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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 18th November 2022

Before:
The Honourable Mr Justice Waksman
Eamonn Doran
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

JUSTIN LE PATOUREL

Appellants

v

BT GROUP PLC

Respondent

A P P E A R A N C E S

Ronit Kreisberger QC, Nikolaus Grubeck and Matthew Barry (Appeared on behalf of Justin Le Patourel)

Daniel Beard KC and Allan Cerim (Instructed by Simmons & Simmons appeared on behalf of BT Group PLC)

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Friday, 18 November 2022

(10.30 am)

Case management conference

(No audio)

THE CHAIRMAN: This is Mr Justice Waksman. Can you hear me? Let us know if you can't hear Ms Kreisberger, who is about to start.

MS KREISBERGER: Thank you, sir. Hopefully you can hear me?

THE CHAIRMAN: Let me try. Can the stenographer hear Ms Kreisberger who just spoke a moment ago? Good.

Thank you, yes.

Submissions by MS KREISBERGER

MS KREISBERGER: I will press on. Thank you, sir.

Sir, before I turn to the agenda today, just a word on appearances and housekeeping. We have some new faces in the proceedings today. I appear with Mr Grubeck and Mr Barry for the class representative, Mr Le Patourel, and we welcome Mr Beard to these proceedings, who appears for BT with Mr Cerim. This is the second CMC in these proceedings, post-certification.

Sir, just on housekeeping, we have three CMC bundles and three authorities bundles. I hope members of the tribunal have received those.

THE CHAIRMAN: Yes, we have. Thank you.

MS KREISBERGER: I am grateful. The agenda for today is in the second CMC bundle and for those working in hard copy that is tab 96, page 847. That's the

agreed agenda which was provided to the tribunal.

THE CHAIRMAN: Yes.

MS KREISBERGER: As you see there, there are five agenda points.

THE CHAIRMAN: Yes.

MS KREISBERGER: The class representative's application for permission to serve evidence from an expert behavioural economist. The second point is the list of issues for trial. That is now agreed and in the bundle. That's at bundle tab 22.

THE CHAIRMAN: Yes.

MS KREISBERGER: Then we have the class representative's two applications for disclosure of material. Fourthly, amendments to the procedural timetable. Those are now agreed I am happy to say, subject to the dates for the disclosure applications if allowed.

THE CHAIRMAN: Yes.

MS KREISBERGER: And finally there is an update on opt-outs. We were proposing to do that in writing, sir, shortly after this hearing.

THE CHAIRMAN: Okay.

MS KREISBERGER: Sir, so that the members of the panel have it, the draft order proposed by the class representative is at tab 1 of the first CMC bundle, page 1. I will take you to that, sir, as we go along.

THE CHAIRMAN: Yes.

MS KREISBERGER: With the tribunal's permission, I propose to deal with the expert evidence application first. Now, if I may make some introductory remarks before I develop my submissions on the application, and I will address the tribunal's very helpful letter of yesterday which really pre-empted the very point I wanted to make by way of preparatory remark to you now.

THE CHAIRMAN: Yes.

MS KREISBERGER: The key issue that arises on the pleadings is the significance of the fact that class members continued to take their existing package from BT in the face of BT's large price hikes rather than switching away to other services or other providers. So that is the nub of the issue and I am going to take you to the pleadings to show you that.

In overview, what BT does is it relies on that non-switching by class members and it says, it pleads the point, that that non-switching should be interpreted in a particular way and that is as a conscious decision, a conscious decision on the part of its own customers to stay on the pricey package. It's what I referred to at the CPO hearing as the Stella Artois defence: reassuringly expensive.

So, as I said, I am grateful to the tribunal for its letter of yesterday because my intention is to make clear that this allegation is relied on by BT in relation to all elements of its case, not just quantum, which is the point that the tribunal has helpfully made. Now, we do make that point at paragraph 10 of the skeleton for today but the tribunal is quite right to give it prominence.

Now, in fact, BT relies on this non-switching point for three distinct propositions to rebut the case against it. As I said, I will show you the pleadings but just to introduce the point.

THE CHAIRMAN: Yes.

MS KREISBERGER: First, they rely on it to argue that BT is not dominant. Secondly, BT pleads that it is not charging unfair prices because customers in the class place great value on BT SFV services, so that is abuse. Thirdly, BT alleges that even if it is charging abusive prices, its customers failed to mitigate their loss and they failed to mitigate their loss by not shopping around to secure a cheaper,

better deal, so that's quantum, and the class representative refutes each of those three propositions.

Now, the question of switching by consumers, or more precisely their failure to do so, its absence, is a familiar but knotty problem in competition law and regulation and it arises in an array of contexts. Now, it is not a problem which can be adequately explained by what one might call orthodox economics because orthodox economics is premised on perfectly rational operators.

Now, that is generally the optimal model for analysing the behaviour of businesses because they are profit-maximising entities and that's why it's a pretty safe assumption when you are dealing with economic operators but it's not a safe assumption for individuals. That's why the relevant discipline for analysing and understanding switching rates by end consumers, whether those rates are low or completely absent, is the science of behavioural economics because that science takes humans and their cognitive processes as they are in the real world.

So it's not at all radical to say in 2022 that behavioural economics is the optimal model for analysing the behaviour of individuals. One might say it's the new orthodoxy.

Of course it is individuals with whom the tribunal is here concerned. It's people, people who buy BT's residential landlines. Critically for the purposes of this case, behavioural economics also looks to the decision environment. That's the environment navigated by the consumer and its impact on her decision-making or lack thereof.

So if permission is given, Professor Loomes will give his opinion, evidence backed by the science, the academic literature and the data in the case, on how to understand the fact that BT customers in the class stayed on their pricey package

and he will address in doing that the decision environment and also it's important to say the part played by BT because it is part of the class representative's case that BT engaged in deliberate conduct to obscure the fact of price increases by, for example, announcing them on a bank holiday to fly below the media radar.

So my overriding submission today is that the class representative is entitled to put this evidence before the tribunal to respond to BT's allegations about non-switching.

Now Dame Vivien Rose puts it powerfully in her competition law journal article in the bundle cited in my skeleton and she says lawyers and judges like to think that understanding human nature is key to making and enforcing good law. Without that science-backed evidence on human nature, the class representative risks being seriously disadvantaged in these proceedings.

So that is by way of introductory remark. I propose to structure my submissions in four parts. The first part is the test for giving permission for expert evidence. I will deal with that briefly. Secondly, the pleaded issues in the case. I will take you to BT's defence and the class representative's reply. Thirdly, I will summarise Professor Loomes' evidence based on his outline report. Lastly, my submissions on why this evidence is reasonably necessary and of assistance and as part of that fourth section will address BT's objections.

So dealing with the first part of my submissions, the test for admitting expert evidence, the tribunal will be familiar with CAT rule 21. I don't think we need to turn it up. That is the relevant rule that says the CAT can give direction on whether to permit expert evidence.

The approach to admitting expert evidence is summarised in the tribunal's guide at paragraph 7.65. That's also reproduced at paragraph 8 of my skeleton.

To paraphrase, the questions which the tribunal must ask itself are: is the evidence

reasonably required and, if so, is it admissible, relevant to the disputed issues and helpful to the tribunal?

Now, I think the test is essentially agreed between the parties. There may be some difference of nuance as to how it is put. So I am just going to briefly touch on a couple of authorities on this, sir.

The tribunal explained its approach in the Enron case. Now, that is in the supplemental authorities bundle at tab 7, page 166. It is at paragraph 77. The tribunal says this about its approach: “the tribunal notes first that the purpose of expert evidence is to enable the tribunal to reach a fully informed decision. The tribunal's powers to control evidence generally derives from rule 22, [that's in old money], and to control the evidence of experts, in particular from rule 19(2)(l), [again old money].

It is for the party seeking to call expert evidence to satisfy the tribunal that expert evidence is properly admissible and relevant to the issues which the tribunal has to decide and would be helpful to the tribunal in reaching a conclusion on those issues."

So that's the test that is reflected in the CAT guide but the tribunal added this:

"The tribunal naturally will have regard to the relevant provisions of the CPR but will ultimately be guided by the circumstances of overall fairness rather than the technical rules of evidence."

So that, I say, is the correct approach. Really just for completeness I mention one other authority, that's BA v Spencer, which BT rely heavily on.

THE CHAIRMAN: Yes.

MS KREISBERGER: That's in the first authorities bundle, tab 14, page 221.

Now, this is a case under the CPR. I am sorry, I have the wrong bundle. When one does not work electronically. Paraphrasing this case, and the test set out, it says at

page 221, at paragraph 63, the court said you need to look at the pleaded issues and ask whether the expert evidence should be necessary or reasonably required. I have set that test out for you. But the paragraph which BT does not refer to in its skeleton is paragraph 63 and that is where the judge cites the types of factors which might be relevant to the reasonably required standard and he says this halfway down:

"The court should in my judgment be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and any delay which it would entail."

So it's a broad discretion, taking into account any relevant considerations.

THE CHAIRMAN: Yes.

MS KREISBERGER: So applying that test, my submission to you today is that Professor Loomes' evidence is at the very least reasonably required and it is helpful to the tribunal given the centrality of the non-switching issue and, stepping back, overall fairness to the class calls for this evidence to be admitted.

THE CHAIRMAN: Yes.

MS KREISBERGER: With that, I turn to the second part of my submissions, I will show you the pleaded issues which arise. If I could ask you to turn up BT's defence in CMC bundle 1, tab 16, page 541.

Now, as I said in my introductory remarks, the issue is really introduced for the first time in BT's defence and the first time it crops up is at paragraph 13(d)(ii) on page 550. Now, to save time rather than going back to the claim form, BT is here pleading to the significance of the Ofcom materials which the tribunal will be very familiar with.

It says this, so this is (d)(ii), half way down page 550. It says:

"The class representative mischaracterises the extent to which SFV customers [that's class members] are informed decision makers."

Perhaps if the tribunal could read to the end of that subparagraph.

THE CHAIRMAN: Yes, yes, thank you.

MS KREISBERGER: BT says that the class representative fails to pay due regard to the high levels of satisfaction amongst class members. That is at subparagraph 2. Then at subparagraph 4 BT says:

"The class representative misconstrues the behaviour of split purchasers by disregarding Ofcom's survey evidence as to the reasons why they chose to split their purchase."

Then importantly BT says this:

"This evidence suggests that a significant proportion of SPCs consider that they are optimising their purchase decisions."

So that is their positive averment. Then for completeness, paragraph 14 goes on to explain in the light of these averments that this evidence shows that there is no breach of Chapter II , so BT is here saying these matters go to abuse.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, if I could ask you to just turn the page and go to paragraph 24(a). This is where BT pleads in relation to the nature of the class, which you will recall was the subject of submission at the certification stage. It is the last sentence of 24(a) I want to draw to your attention, BT says this:

"It is denied that there is any necessary relationship between these characteristics and the ability of relevant class members to make (and incidence of relevant class members making) conscious choices about whether to take advantage of the

opportunities which were available to them in practice to switch their service provider or tariff."

So BT is saying they should have realised there were better deals out there rather than the one they were getting.

Subparagraph (b) is to similar effect. It's denied that these customers tended to be disengaged:

"For example, a material proportion of the class comprises customers who in fact made and continued to make conscious and deliberate choices to purchase their chosen SFV service or to continue purchasing it from BT."

Then I would like to draw your attention to the final sentence:

"BT will adduce factual and expert evidence in due course on the levels on engagement of and switching by SFV customers."

So BT has affirmed in its pleading that it is going to adduce expert evidence on engagement and switching by class members. So just pausing there, that is precisely the issue on which the class representative seeks to adduce expert evidence from Professor Loomes.

THE CHAIRMAN: Yes.

MS KREISBERGER: So contrary to the position which BT now takes in its skeleton where it says these are just factual and legal questions, on the pleadings it actually appears we are ad idem on the need for expert evidence. So the only difference appears to be that the class representative says: well, behavioural economics is the gold standard, and I will come back to that.

Returning to the pleadings, if you could go forward to page 559, subparagraph (d), you see there from the Heading at the top of the page we are now into dominance and BT says this at subparagraph (d) at the bottom of the page.

THE CHAIRMAN: Sorry, just remind me of the paragraph number again.

MS KREISBERGER: Sorry paragraph 52(d) on page 559.

THE CHAIRMAN: 52(d)?

MS KREISBERGER: 52(d).

THE CHAIRMAN: Yes.

MS KREISBERGER: So this is in relation to dominance.

THE CHAIRMAN: Yes.

MS KREISBERGER: I will read it out.

THE CHAIRMAN: Yes.

