ: Sir, perhaps ten tomorrow might be more – I certainly would urge the Tribunal to do that given the time that we have unfortunately taken up so far. I will be guided by the Tribunal as to whether they ----

THE CHAIRMAN: We will sit at ten but feel free to go on a few minutes after 4.30 if that helps.

MR. READ: I am grateful, sir. Sir, can I start the focus of my observations by what is the principal matter that is being addressed before you which is Ofcom's application. Can I start by making two initial points. The first is that this hearing seems to have vacillated from being a matter of general principle to a very fact specific one. If you recall, when this matter was originally raised in Ofcom's letter of 11th May 2010 it was being put forward very firmly as a matter of principle, and it was that basis in BT's submission that, in fact, we ended up deciding that we should have a preliminary point on it. I would add the point also at that stage Ofcom ought to have been fully aware of what BT was saying about the manner in which its evidence had been put forward, because of course it was in the notice of appeal itself as to how BT had actually produced the evidence which it did before the final determination.

What seems now to be absolutely core in Ofcom's case is that you have to treat this as a case specific matter. You have already been very helpfully referred to para.115 of Ofcom's skeleton argument where they say that in terms, because what they say in that paragraph is that when you look at the TRD and the PPC appeals, in any event for the reasons set out above a determination of the admissibility of evidence is a case specific matter. One can also see that at para.44 of their skeleton argument, where it says in terms that Rule 22(2) is a "wide, and on its face, unconstrained provision". As a matter of procedure Ofcom accepts it would be open to the Tribunal to rule that the evidence in both Category 1 and Category 2 should not be excluded or should be admitted for the purposes of determining the appeal.

The reason why I highlight this as a first point is because it is still in some form being presented to the Tribunal as being some matter of general principle and something that needs to be addressed, but the problem – and this is the real underlying fault line in the whole of Ofcom's application in this case – is that the statutory provisions simply do not clearly say that is the position. Indeed, when you look at the statutory provisions there is nothing in reality to support the arguments being put forward for Ofcom for a general standard principle and that is why one has to end up with all these additional matters being tagged on the end, such as, for example, there may be exceptional circumstances, and I think it came down to special circumstances in the course of oral submission, but something that at some point in the future might leave the way open for evidence to be introduced.

We say what the Tribunal is actually being asked to do today is to look at the specific reports of Professor Dobbs, Dr. Maldoom and, indeed, Mr. Richards and Mr. Reid's statements in order to see if parts of those evidence, and I will come back to where I say parts of those evidence shortly, should be excluded. What the Tribunal is actually being

asked to do is to conduct, paragraph by paragraph analysis of the evidence which, in our respectful submission, is exactly what Mr. Herberg started on in the latter course of the morning when he went through this analysis looking at the evidence effectively piece by piece by piece. We say that as a matter of approach this is the complete antithesis of the way that the Competition Appeal Tribunal operates and, indeed, should operate.

In our respectful submission the Tribunal should not be concerned with some sterile debate about technical admissibility of evidence, but what weight should be given to the evidence that is actually before it. I will give just two examples of that, by way of introduction. It is precisely because the Tribunal is not concerned with sterile admissibility arguments that new evidence attached to the notice of appeal have always previously been allowed before the Tribunal, and no one has ever, to our knowledge, and I think it has also been said by, I think, it was O2 may have commented on that, that nobody else to their knowledge has ever been in such a fact sensitive inquiry about admissibility of evidence as to what may be new or what may not be new. We say there is a simple reason for that, and the simple reason is because nobody has ever countenanced such a wide-sweeping general principle before.

We also say that that is the very reason why the Tribunal Guidelines themselves state in terms at para. 12(1) that the strict rules of evidence do not apply. In our respectful submission it is precisely to avoid arguments about technical admissibility like we have had to go through for the most part of the day and will no doubt take up most part of the half day tomorrow, this is not a point of principle that in reality need trouble the Tribunal.

Of course, the situation that we say will develop is that if the Tribunal were to be beguiled into accepting Ofcom's arguments it will all end with endless satellite arguments and endless satellite hearings and applications as to what should and should not be admitted to evidence. It is always a danger to raise the "floodgates" point. With the greatest respect if one once has a point of principle determined but with caveats such as there may be exceptional reasons then all one will do is create endless arguments about whether something is an exceptional reason, a special circumstance or whatever other test is ultimately determined. That is the first point we make, the very fact that Ofcom fluctuate between the general principle and the case specific principle in our respectful submission illustrates how flawed the concept that there might be some form of general principle that the Tribunal should apply actually is.