MS KREISBERGER: BT avers on the basis of the appropriate market definition:

"Entrants and existing players have expanded [so that is its customers] through inter alia the switching activity of customers, including BT SFV customers, to bundled services, including fixed voice access and calls". Again "BT will in due course adduce factual and/or expert evidence that evinces the level of SFV customer switching and that customers who did not switch were actively engaged in the market and made conscious and informed choices not to switch as a large number of voice-only customers [those are the ones without broadband] were both informed and engaged to a degree similar to that of the split purchasers and customers purchasing bundled services, including voice access and calls. BT further avers that the engagement levels of SFV customers does not support the existence of significant barriers to entry for new entrants for existing operators."

Then it concludes:

"So BT face significant constraints ..."

And it couldn't behave independently of customers, rivals and the wider market.

So that is what BT says about dominance. So non-switching is central to their

defence as to why they are not a dominant entity.

Finally if you could move forward -- I should say this is finally on infringement, page 563, paragraph 57(a)(iii). That's at the top of the page. Now, you see from the heading on page 562 this is where BT is dealing with infringement, particulars of breach, and it says this in relation to infringement:

"The prices paid for BT's SFV services accord with the economic value ascribed to those services by purchasers. BT's customers were informed decision makers and the fact that they chose to purchase BT's SFV services evidences the fact that they ascribed economic value to them."

So you see there the argument is plain. Key averment on abuse.

Then finally, as you know, the point arises in relation to the mitigation defence. Perhaps if I could ask the tribunal to read to itself paragraph 60 on the page, page 564, (c) and (d).

(Pause). It is subparagraph (c).

THE CHAIRMAN: Yes. **(Pause)**.

Yes.

MS KREISBERGER: You see the same point on mitigation and switching.

So you have it then. If we move forward to the class representative's reply at tab 17, the following tab in the hard copy, paragraph 27(c) on page 576. So here the class representative responds to the mitigation defence and it says this:

"The burdens, costs and/or disincentives to switching by SFV customers and the low numbers of SFV customers which have switched to other products, other services, are relevant to what can reasonably be expected of class members in relation to mitigation."

And also the point I raised earlier is at subparagraph (d):

"BT took steps to obscure price rises and/or to prevent or inhibit customers from switching to cheaper services."

For example this is by notifying price increases on a bank holiday period so it wouldn't get picked up in the press.

Finally, I want to show you what BT said in their skeleton for the CPO hearing on this particular point in relation -- I am sorry, sir.

THE CHAIRMAN: I am sorry, Ms Kreisberger, before we get there.

MS KREISBERGER: Yes.

THE CHAIRMAN: We noticed that the reply pleaded back to paragraph 57(a)(iii) of the defence, which you took me to at paragraph 23 of the reply because we noticed that at 23(a) it said:

"It's denied that each and every member of the class was an informed decision maker."

And you repeat some of the paragraphs in your particulars of claim which set out their characteristics and levels of engagement.

Also, can I just check, you've taken us to (c) and (d) of paragraph 27 but there's also paragraph -- are you relying on (f) as well?

MS KREISBERGER: Yes.

THE CHAIRMAN: Thank you.

MS KREISBERGER: So this is -- yes, we are, is the short point.

THE CHAIRMAN: Yes.

MS KREISBERGER: But it's right that this is an additional point.

THE CHAIRMAN: Yes.

MS KREISBERGER: I am extremely grateful for that, sir, in relation to both those points.

THE CHAIRMAN: Yes.

MS KREISBERGER: We do, of course, rely on those pleaded points.

THE CHAIRMAN: Right. You were going to take me to something in the BT earlier skeleton.

MS KREISBERGER: In the skeleton because it's illuminating.

THE CHAIRMAN: Right.

MS KREISBERGER: That's at tab 5 of the same bundle. That may be wrong. It's page 182. I will just confirm the ... yes, it is, page 182. That is tab 5. It's just a chunky tab.

THE CHAIRMAN: This was for the CPO application.

MS KREISBERGER: This was for the CPO, so this is BT's skeleton.

THE CHAIRMAN: Yes.

MS KREISBERGER: Here they are responding to the particular point I just showed you in the pleadings, the allegation that BT deliberately announced these price rises on bank holidays. So this tells us a little as to how BT intends to articulate or develop its defence. It's the last sentence. It says:

"In relation to the second point [this is the announcement of price increases] the class rep [now the class rep] ignores the efforts that BT made, in line with its voluntary commitments to Ofcom in 2017, to make SPCs aware of alternatives and the savings from switching to bundles and to provide voice-only customers with information about the switching process and the savings that could be made for a given tariff type within BT and market-wide."

So you see there what BT is saying is they are relying on what a behavioural economist would term the decision environment and in fact it's saying there there is choice architecture in place, to use the jargon, which they pray in aid of their

defence.

So just to sum up on that run-through of the pleadings, the pleaded issues include whether class members were informed decision makers, and the tribunal picked up that very helpful additional paragraph, whether their failure to switch to other cheaper better products or providers was a conscious decision, whether class members believed they were optimising their purchasing decisions by sticking with BT's high priced products and whether BT's own conduct contributed to class members' failure to switch away from the high priced landlines, the relevant decision environment. And that's even before one gets to the specific question about the characteristics of the class, which, as you've seen, is also squarely in play.

As I showed you, BT tells us, BT pleads, that it intends to adduce expert evidence on these points. That's very important.

So that concludes part 2 of my submissions. Part 3 takes me to Professor Loomes' evidence. The tribunal will have seen the professor's outline report.

THE CHAIRMAN: Yes.

MS KREISBERGER: That is at page 189 of the CMC bundle 1, tab 5. We are in the same tab.

Now, Professor Loomes is a highly-respected academic in the field of behavioural economics. He's a professor of behavioural science at Warwick Business School. His experience is set out at paragraph 5 on page 191. As he says at paragraph 6 of his report, his research has focused on people's decision-making processes, with application in the fields of health safety, environment and consumer behaviour.

Now, it is fair to say that the outline report does refer in terms to BT's mitigation defence at paragraph 3, but the three specific questions which Professor Loomes will be asked to consider concern the absence of switching, the non-switching by class

members, and as the tribunal itself picked up and as I have shown you on the pleadings, these three questions, which I will read out, are relevant to market power, abuse, as well as quantum. So the questions don't vary. They are broadly phrased at this stage.

They are this. Is it unreasonable for a member of the general population -- sorry, sir, this at page 190 at the bottom, paragraph 3, subparagraph (a). Is it unreasonable for a member of the general population not to switch away from a current telecoms provider when lower priced and seemingly equivalent services exist? What factors are liable to increase or decrease the likelihood of switching? Then more specifically, is it unreasonable for voice-only customers not to have switched away from BT in the circumstances of this case? And the same question in relation to split purchase customers.

So those are broadly the questions, it's the pleaded issue of non-switching.

If I could ask you to move forward to page 195 in his report, paragraph 17. Here, Professor Loomes refers in particular to the work of Richard Thaler, Nobel Prize winner. Also cited by Dame Vivian Rose in her Article in the Supreme Court in Lloyd v Google. It's where the authors distinguish between rational agents, which they call econs, and humans. Professor Loomes says this about the work:

"What the book demonstrates is the propensity of many humans, possibly almost everyone in one circumstance or another, to make decisions that are less good for them than they might be if they had the powers of an econ to compute and navigate the decision environment."

Just on that point, if I could ask you to turn back to paragraph 9 on page 192. This is how Professor Loomes describes econs:

"In this (textbook) world, consumer decisions are motivated by an ongoing desire to

optimise - to look out for and take any available options that will improve their wellbeing (or ‘utility’)."

I just want to pause there because the language is striking because it directly echoes BT's own averment that I showed you. BT said:

"The Ofcom material suggests a significant proportion of split purchasers consider that they are optimising their purchase decisions."

So we see that BT's case is built on the classic econ approach.

Now, if I could ask you to go forward to page 196, paragraph 18, Professor Loomes says this:

"So the general distinction being drawn between orthodox and behavioural models of consumers is that orthodox analysis sets the benchmark in terms of a theoretical ideal whereas behavioural analysis tries to allow for the ways in which decision processes and subsequent actions operate within the limitations of the cognitive machinery that has evolved [in other words our brains]. That's what we may regard as normal rather than normative."

Now, in the interests of time I am not going to go through the remainder of the outline report in detail. I am going to summarise, I am very happy to answer questions of course but summarise what Professor Loomes explains to be the relevance of his evidence to the present case.

This is at paragraphs 23 onwards.

In summary, he describes the kinds of considerations that he will consider, if admitted, which are, first, whether there were adequate triggers to draw class members' attention to BT's price increases, and on the same topic, were any triggers sufficiently strong to cause class members to review the options. Because of course if you don't get their attention, the question of switching doesn't even arise, they are

just staying with their provider. It's not like some of the mitigation cases I will take you to where you have to replace a service.

That's the first two. Thirdly, if their attention was drawn, what factors could have affected the likelihood of switching, and Professor Loomes names a number, such as complexity, uncertainty, information or choice overload, aversion to ambiguity, loss aversion.

Finally, Professor Loomes explains, and this is at paragraphs 36 and 37 of the outline report, that his evidence will be fact-driven, based on disclosure and factual evidence in the case, and that what he will do is to attempt to reconstruct the environment which class members were actually navigating.

Then he sets out at paragraph 37 the types of information evidence he will need. I am going to come back to that in relation to the disclosure application, but just to summarise briefly, they include facts regarding BT's products, other products, offers made by BT and what form they took, data available to BT customers about switching and of course the characteristics of the class.

So that is my summary of Professor Loomes' evidence, if admitted. Now I get to the meat, reasons why in my submission the tribunal should admit this evidence. My overriding submission is it's reasonably required based on the pleaded issues and helpful. Now, of course, I have already addressed some of this as I have been taking you through so I can deal with some of these reasons quite crisply. Reason number 1: there is a direct match between Professor Loomes' evidence and the pleaded issues. The professor will give expert evidence on BT's various allegations regarding non-switching by class members and its interpretation, its proper interpretation, how that non-switching should be understood in the context of the class representative's claim.

In particular, he will address BT's allegation that non-switching, a very specific allegation, should be treated as an expression of a conscious intent to optimise their purchases. He will also address the question of BT's conduct and BT's claims that its conduct was sufficient to bring price increases to their attention, that BT put in place the right choice architecture, whereas the class representative makes the directly opposing submission that BT deliberately sought to obscure the price increases. So for all those reasons Professor Loomes' evidence is admissible, relevant, reasonably required and helpful. So that is my first reason why this evidence should be admitted.

My second is that the evidence is required to put the parties on an even footing. Now, I showed you the passes in the defence where BT says it intends to put in expert evidence on levels on engagement and switching. Could I ask you to turn to BT's skeleton for today at tab 4 CMC bundle 1, page 35, paragraph 20.

BT says that Loomes' evidence will be duplicative. Second sentence:

"The re-construction of the facts and environment in which class members were operating is one that both Dr Jenkins (for BT)" and BT takes it upon itself to say that Mr Parker will perform this.

Now, that's not right.

THE CHAIRMAN: Just a second this is paragraph --

MS KREISBERGER: I am sorry, paragraph 20, page 35.

THE CHAIRMAN: Just a moment please.

MS KREISBERGER: I will give you a moment to read that.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Now, Mr Beard may have something to say about this when we hear from him, but it does look from this like BT's references in the pleading to

expert evidence on customer engagement and the significance and interpretation of non-switching will fall within Dr Jenkins' domain. I want to make two points on that.
The first point is I have already shown you that BT's case strongly resonates with the orthodox economic approach according to which individuals are treated as optimising their purchasing decisions and the identical language is really striking.
So it's perhaps unsurprising that Dr Jenkins as a conventional economist is going to give this evidence for BT, because that's the approach BT takes. But the class representative's contrary case is that class member purchasing decisions shouldn't be analysed from the perspective of econs, who methodically optimise their buying decisions, and that's why the class representative's expert evidence in support on this point is not the domain of Mr Parker, the conventional economist but is the domain of Professor Loomes. So BT is quite wrong to allege duplication. On the contrary, if Professor Loomes' evidence is not admitted, the parties won't be on an equal footing and that is contrary to the governing principles set out at CAT rule 4 subparagraph (2)(a).
That's my first point in relation to this point. My second is please turn up the second authorities bundle, tab 27, page 778. Now, this is a textbook authored by Dr Jenkins, BT's economist, with some colleagues, Dr Niels and James Kavanagh, a very good textbook. I have cited paragraph 3.159 in the skeleton but we can go to it. It is at page 826 of this document.
Perhaps if I could give you a moment to cast your eye over that.
THE CHAIRMAN: Yes. **(Pause)**.
MS KREISBERGER: I wanted to emphasise the points there that the authors give their view that behavioural economics is a further instrument in the economist's tool kit and that its added value is that it casts further light on what drives search and

switching costs and on how product differentiation affects consumer behaviour in each of the access, assess and act stages of the consumer decision-making process.