The second initial point I want to make is the Tribunal is being asked to exclude evidence at this stage without having any idea of the precise nature of the dispute, because having moved from the general principle to saying it has to be case specific, then what the Tribunal

is being asked to actually do is embark on an exercise saying: "This evidence should be excluded", "That evidence should not be excluded" without knowing in either a defence or a statement of intervention what actually is in issue and is not in issue or, indeed, how relevant or otherwise the evidence might actually be.

If I can just give one illustration of this, to take Mr. Reid's algebraic analysis – I do not think we need to turn it up – as one can see it is a fairly detailed investigation into the algebra of this. On BT's part it says that is either going to be right or wrong, but at the moment we do not know precisely what Ofcom is saying about this. It may be that the analysis is agreed to, full stop, that it is right; that as a matter of sheer arithmetical consideration it is a true proposition. It might be agreed all bar 10 per cent where some further clarification is needed or whatever. Or, it might be agreed that they have said that there are some other points which are relevant and do not apply in this particular case because of A, B and C. You are being asked to reject it entirely at this stage, even though it could turn out that the bulk of it is undisputed. In that context it also has to be noted that Ofcom will have to, and indeed already has started considering that very evidence, because as BT has indicated in its letter of 21st May 2010, and para. 23 of its skeleton argument, there is in fact another dispute tagging along behind the back of this one, relating to 0870 numbers, and 0845 numbers, and that very evidence is being considered in that context. This is not something that is going to go away; that evidence is going to come back at some point and someone is going to have to say whether they agree or they disagree with it.

Likewise, we say you are being asked by O2 to exclude Mr. Reid and Mr. Richards' case on the basis that it is opinion evidence given by a BT employee without any idea whether, at the end of the day, that matter is really going to be in dispute, or what parts of it are going to be in dispute. We say that is a very powerful reason again why, at the end of the day, the way this evidence should actually be dealt with is to consider the weight that is to be given to it when the Tribunal is appraised of everything relating to this case rather than trying to deal with it on technical admissibility.

Having made those two initial points I am now going to structure this reply to the Ofcom part in three stages. First, because it is a case specific inquiry I want to look in a little more detail about some of the specific features relating to this case. Then I want to go back to the statutory framework in which the Tribunal must consider these applications, and finally I want to come back to the specific issues being raised against BT's evidence.

With that, can I turn to the specific circumstances of this case, and first within this category I want to focus on the original focus of the dispute itself. It seems now almost to be

conceded by Ofcom for the purposes of this hearing that prior to 23rd December 2009 BT was not in a position to know that Ofcom in its determination was going to deal specifically with NCCN 956. You will have seen Mr. Fitzakerly's statement, which is in the BT skeleton argument bundle at D15, and if either in that bundle, or where ever else you have it, I could ask you just to briefly look at two of the exhibits to that statement.

The first exhibit TF1 is the current Ofcom bulletin, have you been able to identify it, sir, in the bundle?

THE CHAIRMAN: I have it.

MR. READ: The current Ofcom bulletin on this case, and you can see at the bottom of the first page there is an update note dated 16th November 2009. If one turns over the page to where it has a heading, midway down the page: "2. Level of charges notified in NCCN 956", it says:

> "T-Mobile stated in its response to the scope of this dispute that it considered it ought to be adjusted so that it not only consider whether BT is entitled to impose any charge, but also whether the specific charges including the possibility of different amounts charged to different operators for the same call termination service, are fair and reasonable. We do not consider it appropriate to amend the scope of the dispute to include consideration of whether the specific charges introduced by BT are fair and reasonable."

So it is accepting there quite clearly that the specific charges under NCCN 956 were not included in the original scope. Then it goes on to say:

> "The main issue in dispute is BT's imposition of the new termination charge for 080 calls. Our first task, as set out in the published scope of the dispute, is to consider whether it is fair and reasonable for BT to impose any termination charge for calls to BT hosted 080 numbers."

Then it goes on:

> "We therefore consider that T-Mobile's request for us to consider the specific charges notified in NCCN 956 is premature."

If I can take you on to the next exhibit, which is TF2 – I do not think we need to spend very long on that. This is an email chain and if one looks on the second page at the bottom of the email of 8th December from Caroline Pepper at Ofcom to BT you can see that there is a question being asked. I am not quite sure whether the status of this is confidential or not, so I will not read it out, but anyway, sir, you have it before you.

Then you see the request from Kath Embleton at the top of the page, and I do not think that last paragraph in the email can possibly be confidential so I will read that out:

> "Can you let me know in what context these questions are posed as we are aware that the 080 charges themselves are not part of the 080 termination dispute scope."

Then, over to the first page, you see the response then from Ofcom to BT:

> "While we are not directly considering 080 charges it is helpful to have this information."

So it could not have been clearer to BT at that stage in December that BT was not being asked specifically to deal with the charges under NCCN 956. In our respectful submission, it is quite extraordinary that in the context of a dispute where effectively the first working day BT had to consider specific points about NNC 956 was 4th January it is extraordinary that it is now being criticised for seeking on an appeal to put in more information concerning why it is said that Ofcom actually got its final determination wrong.

Sir, it may be that if the scope had been different Ofcom's case specific arguments would have more force, but really in the circumstances of this case it would be extraordinary to rule BT out from putting further evidence in because BT did not address the charging structure under NCCN 956, that is the starting parameter.

The next point, sir, is that it is only when you come to the draft determination that you in fact see that NCCN 956 was being considered. I would ask you if you can, to take the BT 1 bundle, which contains the notice of appeal and ask you to go back. I will take you to Annex 3, because it was what Mr. Herberg referred you to this morning, so rather than take you off to the same passage in the draft determination I will take you back to the one he took, but it is absolutely correct to say that Annex 3 in the final determination sets out the same material that was in s. 5 of the draft determination – so you are looking at the draft determination, albeit that it is in the final determination.

If I can ask you to go back, sir, to BT1, tab 2, p.107. You were taken to this, and I would just ask you to note that we believe that there is in fact at typo in the text, you probably will not remember but there are references on the previous page to fig.7, we believe in fact it is that fig. 4 that is at the top of the page, so I would not want anyone to think that in fact you were being taken to the wrong figure. But, as you can see, it was firmly focused from that figure on the steps structure in NCCN 956.

Then at para. A.373 – I think you were already taken to this this morning, but I just want to concentrate on these two paragraphs again – Ofcom are saying, this is their concluded view:

"...we consider that the current NCCN 956 structure of termination charges is likely to provide an incentive for MNOs to increase the 080 call price, because the incentive to increase retention is likely to outweigh the disincentive of reducing the volume of calls. Our provisional conclusion is that there is likely to be a negative Direct effect on consumers arising from NCCN 956."

Then in A3.74:

"We note though that a structure of termination charges different from NCCN 956 might have a positive Direct effect on consumers, for example if the termination charge is increased at the same rate as the retail price the first consideration would not create an incentive for the MNO to increase retail prices because the retail price increases would not increase the MNOs' retention. In such circumstances any material sensitivity of the mobile customers to the 080 price would imply an overall incentive on the MNO to reduce the retail call price, such positive direct effect might, however, need to be weighed against the potential for other prices for mobile services to increase via the mobile tariff package."

The point that I want to make about that is that in the context of what BT had been told specifically, both through the bulletin and in the exchanges that the focus was not on NCCN 956, in fact para. A.3.74 supported what BT actually considered to be the true scope of the issue, namely whether or not there was any termination charge that could be set that would have a direct consumer benefit. So, as things stood at 23rd December – whether that was pm or am – there was on an analysis by BT an actual finding here that in fact supported what it thought was the scope of the matters in dispute. I should perhaps just mention in the context of 23rd December – I do not know whether one really needs to go back to the exhibit to Mr. Buckley's statement – it is slightly unfair to say that BT were "lining people up" for the Christmas break in order to deal with it. To the contrary, what that letter – and you were taken to it earlier – was actually saying was: "Let us have it on the 23rd because everyone is going to disappear off for Christmas", and that is the problem we face, and it is clear that 4th January was the first day back because of the way the Christmas dates actually fell on that particular year.