Now, that's the textbook. Notably Dr Jenkins' firm Oxera also prepared a report nearly a decade ago for the Netherlands Competition Authority on the impact of behavioural economics on competition policy. That's at tab 25. Perhaps just for your note, it begins, sir, at page 684 but at 699 to the following page 700 Oxera explains what it is that behavioural economics refers to, Richard Thaler's work, as well as Kahneman, and explains essentially the benefits and makes similar sorts of points as we saw in that textbook.

Now. What I really want to draw out from these two documents is that given this report and the publication, it may be that Dr Jenkins feels qualified to opine on these matters herself. We don't know. We have not heard from BT on this. But what I can say is behavioural economics is not Mr Parker's area of expertise , so keeping Professor Loomes out would result in inequity.

I am on to my third reason as to why Professor Loomes' evidence should be admitted.

THE CHAIRMAN: Yes.

MS KREISBERGER: I can deal with this one briefly. Expert evidence is required in the context of collective proceedings. Sir, the point is addressed at paragraph 14 of my skeleton. That's at CMC bundle 1, tab 3, page 11.

Sir, this cites the relevant passage from the recent judgment from the Court of Appeal in the Gutmann case, seminal judgment, and here the Court of Appeal indicated that class representatives are not expected to adduce evidence from individual class members. In fact, his Lordship says that could be portrayed as

cherry-picking.

So what one sees from the Gutmann judgment is that top down evidence from an expert in relation to the whole class is particularly important because one doesn't have an individual claimant who could give factual evidence.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, if the tribunal is content, I don't propose to say any more on that point, given that BT doesn't seem to deny that this is the preserve of expert evidence, the battle is as to the type of economist.

Finally, I now turn to BT's objections. Now, the point I want to develop here is that the legal standard for addressing reasonableness under the mitigation defence doesn't preclude Professor Loomes' evidence, as BT alleges it does. But before I turn to that argument, the tribunal, of course, raised of its own motion yesterday that expert evidence on non-switching is relevant to infringement as well as quantum and we have been through that point in detail now. So whatever the legal standard in relation to mitigation, this argument cannot knock out this evidence. It does not achieve the goal for BT.

Nonetheless, it's the focus of BT's arguments and they've added a number of authorities overnight to the bundle on this, so I will address you briefly on it. I want to show you that even just sticking with mitigation, which is not and cannot be a complete answer to our application, I want to show you that BT's argument is wrong in law.

Now, BT's argument in essence -- I am going to paraphrase -- is that whether it was unreasonable for class members to keep buying BT's overpriced products, remembering if we get to mitigation it's an abuse, they are unfairly and excessively priced, that BT says whether it was unreasonable for the class members to keep

buying the SFV services is "a question of fact and law, not expert evidence". Some tension there between what BT say in the skeleton and BT's defence, which says they are going to bring forward expert evidence on the point.

Secondly, BT says: the standard of reasonableness is, the phrase they use, "an objective legal question" and it's not assessed by reference to subjective characteristics, qualities and the interests of the claimant. BT cites Thai Airways in support and I am going to show you that.

Lastly, BT makes very a specific submission, they say that reasonableness in this context has a particular legal meaning, that's a quote from the skeleton, according to which the claimant must have gone into the market as soon as possible to obtain a cheaper substitute. With respect, that's a bad submission. I am going to show you what the authorities actually say.

The starting point is that the question of what a reasonable person would have done is a question of fact that depends on all the circumstances of the case. If I could ask you to turn up the first authorities bundle, tab 8, page 80. Two-thirds of the way down, after the quote marks, it says this. This is from the Court of Appeal, an old case about 100 years ago. About ten lines up or so:

"It is plain that the question of what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

It's very clear. You saw BT say it's an objective legal question. This authority says the opposite. It still represents good law. If I could ask you to turn to the supplementary authorities bundle, tab 9, page 268.

This is the case of Servier in the High Court. Paragraph 42, Mr Justice Henderson, from the start of the paragraph, Payzu is the case, Payzu v Saunders I just showed

you:

"In my view the decision in Payzu v Saunders constitutes binding Court of Appeal authority that the question of the steps which a claimant should take in order to mitigate his loss is always one of fact to be decided in the light of all the circumstances."

It's a question of fact, it's not a question of law. The judge went on:

"Self-evidently the claimant's knowledge of the circumstances giving rise to the breach will always be a highly material factor and in the absence of any relevant knowledge it is difficult to see how in practice the doctrine of mitigation could come into play. But the extent of the knowledge required may vary from case to case and cannot in my judgment safely be formulated as a proposition of law as so often everything will depend on the full facts as found at trial."

THE CHAIRMAN: Yes.

MS KREISBERGER: You will recall I showed you that Professor Loomes says he will look at whether the class members' attention was even drawn to the price hikes. The same point, question of knowledge.

So Mr Beard is quite wrong to say that the law ignores the circumstances of the claimant, which here is the class. He is also wrong to say that the law requires that the reasonable claimant has gone to market. He says in his skeleton at paragraph 16(b):

"This is the assumption and expectation of the courts that the reasonable claimant has gone to market."

Well, let's have a look at the authority that he relies on. That is Thai Airways and that is in the authorities bundle 1, tab 12, page 136 this start of this authority from Mr Justice Leggatt.

Now, Thai Airways was claiming damages for breach of contract by an airline seat manufacturer who failed to deliver the seats variously on time or at all. It's a mixture of late and non-delivery. One of the issues was whether Thai Airways had acted reasonably in leasing various aircraft to replace the lost seating capacity.

Now, in that context, if I could ask you to turn to page 144, the judge referred to at paragraph 35 at the bottom of the page, you see there, first sentence:

"Various norms of reasonable conduct have become settled."

He says:

"Foremost of these is the expectation implicit in the market measure of damages that where there is an available market the claimant will go into the market as soon as possible and obtain a substitute for the defendant's performance."

Now, Thai Airways involved a battle between sophisticated businesses. Thai Airways had a business to run and it needed to go into the market to find a form of replacement for the lost seats. That really couldn't be further removed from the present facts, where BT is arguing that its own residential customers should have, first, realised they were on a bad deal from BT notwithstanding its muffling of price increase announcements, they should have realised they were on a bad deal, shopped around and found a better one.

Now, it is a very extreme submission for BT to suggest that the law applies the same business norms, Mr Justice Leggatt's settled norms, to assessing the conduct of a major airline as it does to these landline customers. Some of these customers didn't even have broadband.

Now, what BT has fixed on is that the court says that the test is objective but it's misconstrued that because what that means is that the claimant's own subjective views of what are reasonable are ignored and that is at paragraph 37 on page 145.

The judge said this:

"One result of these rules is that the claimant may have acted in a way which was reasonable from the point of view of its own business interests or personal objectives and yet had not adopted what the law regards as a reasonable response to the defendant's breach of contract."

It refers to a prior case. That was the position in Elena D'Amico regarding a decision not to charge for a substitute vessel, which was found by the arbitrator to be reasonable from the point of view of the claimant's own business interests but was not in accordance with the expectation of the law.

In other words, what the person themselves thinks as to what is reasonable is not the test and that's not at all what we are saying of course because this is an application for expert evidence, apart from anything else.

So this is a straw man. Professor Loomes isn't concerned with what class members thought was reasonable.

THE CHAIRMAN: Yes.

MS KREISBERGER: I just want to be clear, there will no doubt be a fight at trial about all this but it's questionable whether switching was even called for at all. It's not like a business that has to replace something.

So that brings me to my fifth and final point.

BT says in its skeleton that the tribunal would be going down the wrong track if it admitted this evidence and that it would be a slippery slope because this type of evidence could always be introduced where mitigation is raised.

Now, I have two responses by way of concluding remark. First of all, BT are wide off the mark. I have been at pains to explain, it's well understood, that behavioural economic evidence comes into play when one is looking at consumer behaviour.

There is no particular reason to think it's relevant to competition litigation between businesses. In other words, in a case between two businesses, where mitigation is raised, there is no reason to think that because this tribunal has admitted it in this case, it will be relevant. It's not the optimal model for that sort of case.

In any event, slippery slope arguments are always to be treated with scepticism.

But, secondly, there is a general consensus that behavioural economics has important insights for the application of competition law to consumer conduct in particular as regards switching.

Now, just to mention a few who are within that consensus of opinion, it includes the CMA, which has set up a behavioural unit to fight for consumers, the FCA guidance is in the bundle.

THE CHAIRMAN: Yes.

MS KREISBERGER: Competition authorities around the world. The OECD. Dame Vivian Rose, who concludes her article by saying that behavioural economics has a bright future in competition litigation. So specifically litigation. The Supreme Court, who cited Thaler's work to explain why opt-in rates are low featured in the appeal in these proceedings. And BT's own expert, Dr Jenkins.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, unless I can be of further assistance, there are points about timetable that BT makes but I think we could perhaps --

THE CHAIRMAN: We can leave those for the time being. What we are going to do is take a very short break to give the stenographer a break and then we will move to Mr Beard. So 10 minutes please.

MS KREISBERGER: I am grateful.

(11.45 am)

(A short break)

(11.55 am)

THE CHAIRMAN: Before we resume, I have been informed that because of the difficulties over the audio reception when we started, the customary warning which I give in relation to livestream recipients might not have been received, so I am just going to read it again.

Some of you are joining livestream on our website. I must therefore give you the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Now, Mr Beard.

Submissions by MR BEARD

MR BEARD: Sir, members of the panel, good morning.

Let's deal with one or two things that we are not disputing. We are not denying that behavioural economics has developed hugely and is relevant to competition policy generally. We don't deny that the CMA, the FTC, the OECD, any acronym you choose to pick upon within the competition world, are jolly interested in these things. No doubt about it and we don't say it's valueless. That's not our position.

Nor is it our position when we come onto it that mitigation is just some kind of bright line legal test. We recognise it's about facts. What we are concerned about is when it is appropriate to use behavioural economics and when that evidence should be considered necessary or reasonably required, as Ms Kreisberger put it, for the purposes of determining key issues.

Now, obviously in coming forward to the tribunal in dealing with these matters today,

we have focused, not I think irrationally, on the mitigation issues, given that the application is all about mitigation, the instructions to Professor Loomes are all about mitigation and prior to this none of the broader exposition that we've heard so eloquently from Ms Kreisberger featured in any of the arguments to date.

That does not mean that they are irrelevant. We quite understand that the tribunal is concerned that there may be broader issues here. I understand that. We understand that and will engage with those. But I think it is appropriate, if we may, to take it in stages and deal with the mitigation issues first and then come back to those other points, if I may.

In doing that, therefore, what I want to do is briefly go to some of the law on mitigation because our central proposition here is: look, when this application was brought forward, you might have thought that the doctrine of mitigation was untethered in law because there was no citation or reference to any of the relevant case law. In fact there's a huge body of relevant case law that says: look, the test for mitigation is not some kind of general rationality test. Whether you are talking about businesses or consumers, actually there is a structured legal approach and Ms Kreisberger, with respect, misrepresents our position. We are not saying it is an absolute rule that in all circumstances you cannot get home on a mitigation issue unless you have shown that you couldn't go into the market again. We don't put it like that.

What we say is that the learning on mitigation has developed in law over time so that there are broad principles that do condition the way that a court or tribunal should approach these matters and the punchline is essentially this depends on reasonableness, that requires consideration of the facts and that this tribunal is well able to carry out that analysis without the need for behavioural economic evidence

and more than that, as we'll come on to, and this does touch upon some of the disclosure issues, the open-endedness of what Professor Loomes is putting forward risks creating significant problems in terms of it actually being workable and it being proportionate.

Those are our concerns here. We are not saying no, never. We are not saying if you give it, now it will be always, albeit the basis on which it's put forward makes it quite difficult to distinguish when it would be rejected in other cases. But is the way that we are approaching these matter.

So, if I may, what I will do is I will take it first of all just going back to some of those basic legal propositions in relation to mitigation, they may not be very exciting but I think they are important to frame this discussion and frame the thinking of the tribunal in relation to these issues.

I should say in the light of what has been said this morning, if the tribunal were to be against me in relation to the possibility of admission of behavioural economic evidence, I think we are in a territory where we are going to have to go back and revisit how it is we are going to decide what is going to be covered in that evidence. Because obviously Ms Kreisberger said Professor Loomes has three questions that he has dealt with but obviously those questions were framed for the mitigation part and we are going to need to work through what it is the relevant questions are. Are they just, as Ms Kreisberger says: oh, those three questions, I can replicate them in relation to everything else? Or do we actually need to think about that a little further? So I want to park that one because I say you don't need to get there but I put down a marker for now.