If I can then take you to how BT actually responded to this and ask you to go to tab 8 in the same bundle, and ask you just to have a look at the response that BT put in by 12th January. The first date that really this could be reviewed was 4th January, so this is some seven working days later. If I can ask you to look first of all at para. 1.2 through to 1.10 you can see the justification that BT was putting forward and has, indeed, always put forward, for

saying why these charges should actually be imposed, why termination charges should actually be imposed, because effectively it refers to the regulatory principle that 080 and 0808 numbers should be as close to zero as appropriate, it then goes on to deal with the fact that if a retailer of 080 calls is charging above that that leads to distorted results (that is in 1.3). Then in 1.4 BT sets out that there are two ways a distortion can be resolved. The first is that Ofcom may regulate in such a way that calls are free or close to free to the subscriber or end users, and BT notes that Ofcom is planning an NTS review that may address this issue. Then at 1.5 one sees the second way is for a fairer and reasonable division of the spoils effectively.

That has always been the forefront justification from BT as to why it says it ought to be entitled to have a share of these revenues, because what effectively it is saying is that, given the regulatory preference of 080 numbers to be free or as close to free as possible, if people are actually making money out of it then those revenues ought to be shared further down the line so that there is a benefit to service providers and customers at the end of the day, and that is the justification that is always being put forward. For example, one sees that in the rest of those paragraphs – I do not think I need take you through them at great length, but they do mirror very substantially the elements of the grounds of appeal that BT has put forward.

Then can I ask you to look at section 3, which is on p.7 of that document, and ask you to then to p.8 where BT deals with Principle 1. 3.1 I fully accept did not reflect the way the matter is put in BT's notice of appeal but there does not seem to be any challenge over Principle 1 at all in this case as far as Ofcom are concerned relating to the notice of appeal, it seems to be confined only to the matters relating to Principle 2. In any event Dr. Maldoom subsequently put material in his first report which made it quite clear that BT was no longer agreeing that Principle 1 was necessarily a correct principle.

Then 3.2 again makes the point that until Ofcom published this draft BT determination BT had no means of understanding what the cost origination of the MNO network would be.

There is another point that I should also have made earlier concerning the draft determination – and Ofcom accepts this – that in fact the three principles it laid out was the first time it had stated those three principles in that format.

In para. 75 of its skeleton argument Ofcom states:

> "It is true that the precise formulation of these three principles had not been deployed before in one of its determinations."

So again that is a further factor that could only become clear from seeing the actual draft determination.

Ofcom makes a point about the three determination principles – I will call them the "determination three" – can be deduced from the six cost principles that Ofcom usually applies in these circumstances, and they say that the set of six principles (para. 77 of Ofcom's skeleton argument) "can point in a different direction to other principles, but the set of principles provides a framework to identify such trade-offs and facilitate the use of judgment to strike an appropriate balance in reaching the conclusions." That is what they are saying in their skeleton argument. Of course that is absolutely right, those six principles do not inevitably lead to the determination of three principles, it is only when you see the draft determination that you see how Ofcom has taken its six cost principles and applied them to the determination three principles. It is a point I should have made when I was dealing with the draft determination, but it is another reason why it was not that easy for BT to know exactly what it should and should not be dealing with until that was dealt with.

If I can go back to the document that we were on, and ask you to note paras. 3.1 to 3.7 where BT is putting firmly in issue that Ofcom had not applied Principle 1 properly.

At 3.18 to 3.27 – I am not going to take time to read it all out to you and, indeed, I have a suspicion that this itself may attract confidentiality, but in any event the point that I think one can make from this is that BT was making it very clear that one should not be rejecting a termination charge simply because the MNOs had not provided material on which to work out their charging.

Then, if I take you on to para. 3.29, this is turning to Principle 2, and dealing with the provision of benefits to consumers, which is really the one that forms the major battle line, I think, between BT and Ofcom. You can see in the clearest terms BT is saying that it is not agreeing with Ofcom that NCCN 956 will necessarily induce OCPs to raise the retail price of 080 calls. This has to be put in the context of what BT had said earlier in this document as to what the correct scope of the dispute was, and can I at this stage ask you to go back in the document to p.2.3? You can see that BT is saying in terms there that many of the areas covered by Ofcom go beyond the scope of the dispute. At 2.4 the caveat is put down very firmly: "BT responds to these points, even though the points go beyond the published scope solely to ensure Ofcom's full understanding of BT's position." Then it goes on to make it clear that to be consistent with the published scope the key task for Ofcom is to ascertain that the principle of a termination charge is fair and reasonable.

> "Ofcom does not need to consider within this assessment the charges themselves beyond what is required to decide the principle. How the individual charges are set is a matter for the parties to negotiate in the future".

And 2.6 makes the point again. I make the point because the whole of BT's submissions at this stage are predicated on the basis, which in fact now forms the fourth ground of BT's appeal: "You, Ofcom, have misapplied your determination to the scope of the dispute. You have gone way beyond what was envisaged." But again, to start criticising BT when BT is making the point very clearly to Ofcom: "You cannot do this; you have gone beyond the scope, the only reason we are letting you have this information is solely to ensure Ofcom's fuller understanding of BT's position". In those circumstances to criticise BT for not having produced evidence and material to the standard that BT has now produced is, in our submission, fundamentally flawed on the specific facts of this case.

Can I now ask you to go back to 3.29 in the document? You can see there that BT is making the very clear point that it does not actually agree with NCCN 956, and it says in terms:

> "It appears highly likely the MNOs have priced in such a way as to maximise profits. It is evident the 080 calls form no significant part of the competition between the MNOs and there is considerable price inelasticity at the retail level of market.
>
> The MNOs have likely treated these calls as distress purchases and sought as high a margin as possible to price at the point the charge would no longer be tenable. Given that the MNOs are likely to be profit maximised the question arises as to whether or not NCCN 956 can induce any further increase."

And then it goes on to set out four aspects which I will not read out, but you can see there for yourself. The point I make very forcibly about this is that Mr. Richards' evidence goes to whether or not the MNOs are profit maximising. This is precisely the point that BT was making in its submissions to Ofcom, that Ofcom's assessment in the draft determination was ignoring the fact that the MNOs were effectively maximising their profits already, and so that point was made absolutely clear at that stage that that was an issue that BT were raising as an important point.

So we say there was a very clear joining of issues on the points that have subsequently been raised and developed in the evidence. What Ofcom's real complaint seems to be is that although BT told Ofcom that in fact (a) it should not have reached the conclusion because it was outside the scope, but (b) also that the conclusion was wrong, BT did not give it all the

information it should have needed for Ofcom itself to realise that its decision was flawed. In essence Ofcom's view seems to be that it wasn't Ofcom's job to consider anything unless BT provided the detailed pristine evidence for it to consider – of the sort that one would expect served with a notice of appeal. We say that is the antithesis of a proper regulatory investigation and an approach that is certainly at variance with what Ofcom has regularly conducted in other cases. I do not want to spend too long on this document but if you look, for example, at para. 5, the conclusions, at 5.1 it makes it quite clear that Ofcom has not evidenced or demonstrated the pre-NCCN 956 charges are fair and reasonable, and as such it is not possible for Ofcom to conclude, should it be minded to and contrary to the published scope, what a fair charge is as between the parties.

So again, another point that features very firmly in BT's notice of appeal, namely, that Ofcom were only conducting one side of any inquiry. In other words it was saying: "Let us look at the price increases proposed in NCCN 956" without conducting the other side of the inquiry which is to say: "Are the prices as they stand at the moment fair and reasonable?" because effectively Ofcom ordered a return to the *status quo*.

Even on that material we say that Ofcom could well see where the fault lines, the battle lines were between BT and itself on its draft determination. But of course that was not all that they had when they came out with the final determination, because they had Professor Dobbs' first report and Dr. Maldoom's first report, and I would just like to illustrate what actually Professor Dobbs' report was indicating. I should preface it by saying as indicated in footnote 21 of BT's skeleton argument, he was in fact on holiday to 17th January, so that gives the Tribunal an idea of when it is having to look at case specific material, how tight the actual provision of this material actually was. Sir, you have already anticipated it is in bundle BT2, and if I can ask you to look at tab 16, which is what has been called "Dobbs 1" you can see there what he is actually putting forward within the eight working days that he has had since he returned from holiday.

If one looks at that:

> "This paper presents an economic rationale for wholesale price setting in which the price per minute wholesale charge increases at an increase in rate with the MNOs choices of retail price. It shows that there exists a wholesale price schedule that incentivises MNOs to leave unchanged their choice of retail price. In this schedule the rate of increase in the wholesale price depends on the price sensitivity of demand, the elasticity of demand, such that the more the retail

demand the greater the rate of price increase, and the greater the convexity of the wholesale price schedule if this is to incentivise a zero change in retail price."