THE CHAIRMAN: Thank you.

MR BEARD: So going back to a little bit of law, if I may. Can I just kick off with RBS

Rights Issue Litigation. That's authorities bundle tab 13 and going to pick it up at 182, if I may.

Page 182 is just the page reference to the start of the judgment. I want to pick it up at 185. This is just because it essentially sweeps up a bunch of the case law and key of the key principles on expert evidence, et cetera, all in one place.

I am picking it up around 15. Obviously if you go back to the preceding page 184, test to be applied about whether or not to admit expert evidence, this was in relation to an equity analyst matters, not at all for these purposes.

But you'll see there, 15, two further restrictions: an expert is not to find facts but to express an expert opinion on assumed facts.

THE CHAIRMAN: Yes.

MR BEARD: An expression of the opinion of what the expert would have done in the hypothetical situation is inadmissible.

THE CHAIRMAN: Yes.

MR BEARD: All basic stuff. If the evidence is admissible, expert evidence should be restricted to what's reasonably required, so that's the phraseology that Ms Kreisberger quite properly used as the test.

THE CHAIRMAN: Yes.

MR BEARD: "In determining whether particular evidence is reasonably required, a key question will be whether the subject matter of the opinion is such that the person without instruction or experience in area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area."

That's drawing on a couple of other cases that we've cited.

Now, one of the key things here is the question that is being posed in relation to

mitigation, and I don't want to get into the substance of mitigation in any major way, but it's to do with the reasonableness of the actions that we are concerned with and the question we are asking ourselves is: is this tribunal able to assess reasonableness in this context without the assistance of behavioural economic experts? We say, yes, you are, along with a great tradition of courts and tribunals assessing reasonableness in a whole range of situations where mitigation issues arise.

You will have the factual matters. You will have experts analysis in relation to the economics of these markets. You will have all of the documentary material which we have been disclosing about what BT did in relation to pricing, when prices were rolled out, what information was available to people and so on. You are going to have all of that material. We say this extra layer is not necessary and therefore the essence of the point is that the Bonython test is not met here.

So, just so you've got it, 18 and then 19 cite the JP Morgan Chase case and then British Airways v Spencer case, which I won't go back to but I think you have the points on those --

THE CHAIRMAN: Yes.

MR BEARD: -- in relation to these issues. But I do now want to just take a quick trip back to the basis on which mitigation issues arose and why it is you don't have some sort of general assessment of rationality as the exercise you engage in when you are considering mitigation questions. To do that, can I briefly go back to British Westinghouse, tab 6 in the bundle beginning at page 46.

Now, for anyone that has ever had to deal with any sort of mitigation issues or indeed collateral benefits cases, British Westinghouse is familiar. It was this case where turbines had been bought by the London Underground that weren't working

properly and so London Underground replaced them and also sued the supplier because the turbines weren't up to spec. London Underground claimed as part of its damages the cost of replacing those turbines with new ones and vendor of the original turbine, British Westinghouse, said: well, hang on a second, you should actually take into account the benefits of those more efficient turbines.

THE CHAIRMAN: Yes.

MR BEARD: That's what's known as collateral benefits issue. But what you have in relation to British Westinghouse is an exposition of the relevant principles about pecuniary damage. Although this is a contract case, we know that these principles also apply in relation to tort.

So if we just pick it up at 687, that's page 60 in the bundle numbering, I have 687 just as my reference from the case:

"The question thus arising was decided by the majority in the Court of Appeal in favour of the respondents. They held that the law as to the measure of damages had been rightly laid down by the Divisional Court. They thought purchase of the Parsons machines [these were the other turbines] must have been taken to have been merely for the purpose of mitigating damages and that the appellants were not entitled to have pecuniary advantages arising from that subsequent use taken into account in the damages."

Obviously this is what the House of Lords then overturned. If we go over to page 62, 689:

"The fundamental basis [of damages] is thus compensation for pecuniary loss naturally following from flowing from the breach. But this first principle is qualified by a second which imposes on a plaintiff the duty to take all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of

the damage which is due to his neglect to take such steps."

There is a reference to the old Dunkirk Colliery case and then further down citing that:

"The second principle doesn't impose on the plaintiff an obligation to take any step which a reasonable and prudent man wouldn't ordinarily take in the course of his business."

Now, I know Ms Kreisberger says, well, she wants to run a case that there are different principles in relation to consumers as compared with businesses. We don't accept that that would be the right approach. But leave that to one side for the moment, what we are talking about is the reasonable and prudent man here or reasonable and prudent person. So you are taking an objective standard and you are asking yourself what are reasonable steps here.

I will skip on, if I may, to the Thai Airways case which Ms Kreisberger took you to, tab 12 in the authorities. I just want to take you in particular to paragraph 30 -- well, we see the start of this on page 142 of the bundle numbering. So mitigation, the law. You'll see basic principle echoing the old British Westinghouse approach set out in first couple of sentences of paragraph 31.

Then if we flip over a couple of pages because I don't want to go through this in great detail but it's important to just go to 34:

"It is commonly said that the claimant has a duty to take reasonable steps to mitigate its loss. This formulation is, however, potentially misleading in at least two ways. First it is well established in the absence of contrary agreement that a claimant is free to act as it wished following a breach of contract by a defendant and does not owe any duty in law to the defendant or anyone else to mitigate its loss."

So it's not an absolute duty.

"Mitigation is not a duty but an assumption. Damages are calculated on the assumption that the claimant has taken reasonable steps in mitigation whether it has in fact done so or not."

The second point, and this is important:

"The test of what is reasonable in this context is not simply one of general rationality but is governed by legal rules."

So the point we make is, at its highest, Professor Loomes' evidence, the first question is: what is the approach to reasonableness of members of the general population, as he puts it, in relation to what is again -- there is a danger of lapsing into jargon -- here the decision framework or the choice framework. The question is, can a tribunal assess what is reasonable for a member of the general public to do? Do you need behavioural economics in order to assist you in making that assessment? We say absolutely not. You will have the facts as to how prices, pricing, the market worked before you. You can make that assessment in relation to the general population and you do it by reference to the legal rules.

I think we can skip forward. It may be of assistance here just a couple of points. Although Ms Kreisberger skated very elegantly over paragraph 37, so it's just over the page:

"One result of these rules is that the claimant may have acted in a way which was reasonable from the point of view of its own business interests or personal objectives and yet not have adopted what the law regards as reasonable response to the defendant's breach of contract or other wrong for the purposes of assessing damages."

He then cites two cases, the Elena D'Amico, which was to do with time charters and therefore I won't focus on that one, I will just go to Darbishire v Warran, consumer

case. No business involved here. The judge had found that:

"The plaintiff acted reasonably in having his damaged motorcar repaired rather than buying a similar second-hand vehicle even though the cost of repairs was more than twice the market value of the car before the accident. The Court of Appeal nevertheless held that while the decision to repair the car may well have been reasonable so far as the plaintiff himself was concerned, he had failed to mitigate his loss because there was a cheaper option reasonably available of replacing the car. Damages were therefore limited to the replacement cost."

So what you are seeing here is those rules biting in relation to a consumer, not in relation to a business, and saying: no, no, no, you don't just think about the general rationality. If we apply Professor Loomes' great brain to the problems of Messrs Darbishire and Warran, he might have said: well, yes, there were all sorts of concerns, he had a particular affinity for this car and therefore with those sorts of concerns about the car and the affinity he had for that particular vehicle meant that he was conditioned in a particular way and it was entirely reasonable for him to incur those repairs. And actually the court says: yes, okay, from a personal point of view, we understand that, you are not having your money for that though because in law, when we are thinking about rules in relation to loss, what is reasonable is different.

So I won't go on -- at 38 there's this lovely phrase that's used:

"The standard of reasonableness is, however, applied with some tenderness towards the claimant having regard to the fact that the claimant's predicament has been caused by the defendant's wrongdoing. Thus the claimant is not expected to take steps which would involve unreasonable expense, risk or inconvenience."

Of course, that's where we get into those things like the impecunious claimant issue that are dealt with in other cases that have been cited in the supplementary bundles.

If you are so impecunious that you have no choice, effectively, as to which option to take and you end up taking a much more expensive option than the option you would have taken had you had the resources to make a free choice, then the court doesn't criticise you for that. That was seen in these credit car hire cases like Dimond v Lovell and Lagden v O'Connor. I won't go to them but that's the key issue.

I am sorry, Mr Doran.

MR DORAN: So you can take into account financial resources but not other disbenefits that you may be under?

MR BEARD: What is actually said in Lagden v O'Connor is, essentially, because you are so impecunious, you had no choice, because in Lagden v O'Connor, I can't remember -- I don't know to what extent you are familiar with the joys of the credit car hire litigation but what happened was that people would have an accident, their car would be taken off to the shop to be mended and there were companies that came along and say: we can take on your case, sue the other side and give you a car to use in the meantime, but the rates they charged for those cars were way higher and in Dimond v Lovell what was said was: well, you, in choosing the credit hire option, effectively imposed an excessive damages cost on the insured and you are not entitled to recover that, you can only recover reasonable rate.

Then Mr Lagden came along and said: yes, yes, but I couldn't afford the lower daily rate because I had no money, the only way I could get a car to substitute for my crashed vehicle was to go to one of these credit hire companies that would charge me nothing and said they would bear the risk and sue insured and so on. That point the court says: well, yes, okay, you had no choice and if you've got no choice then in those circumstances we will allow you to claim the full credit hire cost as damages in relation to the claim against the insured.

So, yes, there are exceptions. There are exceptions in relation to, for instance, personal services contracts in certain circumstances. Actually probably the best way of dealing with this if is if you go to McGregor because in McGregor there's a kind of list of the rules that have been developed in relation to this. If I could just pick this up, it's in the supplementary bundle --

THE CHAIRMAN: Sorry to interrupt, Mr Beard, but following on from Mr Doran's questions.

MR BEARD: Yes.

THE CHAIRMAN: Given that whether you agree with it or not the conceptual underlay to the mitigation argument is (a) these people have these particular characteristics and (b) they say people with those characteristics have degrees of lack of engagement or aren't fully able to exercise informed choices. On that second question, is it your proposition that as a matter of law those matters cannot be relevant on the question of reasonableness?

MR BEARD: I don't think we go as far as to say they cannot ever be relevant. The question is the degree of assistance that it is providing to the tribunal and whether or not it is reasonably required to have that expert evidence in order for this tribunal to assess those matters on the basis of the factual material you have.

THE CHAIRMAN: Well, you see, thank you for that clarification because had you been positing it as a matter of law that excludes those considerations, we certainly wouldn't be ruling on that today.

MR BEARD: No, no.

THE CHAIRMAN: That would be a matter for trial and therefore what I am anxious to avoid is a sort of deep excursus into the rules of mitigation law in circumstances where your contention isn't that as a matter of law these considerations are ruled out.

If your true contention is on the question of informed choice and whether people of these characteristics, which I know you dispute, are people who therefore and as a consequence of those characteristics have a lower level of engagement or a lower level of informed choice making, if your question then is: well, that's fine but the tribunal can decide that question itself and won't be assisted by expert evidence, then that is a different point.

MR BEARD: Yes.

THE CHAIRMAN: Perhaps one on which we would be more assisted.

MR BEARD: Yes, it's that that I put forward.

THE CHAIRMAN: Yes.

MR BEARD: Because I preserve the position on law but it's not the way put matters today.

THE CHAIRMAN: No.

MR BEARD: Because obviously I am not inviting this tribunal in the course of a CMC to make points on the law of mitigation.

THE CHAIRMAN: No.

MR BEARD: That wouldn't be right. The reason I refer to these issues though is because there are structured rules and therefore I am not saying it is impossible that these assumptions and rules that, for instance, McGregor articulates can be displaced.

THE CHAIRMAN: Yes.

MR BEARD: The way in which this application was put forward was without reference to any of that framework.

THE CHAIRMAN: I understand that.

MR BEARD: We say: look, you've got to think about it within this framework.

Actually there are assumptions and rules that operate here. The predominant rule is you should go back into the market if there's a cheaper option. That is the way in which this is put forward. In those circumstances, where you have or will have all of the relevant factual material and the assistance of experts dealing with the economics of the market, what is actually required for you to make the assessment of reasonableness? We say you don't need a behavioural expert in order to do that.

THE CHAIRMAN: Can I just pick up on that, please, because I would like to sort of cut to the chase, if I may.

MR BEARD: Yes, sure.

THE CHAIRMAN: Reasonableness in law clearly includes a whole host of factors. I don't think if one was considering the mitigation argument it is being suggested that reasonableness is irrelevant. It is a question of reasonableness.

MR BEARD: Absolutely.

THE CHAIRMAN: I quite understand you say that there is this external circumstance and there is that external circumstance at BT did this and BT did that and all rest of it. I totally get that point. However, this is a particularly discrete narrow point, as I see it, that within this entire framework of reasonableness there is an argument, which you reject, which is: people in this group have particular characteristics (a). (b) if they have those particular characteristics, there is a tendency or likelihood to mean they are less engaged, less responsive and not fully informed choice-makers, which you positively plead they are.

That it seems to me is the key question we are talking about and the question there is, and I will put it in very blunt terms: if someone is elderly, is it then for us simply to scratch our heads and say: well, of course, you know, people who are elderly don't read things, they don't pick up on what's being said, they don't read the post, they

are likely to be less engaged, are we meant to do that ourselves or are we meant to have somebody else help us do?

MR BEARD: Look, let me take that in two stages because I think the first thing is to highlight, and I do want to come on to this, whether or not we are actually going to embark on a project that is going to assist the tribunal, because you take the single individual who is elderly or a group that is elderly, now one of the significant problems here is there's a degree of wishful thinking about what data there will be that can actually inform how you make these assessments. Because on Ms Kreisberger's case and Professor Loomes' three questions, you either start with the whole of the general population. Well, on that we say, yes, oh, tribunal, you really can. You then are asking about these two subgroups of the class, the voice-only customers and the split purchase customers.

THE CHAIRMAN: Yes.

MR BEARD: You have a fundamental problem that we haven't identified away, that you might be able to assess the degree to which these characteristics actually enure in these classes because of course what Ms Kreisberger says is: well, you can't get everyone to come forward, so we've got to use some other technique. We say: well, look even if you are right on that, how are we going to do that when you don't have a way of actually making these sorts of sensible assessments? Because part of the problem, and this does overlap with some of the disclosure requests, if you look at Professor Loomes' disclosure request at I think it's 37(f), it's: I would like information about the characteristics. Well: age, yes, we can see. Income, that might be highly material but it's not clear that BT are going to be holding any of that sort of material. Tenancy is referred to. It's not clear why that matters, it's not clear how comprehensive that sort of material is. Does it matter that you attend evening

classes and are interested in learning a second language that makes it suggest that in some way you have enquiring mind? What are the characteristics and what's the data that we are looking at and then how do we apply this in a proportionate way in relation to these classes?

Because what we are concerned about is that there is a hope on the part of the claimants that we hold so much material that we will be able to assist in an informed way. If that case that Ms Kreisberger puts forward were true, then the tribunal might say: well, actually in relation to these groups, we can see that there are certain proportions with them, we can be assisted in relation to how those characteristics apply in the proportions in the class and so on.

At the moment we just don't see that working and therefore we do have a significant proportionality issue here, that we can be embarking on an exercise which may not assist even on, sir, your approach to looking for help from someone else, essentially.

THE CHAIRMAN: I follow that but just one supplemental point then I will let you get on, which is that there is an express pleading in paragraph 80 of the particulars of claim pleading out the particular characteristics.

MR BEARD: Yes.

THE CHAIRMAN: You have agreed that that is a list of issue for trial.

MR BEARD: Yes, we have.

THE CHAIRMAN: So it's going to come up whether you like it or not.

MR BEARD: Yes.

THE CHAIRMAN: There may be points on disclosure, I entirely understand that. There may be points that you will say: well, we dispute all of this.

MR BEARD: Yes.

THE CHAIRMAN: Go ahead and prove it.

MR BEARD: Yes.

THE CHAIRMAN: You can't prove it. I fully take that but it's an agreed list of issues for trial --

MR BEARD: I am not backing off the issues, I should be really clear about that.

THE CHAIRMAN: So it's there one way or the other.

MR BEARD: But there's a difference between those being issues between the parties and you as a tribunal at this point saying: yes, because what we'll do is we will set off down a course of having behavioural economic experts --

THE CHAIRMAN: Yes.

MR BEARD: -- engaging in an exercise of trying to gather this material in order that it can inform them. We will then need to respond to that because we don't actually know what it is that is going to be the framework for this behavioural expertise that's being put forward. Ms Kreisberger this morning has said: oh, Mr Parker is not going to deal with it, but it looks like Dr Jenkins was going to. Dr Jenkins isn't going to deal with that. Those references in the pleadings to expertise relating to levels of switching, that's all to do with the sort of brute economics of how many people are expected to move in particular circumstances. It's not doing a behavioural economic exercise. That isn't because Dr Jenkins is somehow antithetical, her approach is antithetical to behavioural economics. Dr Jenkins is well aware of these things. As Ms Kreisberger fairly showed, she had been an author of various books and documents on these things.

But that's not the expertise we are talking about. So there's no equality of arms thing here. What we are talking about is augmenting the evidence here and creating quite a significant additional burden in circumstances where there are real concerns as to whether this is even going to be feasible in relation to two questions.

The first question, general population, we say you just do not need a behavioural economist in relation to that.

THE CHAIRMAN: Yes.

MR BEARD: So that's why we go back to the reasonably required test and we do say if you don't have a route through to explaining how it is that you are actually going to be able to get the information such as will feed in and provide an informed report rather than just sort of generalised speculation, this is not a course to be going down. That's our concern here. It's not, as I say, an objection to behavioural economics per say.

THE CHAIRMAN: Thank you, that's helpful.

MR BEARD: On that, if I may -- sorry, I won't -- can I just provide you with the reference to McGregor since I was in passing going there.

THE CHAIRMAN: Sorry, yes, I interrupted you.

MR BEARD: No, it's absolutely fine. Supplemental authorities bundle, tab 14, the illustrations are at 487 onwards and the impecunious claimant problem is dealt with at page 492, just so you have that.

I don't think I probably need to go through lots of the examples that were given about Dame Vivian Rose's article. She talks, yes, about the possibility that there may be circumstances where behavioural economics may be useful, albeit ironically a number of the examples she gives are not really behavioural economics examples at all, they are just orthodox economic analysis, as Ms Kreisberger will put it.

But leave that to one side, she's not, I don't think, suggesting remotely that that tells you when behavioural economics is appropriate, nor does Lloyd v Google. The irony of citing Lloyd v Google is of course that there there were discussions about the proclivities to opt in or opt out. No behavioural expertise was needed in order to

make those sort of assessments. Indeed that's a generalised point that could be made in relation to all of these cases. This is an entirely new approach.

So I've picked up on the questions in particular, the three questions. Just so you have it for your reference.

THE CHAIRMAN: Yes.

MR BEARD: The Loomes report is CMC bundle 1, tab 5 at 189. It might just be worth turning them up, if you don't mind.

THE CHAIRMAN: Yes, we've got that. Thank you.

MR BEARD: 189. Just so you have it, since we are passing, paragraph 3, 190, makes it very clear this whole outline report is predicated on consideration of mitigation.

THE CHAIRMAN: Yes.

MR BEARD: If we go to the questions, they are just below that:

"Is it unreasonable for a member of the general population not to switch?"

Now, we say we just don't understand why it is that when you've got all the factual background material that's being disclosed, has been disclosed, when you have witness evidence, why you as a tribunal are in any different position from anybody else in relation to these matters and why you need assistance in relation to dealing with the question that arises in pretty much all mitigation cases.

Then (b) and (c) are the subgroups of the class. As I say, one of the difficulties that arises in relation to these subgroups is how it is you are going to actually identify what are the sort of relevant categories of information that will inform you in relation to those.

Now, I think this does trespass slightly into the disclosure issues. I know we are coming on to those but I think it is important because it gives us an insight into what

traps we may be setting ourselves, frankly, as we go down the road and I don't just mean on one side, I mean for all parties, because experience tells that there can be occasions when novel evidence is extremely useful, there are other occasions when novel evidence can create all sorts of burdens and not necessarily assist.

If we go on to page 201, which is paragraph 37 of Professor Loomes' report, so we've got this list of information that he wants. So we've got the material here that talks about (a) “description of products BT were and are providing to class members; the prices being paid; how payments were made”; all of that stuff has been disclosed anyway. Alternative products available from other providers. Well, we are disclosing stuff that's relevant to market material but we aren't the other providers, we are not going to have lots of this material and so quite how that's going to be dealt with, we are not entirely clear. What offers BT made to class members “which if taken could be argued to have mitigated”. So this is either the other general pricing offers that we have. I mean, there are going to be some interesting problems and issues arising here. For instance, you have 17 per cent of one of the classes is business consumers. I mean, actually they should have been on business tariffs, not on consumer tariffs at all, but leave that to one side for the moment.

You have what offers BT has made. I think there's a discussion about what steps were taken in a process if a particular customer engaged with BT and so on. Well, we've talked to --

THE CHAIRMAN: Yes.

MR BEARD: -- the claimants and said: well, hang on a minute, you know, this is extraordinarily burdensome because we have these spreadsheets with notes of calls, but the idea that we can work out what was particularly related to these particular customers in relation to this issue, that's a huge exercise and it's not clear

it's going to tell us anything very relevant. Protocols for switching; well, if we have internal material, yes, we can provide that.

"What data is available about switching for those who switched away from BT to alternative providers". Look, if BT had the information about what happened to the customers they lost and where they went and what they did afterwards, I mean that would be magical. It doesn't exist, that sort of material in that way.

Then "what is known and can be disclosed about the characteristics of class members". Well, this is the question that Professor Loomes is asking himself: what are the characteristics that matter? Well, this is where it really becomes quite intractable. We do not know what it is that is really going to be relevant here other than this reference to tenancy. Then we get indications that apart from comparing the number of customers who switched from BT versus those who contemplated switching, which is an interesting conceptual exercise in itself, they want data on characteristics of class members, as I say, but what is it that is required and what data on other enquiries made by class members is it that we should be providing?

Because we have spent millions on this disclosure exercise. We've spent £3 million so far on disclosure. Now, around 1 million of that is just in relation to documentary disclosure it's around £860,000 so far. That's on what's referred to as unstructured data. It's a rather deprecating term for documents. It's not in spreadsheets, databases and so on.

We are being asked to feed this process with requests that are entirely unclear and we are explaining that we do not have the material and we say even beginning this sort of exercise is vastly expensive in circumstances where we have already spent millions.

Now, when we come to reasonably required and proportionate, we do say that those

things matter here. It takes me back to the point that if you are against me on whether or not this sort of material should be admitted, we do not think that the way this is being put forward is in any way adequate. Essentially what will be happening if this material is being admitted on the basis Ms Kreisberger puts forward is that it's not just in relation to mitigation, it can be in relation to abuse and dominance and anything else that they want to rely on it for and are we just dealing with these two questions?

THE CHAIRMAN: You have engaged with -- leave aside what your intentions as to expert evidence were. I am sorry to interrupt again.

MR BEARD: No, no.

THE CHAIRMAN: But you've engaged with this on the pleadings. You've positively said as a defence to the abuse argument, and Ms Kreisberger read out the relevant bit in your pleading --

MR BEARD: Yes.

THE CHAIRMAN: -- no, they were informed choice-makers. Now, you've pleaded that. That's an issue in this case already.

MR BEARD: Absolutely.

THE CHAIRMAN: And you've taken issue with the articulation of what, if any, particular characteristics these groups have that you say but, in any event, even if they have all of these things, they are nonetheless informed choice-makers and that's an issue in the case.

Now, I quite follow that in relation to that dispute there may have to be some arguments about: well, leave aside informed choice-makers but on the fundamental question what characteristics do they have, how the claimants are going to prove their case on that, but it's already an issue in the case.

MR BEARD: I agree and let's take it in stages. I don't want to move straight to informed or conscious knowledge and all of those sorts of things because all of those questions are still in play as to how they matter or don't matter.

THE CHAIRMAN: Correct.

MR BEARD: So.

THE CHAIRMAN: Yes.

MR BEARD: We park all of that but I completely understand those matters are engaged with but there is a big difference between us saying: look, we don't accept this story that you are putting forward that these are non-informed choice-makers, these are things you have to prove, as you rightly said, sir.

Us then turning around and saying: we've got a magic solution in the form of Professor Loomes who will come along and solve all our problems and we say: hang on a second, even if you are right on everything else about the law, how is this going to work? And that is where we end up getting stuck. That's not in any way contrary to our pleaded case, that is entirely consistent with us saying: no, we do not accept that the allegations you are making are founded and it's for you to prove them.

The difficulty that Ms Kreisberger of course has is she on the one hand says: well, look what Ofcom says, and then on the other hand says: no, I am not relying on what Ofcom found in relation to these matters. That's a dilemma she is going to have to grapple with.