So he is looking specifically at the incentives on MNOs that a price change, wholesale price linked to the retail price, is actually showing. He then goes on to say:

"It also shows that if the demand is more inelastic than expected, such as the chosen wholesale price schedule increases too fast relative to the schedule in which the retail prices remain unchanged, this is welfare beneficial since it incentivises MNOs to actually reduce their retail prices."

Then he goes on to set out the rationale for it, and he makes the point:

"However, when the wholesale price increases with the retail price set by the MNOs they have an incentive to cut back on retail price in order to benefit from a lower wholesale price. But so long as the rate of wholesale price increase is sufficiently fast the latter effect will outweigh the former effect and overall retail prices will fall."

So what Professor Dobbs is predicating there is not that necessarily you cannot devise a pricing schedule that will actually have no effect on the retail price, you will have a wholesale pricing schedule that will actually incentivise a reduction in the MNOs retail price. So that was firmly in his sights when he was actually writing this first report.

Then if I can ask you to look at p.3, because we see from p.3 that in fact the genesis (or part of the genesis because Dr. Maldoom starts doing it as well) of trying to work out the algebraic modelling that will actually demonstrate this quite clearly. I will not spend a huge amount of time going through it even if I can precisely remember what it actually means, but I seem to be criticised for not being an economist at one point by I think T-Mobile, so perhaps I ought not to go into it in any great depth.

If I can then ask you to note how much work is actually done between pp. 6 and 7, and then ask you to look at p. 8 where one sees that the specifically deals with step functions – of course, the step function is the end specific property of NCCN 956. Then he goes on:

"As in s.2 above, assuming the initial position is one of zero wholesale price, suppose this is replaced with a step function that approximates the optimal smooth function discussed in s.2. Suppose that the current retail price of a particular MNO locates on a particular step, such as with P2 in figure 2, an MNO initially setting a price such as P2 in effect now faces a positive but constant wholesale price and so would have a clear incentive to increase price to some extent. The MNO may thus choose to increase price so moving along the step, or it may

> choose to increase the price up to the point where it would trigger a step increase in the wholesale price if it were to increase price further. It may even, if the height of the step is too small, choose to increase price even further, but the step change in wholesale cost is designed as an inducement against this."

So the first point he is making there the step function is actually designed as an inducement for going beyond the height of the step to the right.

> "So long as the step function approximates to the price function identified in section 2 MNOs will be unlikely to increase price more than to the foot of the step they are currently on. In this way the step function limits the increase in retail price. Notice that the extent of the induced price increases will tend to be smaller the closer the current prices are to the next step, and also the smaller the step width. This is because with a smaller step width the step functions can be made to more closely approximate the smooth function W(P). Notice also that if the step to the left is sufficiently far down this incentivises the MNOs to reduce price to the price at the right hand side of that step, finally clearly in the limit as the step width is reduced to zero the approximation becomes exact."

Then he finishes at the bottom of figure 2:

> "Naturally the step function should probably feature some degree of convexity. Interestingly, this appears to be the case in BT's proposal."

and then he goes on to quote from Dr. Maldoom and, as one can see from that there is actually a suggestion from what Dr. Maldoom is saying that in fact the incentive may be to push the prices down.

The key point about this evidence is it is not actually saying: "Look, the step function will increase prices, it is saying it may, but it may also have the effect of reducing prices if it has a sufficient degree of convexity, which is of course the very point that he is making about BT's step function in NCCN 956.

I think that might be a convenient point, but this is quite an important point when I come to tomorrow, because you will see one of the things we say that Ofcom has got wrong in its final determination is that it completely misunderstood that passage. Part of Professor Dobbs' third report (Dobbs 3) is specifically dealing with that point. So on BT's side we cannot see, even on Ofcom's general principle approach, that that material can be excluded, and I wanted to make that point in closing because if you remember at the start I said that this application is really about excluding parts of the various reports, and that is an example of how this Tribunal is going to be asked by Ofcom to look on a specific paragraph by

paragraph basis as to what should be allowed and should not be allowed which, as we said at the outset, is the antithesis of the way the Tribunal should approach the matter.

Sir, would that be a convenient point?

THE CHAIRMAN: That is very helpful, thank you very much. We will reconvene at 10 o'clock tomorrow morning and hopefully you will finish then.

(Adjourned until 10 a.m. on Wednesday, 23rd June 2010)