THE CHAIRMAN: I quite take the point that there is an issue about the status of the Ofcom report which is going to have to be grappled with at some point, in my view.

MR BEARD: That may be true.

THE CHAIRMAN: But not today.

MR BEARD: No, definitely not today, definitely not today.

But the point I am making is not a just a broader one, that when we are applying this reasonably required approach the fact that we have pleaded saying: no, no, no, your assertion that these people were somehow trapped and therefore couldn't change, that is not something that goes to suggesting that there was any abuse here. That is a matter for them to prove and it is not a matter for us to be coming along and saying: look, here are the demographics and so on.

Now we do have some data from the Ofcom material and from other sources, I accept that, but that's not what is being asked for here, it appears to be much more granular, and we don't understand how that is going to work. We say that does feed in. So, even if you are against us on the points on law, that has to be part of the discussion in relation to how this is going to progress.

Because I think it is important just to emphasise how many documents and categories that have been asked for have actually been provided: the material on BT's price visibility, the bundle customers, the take-up of home phone saver and alternative services. All of that material has already been provided. So there is a great deal of material. And of course all the marketing materials that we have, those have been provided.

Ms Kreisberger keeps coming back to some particular example about a price rise happening over a bank holiday. That is not going to be -- unless she is saying: well, this was the pattern, that it was only on bank holidays you got price rises, and that that means that these people are somehow trapped, neither of which proposition we accept, then we think we are a very very long way from these sort of anecdotal pieces really fitting into any sort of story that can then be digested by experts in relation to these matters.

Now if, contrary to that, the tribunal says: no, no, we think on balance we would be

assisted with such an expert, I would suggest that there are two matters that need to be dealt with: the structure of how we go about working out what the questions are for those experts and what the material is that is really needed, given what we have said about what we can and cannot provide.

THE CHAIRMAN: Yes.

MR BEARD: And, furthermore, a staged process. Because we genuinely are not clear how this is going to be approached, we are going to have to have a serial exchange of expert reports --

THE CHAIRMAN: Well, I think that if we were to go down the road of admitting this evidence it would have to be a sequential exchange, with the claimants going first.

MR BEARD: Yes.

THE CHAIRMAN: Because they are making the running on this.

MR BEARD: They are.

THE CHAIRMAN: I take that point.

MR BEARD: But, as I say, I think there is a prior issue here that it would not be something I would wish upon a tribunal to draft the order as to what the content of the order in relation to this expertise should be, because if you draw it too broadly or too vaguely then there is a danger that it's not of assistance.

On the other hand, we recognise that if the tribunal's position is: well, we would like this material, not just in relation to mitigation but other matters, then it needs to be reasonably broad. But then we need to focus on what are the sensible additional data and disclosure steps that go with that, in circumstances where we have been engaging and providing material, and proportionality really does come into that analysis.

As Mr Cerim quite properly puts it, were we applying Commercial Court approaches

to these sorts of matters, I think we might be in the territory of saying: look, this should be the subject of a reapplication because the application that stands at the moment is one that's focused only on mitigation. What we've heard today is completely different. That may have been inspired by the CAT, that's completely understandable, but it does leave us with that sort of difficulty about the relevant focus in relation to these issues.

THE CHAIRMAN: Yes.

MR BEARD: Unless I can assist the tribunal further in relation to those issues. I should say that, finally, on these matters, as well as the question arising in relation to law and mitigation this tribunal shouldn't lose sight of the fact that the excessiveness element of the allegation of excessive pricing in the two limbs of United Brands, it's very hard to see why excessiveness would be anything other than what Ms Kreisberger puts, somewhat pejoratively, as the territory of orthodox economics.

THE CHAIRMAN: I take that point.

MR BEARD: In relation to fairness, I think we do need to bear in mind of course that questions of fairness again paradigmatically are ones that courts and tribunals decide all the time, procedurally or otherwise, and obviously it's a matter of fact as well as of law but that's to be taken into account in the assessment of whether this is reasonably required here.

THE CHAIRMAN: Thank you very much, Mr Beard.

Yes, Ms Kreisberger.

MS KREISBERGER: Thank you, sir.

THE CHAIRMAN: Just give us one moment please. Yes, thank you.

MS KREISBERGER: Sir, I do wonder if, given the time, we could perhaps rise early

and return at quarter to two. Would that make sense?

THE CHAIRMAN: Well, it might assist because can we just indicate what we really want to hear you on. I think after Mr Beard has realistically accepted that he's not making some point of law that some piece of evidence is inadmissible and he's not asking us to rule on a point of law, as it seems to us the key question comes down to reasonably required, questions of proportionality, questions of what precisely is the issue that this expert is asked to opine on and whether they can opine on those issues and what are the practical implications for disclosure going forward.

Those, it seems to us, are the key points which have emerged from this discussion. If we take a break now, that might enable everyone to focus on those points.

MS KREISBERGER: Thank you, sir, that would be extremely helpful.

THE CHAIRMAN: All right, we will rise now and come back at ten to two.

(12.46 pm)

(The luncheon adjournment)

(1.50 pm)

Reply submissions by MS KREISBERGER

THE CHAIRMAN: Yes, Ms Kreisberger.

MS KREISBERGER: Well, I am grateful for the guidance from the members of the panel as to what you would like me to address in reply and I will take each one in turn. At some point I confess I think I lost count of the number of points, working through at speed, but I will try to keep you posted.

So, the first question which I am asked is why, why is this expert evidence reasonably required? So let me give you the answer in stages. The first stage, which I know you have well in mind, is that there are pleaded issues in relation to,

one, market power; two, unfair pricing; and, three, quantum.

As to how the tribunal should understand the facts that customers in the class continued buying BT's SFV services when BT began to push the price up. That's the nub of it. Pleaded issues in relation to market power, abuse and quantum.

The genesis -- so that's my first point. The second point, the genesis of these pleaded issues as matters stand today on the basis of the pleadings as they are is BT's defence. BT says, it alleges, that it did not have market power, it was not dominant, one; and two, that its prices weren't unfair and therefore abusive under Chapter 2, because they say class members had a number of attributes. So these are attributes pleaded by BT. And those are these. Three in particular -- sorry, two.

These class members were informed. And, two, they made a conscious decision to optimise their purchasing of SFV services, that's still on BT's defence, and therefore they stayed with BT because they greatly valued its service. So that is the position on the pleading.

Now my third point is it's right, contrary to I think some of the points Mr Beard made, that BT will have to make the running on those points. It has to make good its averments about conscious decisions and optimising buyers.

BT will have to make good those points and Mr Le Patourel is entitled to respond on behalf of the class.

The fifth point. These allegations which I have laid out for you in relation to market power and unfair pricing are not associated with the standard of reasonableness. Okay. That arises in relation to mitigation and I am not going to repeat what I have said there. You have my points on that.

But let's stay with market power and abuse. The tribunal, when it comes to determine these matters, will not be asking was it reasonable for customers to stay

with BT to work out if BT is dominant, does BT have market power? Reasonableness isn't the question. The question is whether those customers' failure to switch in the face of price rises is good evidence of market power.

In other words, low switching rates can be exploited by dominant firms. It's not about whether it's reasonable, it's what is actually happening in the market.

Now again BT deploys the point in this way in relation to abuse. The question which the tribunal must grapple with is whether BT's contention that class members' non-switching is evidence that those customers ascribed economic value to BT's service. So that is the point. It's on the pleading. BT says in terms they were conscious decision makers, they were informed and they were optimisers, and the fact that they stayed with BT shows that they ascribed economic value. And that is relevant to abuse because BT says, it's not my case, BT says, well, the price can't have been unfair. They say it was a fair price because you should read into the fact that these customers didn't vote with their feet, you should read into that a high value being ascribed by those customers. And that is relevant, BT says, to your assessment of whether these prices breach Chapter 2. That's their argument.

So can I just pause there. When Mr Beard says well this is just a case about data, success to pricing. It's not. And that's because of the way -- not least because of the way BT has put its case. It says you have to look at the value that these people ascribe and what is the evidence that BT relies on to make out its case on economic value? Non-switching. Okay. So the class representative needs to have an opportunity to respond to explain why that's not the right interpretation of this evidence of non-switching.

The tribunal is going to have to determine whether it is right that these low switching rates should be treated as evidence, as BT contends, that customers valued the

service highly and that is a specific question. It's the nub really of what would be Professor Loomes' evidence.

Professor Loomes will draw on his experience as a behavioural economist to offer his expert opinion as to why switching rates were low in response to the allegations against the class.

Now, this question of why switching rates were low or this question of low switching rates by consumers even in the face of unattractive products that they are buying, expensive or poor quality, that is a key focus of behavioural economics. And I have shown you some of the references, both in Professor Loomes' report and also other examples, including from Dr Jenkins herself.

Behavioural economics looks at the reasons and causes for, the reasons why and causes of, customers not going for a better deal when there is a better deal to be had. It's the science that looks at that. I can't really labour this particular point enough, because in the face of the allegations made by BT, fairness demands that Mr Le Patourel can respond to BT's interpretation as pleaded of these low switching rates and say: no, it's not evidence of economic value because it's wrong to treat the class as rational, methodical, purchasing optimisers. Low switching rates are a common phenomenon. You have to look at the context and you have to understand what is going on. That's why Professor Loomes has explained that he will reconstruct the environment to understand what was going on and why from the perspective of science.

That's what the class representative asks for permission for today.

THE CHAIRMAN: Yes.

MS KREISBERGER: The class representative would not be proposing that he cherry picks a few class members to say to the tribunal --

THE CHAIRMAN: I follow that. I follow that. What I think we would be helped on now, having had that introduction, are the sort of practicality questions.

MS KREISBERGER: Understood.

THE CHAIRMAN: That's what we are keen to hear about.

MS KREISBERGER: Understood. Yes, I am grateful for that, sir.

So is it just helpful if I just very briefly set out the four key areas which Professor Loomes will opine on so that we can then talk about the practical implications. I will do it just briefly.

THE CHAIRMAN: Yes.

MS KREISBERGER: So the broad first question that arises is how to interpret the absence of switching. The second is how do the specific characteristics of the class impact on the probability of switching.

THE CHAIRMAN: Yes.

MS KREISBERGER: That's the point you have made, sir.

The third is to what extent is the probability of switching impacted by the available information for customers, marketing and so on, the material, general circumstances and how does BT's own conduct affect the scope of switching. There is this final point about market power, the ability of a dominant firm to exploit low switching rates. With that, I move on to your question, sir, of proportionality --

THE CHAIRMAN: Yes.

MS KREISBERGER: -- and practical implications. I think I can deal with those two categories together.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, as you said, these issues are in the case, the tribunal has to grapple with them. One of the reasons why Professor Loomes' evidence will be of

assistance to the tribunal practically, practically speaking, is that he will bring to bear studies and literature from outside of the sector to help understand the low switching within this sector. So that is one sort of practical way in which Professor Loomes will assist.

Now I make this submission in the context of what you heard from BT today which is we don't have this data. I am going to come back to that but if BT genuinely doesn't have this data then we are going to have to look at what is in the public domain and help the tribunal as best we can.

Now my next point on practical implications is I want to disentangle disclosure from the question of whether you admit Professor Loomes.

THE CHAIRMAN: Yes.

MS KREISBERGER: If we had to, we don't want to, but if we had to, if the class representative was not given a single additional piece of paper by BT in relation to these matters, Professor Loomes will opine. He will opine based on what there is there today and based on public domain information. And critically he is going to rely on the data that we do have from Ofcom.

Now Professor Loomes will be in a better position to give his opinion if we do have evidence which the class representative needs from BT. That's clear. But his evidence isn't -- the additional disclosure isn't the predicate of Professor Loomes' evidence.

Now I think it is important that I say Mr Le Patourel, when it comes to the categories of data that he is seeking, is not trying to be difficult. He wants to take a proportionate approach to disclosure. We genuinely want to hear from BT what it is they have that goes to these issues, because they are issues in the case whether Professor Loomes is admitted or not.

There is a specific point here. The data which Mr Le Patourel has requested aligns with data which BT provided to Ofcom. Now I am just going to turn to those behind me if I may.

(Pause)

With absolutely superb timing, this is -- and I am dealing with this at speed as it were, sir. I am told it's paragraph 150. Perhaps if everyone could just -- I will just introduce the document. So this is evidence supporting Ofcom's 2017 review. It was before the tribunal at the CPO stage.

THE CHAIRMAN: Yes.

MS KREISBERGER: It's not in the bundle, unfortunately. If I could ask the tribunal to read paragraph 150 on the second page, please.

THE CHAIRMAN: Where are we -- we don't have it.

MS KREISBERGER: I am sorry. I am sorry, sir. **(Handed)**

If I could ask the members of the panel to begin reading at 149, please. I think it's sufficient to go to the end of that page. **(Pause)**

MR BEARD: Just to be clear, Mr Le Patourel has had all of the material that is referred to here.

THE CHAIRMAN: Yes, thank you. Yes. Right.

MS KREISBERGER: So our point here is that BT does have material about its customer base.

Now Mr Le Patourel of course has no visibility on what else BT has, what has been provided to Ofcom, what else there might be. We are entirely in the dark. We are in BT's hands. But it's not unreasonable for Mr Le Patourel to say to the extent you have evidence about characteristics of class members, it should be within disclosure. That is all we are suggesting here, sir.

Sir, unless you have any other questions.

THE CHAIRMAN: No.

MS KREISBERGER: On the practical implications those are my submissions in reply.

THE CHAIRMAN: Thank you very much.

MS KREISBERGER: I am sorry, sir. I am sorry, sir. If I may just have one moment. **(Pause)** Sir, I am not proposing we go through the categories now of disclosure.

THE CHAIRMAN: No. No, thank you very much. Thank you.

Rulings 1 and 2

Ruling 1

THE CHAIR:

1. We have reached a firm and unanimous view on the question of the admission of the expert evidence in question, so we will give a judgment now on behalf of all of us.

2. The application in short is to adduce expert evidence to be provided by Professor Loomes, a professor of behavioural economics at Warwick University, and we have in support of the application, a brief preliminary report by him, explaining what behavioural economics is and how it can assist in relation to certain issues in this case.

3. He also identifies what further disclosure he considers would be useful to assist him in his task, if permission is given, although Ms Kreisberger has made it clear, just now, that if he was provided with no further material at all by way, for example, of disclosure, he would still be in a position to write a report.

4. The way in which the application was framed, and indeed it would appear the

way in which Professor Loomes has been instructed, was to address a single point, though with many strands. That is the point raised by the defendant (which bears the burden here) to say that even if the tribunal came to the conclusion that there was an abuse of dominant position, nonetheless the members of the two relevant classes had failed reasonably to mitigate their losses and/or were guilty of contributory negligence.

5. That is the way in which the matter was principally put in the skeleton argument for the class representative (although it is right to say that paragraph 10 thereof made a brief reference to other relevant matters) and unsurprisingly, that was the target which BT set itself to meet in formulating its position, which is to resist the admission of such expert evidence.

6. It appeared to us, on a perusal of the skeleton arguments, and considering the case more generally but in particular what we had said ourselves in paragraphs 90 to 100 of our judgment of 27 September 2021, on the CPO application, and on perusing the pleadings, that this principal basis for the application may be somewhat artificially limited. Not deliberately so, of course.

7. To that end, we wrote to the parties yesterday making the point that it appeared to us that behavioural expert evidence could, in fact, be relevant to some other issues in the case, in particular the question of whether there was an abuse of the dominant position at all, or to put it in a more focused way, the extent to which any excessive pricing was unfair.

8. As became clear from oral argument today, the class representative sensibly took that point on board but the effect of that was to widen somewhat the debate. That was a point made by Mr Beard for BT but he did not suggest he was not in a position to deal with that slightly wider form of the application today. Indeed, he

made submissions on all relevant points.

9. Let me first simply say what is meant by behavioural economics, and we take this from certain paragraphs of Professor Loomes' preliminary report. He makes the point that in academic economics, there had been a view that individual decision-makers in general (including consumers) acted as rational agents or “economic operators”. But that prevailing view has been challenged by the discipline of behavioural economics. This involves a more psychological approach, leading to a distinction between orthodox and behavioural models of consumer behaviour. In short, behavioural economics seeks to reflect that human beings typically do not operate as entirely rational economic operators when it comes to the making of certain choices which are available to them.

10. That is of particular relevance in this context because of course what BT says is that there were alternatives available to the members of each of the two relevant groups, namely VO customers and SPCs which, in short, would have given them a better deal. Yet they did not take advantage of that opportunity. That has been described as the issue of switching or not switching.

11. There has already been a significant body of literature as to why consumers in such positions might not have taken, what is said to be, the economically rational course and that is where behavioural economics comes in. There is only one example that I need to give of the invocation of behavioural economics. That is the UKRN (UK Regulators Network) Statement on "Consumer engagement and switching” dated 17 December 2014, which was one of the documents relied upon by the Ofcom report.

12. It is plain from Professor Loomes, and indeed the surrounding literature on behavioural economics in this area, that behavioural economics is not limited to what

characteristics the general population may have in terms of whether they do or not take an economically more rational choice, and where considerations such as brand awareness, inertia and preferring to avoid a loss rather than taking a gain and so on and so forth, come into play.

13. For example, in the UKRN Statement, there is a section which says:

> "Factors leading to lower levels of capability or capacity among some groups. The least engaged and active consumers are often the most disadvantaged and vulnerable; common factors associated with lower levels of market participation include lack of access to the internet, lower incomes, being older and other factors that may reduce a consumer's ability to assess information and invest time in switching decisions (e.g. lower literacy or numeracy skills, English not being the main language, disability or chronic illness, mental health issues or major life events."

And there are behavioural biases as well.

14. It is plain from an examination of the defence in particular, but also the particulars of claim and the reply, that there are certain matters raised in the context of three issues: market power or dominance, abuse of dominant position and mitigation of loss.

15. There are two questions in relation to each. The first question is: what particular characteristics do each of the two groups have as a matter of fact? There are ample references in the statements of case to, for example, the question of age, socioeconomic group, vulnerability, all of which are either wholly or to some extent denied in turn by BT. That is the first question. It is a question of fact.

16. The second question is, if we may put it this way, what is the consequence of a group having such characteristic(s) for its ability or its likelihood of being able to

engage so as to make a conscious choice, either to remain where it is or to choose what is, in fact, a cheaper alternative. Those two questions as it seems to us, are relevant to all three issues to which we have referred.

17. So far as the issue of mitigation of loss is concerned, which in fact is the last of those issues from a logical point of view, both sides started in oral argument today with principles of law. However, as it emerged in the course of argument Mr Beard quite sensibly, and inevitably, accepted that BT was not contending that the sort of characteristics and tendencies of the relevant consumers could never be relied upon as a matter of law, such that expert behavioural economic evidence questions would never arise.

18. That must be right. But, at this stage, of course, we are not making any rulings on questions of law. The extent to which those characteristics and their implications will be relevant to, or of assistance in assessing, reasonableness on the question of mitigation of loss must simply await the trial.

19. In any event, of course, whatever the rules of mitigation of loss, they do not bear upon the validity or otherwise of the two logically prior issues, of market power and abuse.

20. It is worth, at this stage, saying two things about the defencebefore one reaches the question of mitigation of loss. At paragraph 24(a) of its defence, in terms of characteristics, and dealing with the Ofcom materials,BT admitted (in relation to paragraph 80 of the particulars of claim where the essential characteristics relied upon by the class representative are set out), that some of them tended to be older but BT will bring its own evidence in relation to that matter. However, the paragraph continues:

> "It is denied that Class Members who fall within these demographics can by

> virtue of the characteristics of being elderly/older or in lower socio-economic groups be classified as "*vulnerable*" and/or disengaged. It is denied that there is any necessary relationship between these characteristics and the ability of relevant Class Members to… make conscious choices about whether to take advantage of the opportunities, which were available to them in practice, to switch their service provider or tariff."

20. If we may say so, that last sentence encapsulates precisely to what it is said the behavioural expert issue will go to. And it is a point that has been raised by BT.

21. The second aspect of the defence to which we would refer deals with the question of breach, that is infringement and abuse. Paragraph 57(a)(3) asserts that the prices paid accord with the economic value ascribed to those services by purchasers:

> "BT's customers were informed decision-makers, and the fact that they chose to purchase BT's SFV services evidences the fact that they ascribed economic value to them."

22. Put in different words that is the same as the earlier allegation and both of those points were put firmly in issue by the class representative in his reply.

23. The fact that Professor Loomes was directed solely to the issue of reasonableness in relation to mitigation of loss is unfortunate, but in our judgment it does not make any difference because he is concerned with the underlying question of the consequences of possessing those characteristics in terms of the ability or tendency to switch, which arises in precisely the same form as regards the issues of both market power and abuse.

24. All of the above states the background to this application. So far as the law is concerned, it is common ground that, at the very least, any expert evidence in

relation to a particular issue must be reasonably required for the determination of that issue and that can include questions of proportionality, practicality and so on going forwards.

25. BT does not, for present purposes, suggest there is no such discipline as behavioural economics or that, in certain circumstances, at least, it cannot be of assistance in competition cases. There is far too much material to suggest otherwise.

26. The key question, however, of course is: is such evidence reasonably required for this tribunal to address that particular issue which we have described above? That is a focused issue. This tribunal is not being asked to consider the tendencies of the general population as a whole, as Mr Beard rightly pointed out. If that is all that was going to be done, that would pose a rather different situation.

27. Let me try to summarise a description of the issue which we think arises and in relation to which we are being asked to say whether expert evidence is reasonably required. We frame it in this way. It can be broken down but for present purposes we are simply stating it as one long sentence. The issue is the extent to which the members of each group, i.e. VO customers, and SPCs were by virtue of their particular characteristics, as alleged by the class representative, in a position or likely to make conscious and informed choices about whether (a) to remain with BT on their existing tariffs or (b) to engage with and take advantage of such opportunities as were available to them to switch service providers or tariffs.

28. It will be seen that that is in fact an amalgam of the two points taken in the defence by BT.

29. The choice as it seems to us is this: is that clear issue to be decided simply by us or with the benefit of expert assistance? There is no other option. There is no

ability to take factual evidence from a lay witness to decide that point. Either we do it or we have the benefit of expert opinion evidence. It seems to us clearly right that if there is a respectable body of expert evidence that can assist on that issue and for present purposes, we accept that there is, as Professor Loomes himself has said, then that is evidence which we should have before us in order to make that decision.

30. It would be most unfortunate, we consider, if we were simply left to our own devices in relation to that, to try to describe, with the best efforts that we could make, what the particular consequence are of people in certain socioeconomic groups or by reference to their age or anything else. We would simply be using our own experiences but perhaps with our own pre-conceptions as well.

31. We do not consider that that is the way to go forward if there is a body of expert evidence which can assist. We clearly think there is. There is clearly an issue to which it goes and on that basis we think that such evidence is reasonably required.

32. That is the first point. But the second point is that BT says, even if *prima facie* that is the view of the tribunal, there are all sorts of practical consequences which flow from that decision, which entail that it should not ultimately be made. Mr Beard, not unsurprisingly, makes reference to the particular disclosure which Professor Loomes says he would find useful in writing his substantive report. And there is a list of such items at paragraph 37, some of which have already been provided. But, for example, in category F, what is known and can be disclosed about the characteristics of class members? How long have they been customers? What are their patterns of usage. Whether they were owners or tenants, which we infer goes to the socioeconomic question, and so on.

33. It is unfortunate that the disclosure request has emerged in this way because

we regard it as somewhat back to front, as Ms Kreisberger says. In fact the issue to which the expert evidence would go has always been there, and whether there was an expert to assist the tribunal or not, that issue would have to be resolved and disclosure in relation to that issue should have been given already.

It is a matter already in play.

34. But as it seems to us there are two quite distinct questions, given that Professor Loomes is prepared to opine even if he gets no further material. And that is should permission be granted and then, secondly, in the light of that, and the underlying factual question, what further disclosure, if any, should be given. That is a separate matter and we are not going to deal with it now, save to say that we do not consider that difficult questions which may have to arise on disclosure are so obvious and significant that they make the whole exercise of having expert evidence disproportionate in the first place. We reject that suggestion.

35. It does occur to us in the light of this debate that there is a matter that has been thrown up (which perhaps should have been addressed earlier but it does not matter), which is how in fact the class representative is going to prove its case on the particular characteristics it ascribes to the two groups. That is not to say there is not material already in existence. There is a great deal of material and some of it was in fact provided by BT to Ofcom in the first place.

36. But there is an incipient dispute between the parties, at least on paper, as to whether the Ofcom report should be an admissible piece of evidence at all, as opposed to BT simply making observations about its weight. That particular problem has to be grappled with and it has to be grappled with in the near future. But that again is not something which goes to the present question admission of expert evidence in principle.

37. Let us make just a few other points. First of all, Mr Beard said that there was the concern that if this evidence was admitted then it opens the floodgates, as it were. We do not accept that it does. It might have done if this was in relation to the general population but that is not the way in which the case is being put. It is far more focused than that and it concerns a particular group of consumers.

Mr Beard made the point that, perhaps, the best way was for the class representative to go away and reformulate its application for expert evidence in the light of the debate we have had today. We do not consider that that is necessary, and we certainly do not consider it is advisable, given that we would like to progress the timetable to trial here. There is quite sufficient within Professor Loomes' report to enable us to make the decision in principle today and for BT to have been able fairly to engage in the debate as it has transpired.

38. What we therefore say and rule on is this: first of all, there will be permission for the class representative to adduce evidence of an expert kind from Professor Loomes on the issue which we articulated earlier on, and we will spell it out again to the parties shortly. But that will be the issue to which the expert evidence will go.

39. We are also going to make some further directions The context here according to Ms Kreisberger is that BT introduced the issue. The answer to that is, yes, and no. It did in the way indicated in the pleadings. But also, the reliance on the characteristics of the groups was actually introduced by the class representative first. This goes to the first of the two procedural questions arising now.

40. We consider the right and fair way forward is for the class representative to adduce its expert evidence first and then give an opportunity for BT to reply. We do not see any trial timetable difficulties. It can be adduced with rest of expert evidence

in the middle of next year and BT will have ample time to respond to it without affecting the other tasks it has in moving forward to trial.

41. Second, however we are concerned about the question of the proof of the underlying factual matters, quite apart from disclosure. So we are going to make the following further directions subject to drafting and subject to time. Although there are many references, for example, in paragraphs 24, 44, 64 and 80 of the particulars of claim where the claimant sets out the different characteristics to rely upon, we think there should be some definitive statement of that and therefore we are going to direct this. In 14 days the class representative must say (a) what relevant characteristics it claims are possessed by the members of each group; (b) the proportion of such group that possesses those characteristics, which of course might be all of them and then; (c) the materials on which it intends to rely to establish those facts.

That might include forthcoming witness evidence.

41. The defendants, BT, should then respond to that, which will give them an opportunity to either completely or partly admit any of the characteristics, but it will also give them the opportunity to challenge, for example, whether the entire group has those characteristics or only a proportion of it. This may have implications later on depending on how we were to decide the ultimate question. And then it will also enable and oblige BT to articulate whether it is contending that any of the materials which are intended to be relied upon by the class representative cannot so be relied upon.

42. That will flush out the issue of the status of the Ofcom report, whether it is being said it cannot be used at all or whether the matter only goes to weight. If there is a dispute about that we will have a hearing to decide it and that will be sooner

rather than later. Then everybody knows where they stand.

43. So that is our ruling. Insofar as it needs to be clarified or amplified, once we have received the transcript then of course we reserve the right to do that.

After further argument:

Ruling 2:

THE CHAIR:

1. Having articulated the issue as we saw it for expert evidence, that issue included these words:

"The extent to which the members of each group were by virtue of their particular characteristics as alleged, in a position or likely to make conscious and informed choices, etc ".

2. Ms Kreisberger has submitted that the words "by virtue of their particular characteristics", should be removed or alternatively, the word "including" should be inserted before them. This was because a general point is being made about the unlikelihood of engagement or conscious choice making in relation to those two groups of consumers, irrespective of whether they have those particular characteristics.

3. I am afraid that we take the view that is certainly not how it is put in the pleadings. The best way of seeing this is the response to the informed choice point in 23(a) of the reply. Here, it is denied that members of the group are informed decision makers, and it refers to paragraphs 44, 64, 70 and 80 of the particulars of claim. These are all about the characteristics of the group and its members.

I do not think that the position is advanced by reference to a denial in paragraph 23 (b) without any positive averment that the members of the group chose to pay those

prices.

4. If, and we say "if" advisedly, the class representative wants to make a separate point which is not pleaded, which is to the effect that whether they have these characteristics or not they are susceptible to inertia or other tendencies as a matter of behavioural economics, we would want to see a pleading to that effect and there would have to be a separate application for expert evidence in relation to it. We are not going to rule on that now as it is not for today.

Further submissions by MR BEARD

MR BEARD: I am most grateful. I think in relation to that, if there is going to be a moment of clarification on the transcript, perhaps the sensible thing is to look at the transcript and the particular phraseology of the issue that you've identified, rather than try to do these things on the hoof today in case there are any issues.

THE CHAIRMAN: No, I entirely take that point. If the parties, for example, want to split the issue up into sub-issues, because it was a rather long sentence, then that is fine. But I hope that what I have said there encapsulates what I regard as the core issues.

MR BEARD: It's well understood and obviously the reasoning in the judgment will assist us in that. It's just that trying to parse what you have provided us with very helpfully ex tempore.

THE CHAIRMAN: I entirely understand that. We can make provision for that.

MR BEARD: In relation to the 14 days --

THE CHAIRMAN: Yes.

MR BEARD: -- that's very helpful and we will therefore engage with that.

THE CHAIRMAN: Yes.

MR BEARD: We will need to have a timetable for us engaging with the material that's provided within 14 days I assume we will have at least 14 days in order --

THE CHAIRMAN: That is alright. I should have said 14 days to reply.

MR BEARD: Yes.

THE CHAIRMAN: I was not anticipating that you are going to get new material. This is simply the class representative indicating what material it wishes to rely on in establishing those facts.

MR BEARD: Yes. I understand and it has the collateral benefit you identify of potentially streamlining what can be relied on later.

The obvious further question that then arises is dealing with what you, sir, with respect very sensibly referred to in terms of the generality of the disclosure.

THE CHAIRMAN: Yes.

MR BEARD: Now in relation to the exercise that is now being put forward, this 14 days specifying characteristics, it seems to me, and obviously Ms Kreisberger can take instructions, but trying to deal with disclosure matters that relate to these sorts of issues before we understand what they are specifically putting forward, does not seem necessarily the most sensible course of action now.

We have put in our submissions in relation to disclosure topics that have been put forward to date and we've set out the real problems that arise with them. But I wonder whether there might be a sterility to this debate if we are going to await that sort of discussion further. On the other hand, I quite understand that we don't want to defer disclosure issues in the sense that we are very concerned about unrealistic expectations being put forward and proportionality problems and timing problems arising.

THE CHAIRMAN: I think that's right. Let me just see if there's any observation on that last point from Ms Kreisberger.

Further submissions by MS KREISBERGER

MS KREISBERGER: Sir, I hesitate to respond in this way but I do have a prior submission that I think I need to make --

THE CHAIRMAN: Right.

MS KREISBERGER: -- in relation to the tribunal's articulation of the issue.

THE CHAIRMAN: Right.

MS KREISBERGER: So with your permission I would address you on that first.

THE CHAIRMAN: Right.

MS KREISBERGER: It comes down to a single word really.

THE CHAIRMAN: Right.

MS KREISBERGER: So I hope it won't cause too much trouble. But the version of the issue as articulated by you, sir, is the extent to which the members of each group by virtue of their particular characteristics were in a position to make reasonable and informed choices about it whether to remain with BT or switch to a different provider.

THE CHAIRMAN: Not quite. "Whether by their particular characteristics (as alleged by the claimants) were in a position or likely to make conscious and informed decisions." Conscious and informed choices was the phrase used.

MS KREISBERGER: I am grateful for that. So the --

THE CHAIRMAN: The reasonableness, there's no reasonableness bit in this thing. That's a subsequent legal point.

MS KREISBERGER: I am grateful. But the insertion I am suggesting after "group", so the extent to which members of each group, including by virtue of their particular

characteristics.

Now the reason I make that submission is that Professor Loomes cannot as a behavioural economist jump straight into the questions of particular characteristics because the science of behavioural economics is to understand why end consumers, individuals, make the decisions they make, or act passively, why they do so. That's a prior question to their particular characteristics.

So I just lay down the marker that Professor Loomes cannot go straight into the question of, for instance, the ageing -- the proportion of this class who are elderly and the impact that has. He will by necessity begin by looking at the real world.

THE CHAIRMAN: I can understand he may do that but nonetheless your case, as I understand it and as pleaded, is on the basis that the -- leave aside what literature is provided and all the other external factors, your case has been that they possess these particular characteristics and the consequence of that is an impact on their ability to make conscious and informed choices.

That doesn't stop you saying, actually they weren't given much information. That's a kind of factual question. But that doesn't stop Professor Loomes articulating the general theory of behavioural economics or consumers in general. But it then has to relate to that specific question because as I understand it that's your case.

MS KREISBERGER: Sir, if I might, with the utmost respect that's only one side of the coin because we have our positive case in the claim form in the particulars but the class representative must also respond to the case against it.

The case against it, as we have been through at some length today, is that the class was made up of informed optimisers. And Professor Loomes will need to respond to that. So it's not just the positive case in the claim form. It's responding to the allegation that the whole of the class -- BT has not confined its arguments. BT's

position is the class as a whole has taken this conscious decision to optimise and for that reason their non-switching is evidence of economic value and no market power.

The class representative asks for an opportunity to respond to that, including by reference to Professor Loomes, who will explain why it would be a mistake for the tribunal to treat the non-switching as evidence of the whole of the class in its entirety placing economic value on the service.

So whilst you are quite right to say that's the way we put the point in our claim form, we also have our reply and I can take you to the relevant part of that; but that would be only half the story. The class representative needs to respond to the case against it.

In terms of the reply, it's tab 17.

THE CHAIRMAN: Yes.

MS KREISBERGER: Paragraph 23. Now you see on page 574 the heading "Abuse".

THE CHAIRMAN: Yes.

MS KREISBERGER: So this not mitigation. It's abuse.

THE CHAIRMAN: No.

MS KREISBERGER: The class representative says:

"It is denied that members of the class were informed decision makers."

It's also denied at (c), that the fact class members paid the prices is relevant to the question of whether the prices were unfairly high.

So it is a part of the class representative's case that it's a mistake to treat the evidence of non-switching as relevant to the -- as evidence of a fair price. That's BT's case.

THE CHAIRMAN: Can we just -- you see, what you've done in your reply,

paragraph 23(a) is you deny that they were informed decision makers. And you repeat, 44, 64, 70 and 80. 44 is all about particular characteristics. And so is 64. So is 70, insofar as it deals with any characteristics, but it talks about the -- not working financially vulnerable. And the same is at paragraph 80. That's the issue. That's how you've pleaded it.

MS KREISBERGER: Sir, well it may be we need to take a careful look at the pleading. Which we will do. But it is the case -- this is a reply of course.

THE CHAIRMAN: Yes, but that's the point, isn't it? It's a reply to what they've positively asserted about informed decision makers. This theme of these groups possessing these particular characteristics leading to disengagement, putting it bluntly, has been a constant theme in this case from the word go, and of course it informed the debate about whether there should be an opt-in or opt-out.

MS KREISBERGER: Of course that's right, sir. But I want to be absolute clear on this and (b) is also helpful:

"It is denied that each member of the class chose to pay BT's prices."

That's the language which BT adopts.

In other words, BT's case is you, the class members, did this consciously. Let me give one illustration which might help, sir. Can I give a practical application of this?

BT say you were conscious decision makers and Professor Loomes explains in his report these class members may not even have had their attention drawn to the fact that there were better deals out there. They might not have known.

Now the fact that they may not have known may have nothing to do with the fact that they were old or disadvantaged in some other way. It might be because BT kept the price announcements on the low, for instance. Or it may simply be, and this is where Professor Loomes comes in, there weren't sufficient triggers.

Now it would be contrived to ask Professor Loomes to close his mind to, for instance, the question of triggers which aren't associated with the ageing nature of the class. Professor Loomes will look at whether the way in which human beings function means that class members won't have realised there were better deals, but even if there were, cognitive biases like -- cognitive biases like inertia mean they won't have taken action.

THE CHAIRMAN: I follow that but none of that is pleaded.

MS KREISBERGER: Well sir, that's evidence and we also --

THE CHAIRMAN: It's more than -- I am sorry, I think it's more than evidence here. Just give me one moment please. **(Pause)**

MR BEARD: I am so sorry. **(Pause)**

THE CHAIRMAN: Just a moment. **(Pause)**

Mr Beard, if you have some observations on that maybe that's why you were standing up.

MR BEARD: It was.

THE CHAIRMAN: Yes.

Submissions by MR BEARD

MR BEARD: I will be extraordinarily brief.

THE CHAIRMAN: Yes.

MR BEARD: As far as I understand it, what Ms Kreisberger is effectively trying to do is revive the general population issue. And we say for the reasons, sir, you articulated in the judgment, that is precisely not what should be going on here. We understand the difference when you are talking about the characteristics. I think we made that clear in our submissions and we should not be revisiting that. So it's not

just one word as Ms Kreisberger elegantly wishes to put it. It's a different way of approaching things that is actually deprecated in the reasoning of this tribunal's judgment.

THE CHAIRMAN: Yes.

Reply submissions by MS KREISBERGER

MS KREISBERGER: Sir, just to ensure you have the right parts of the pleading in front of you. As I said, it's 23(b):

"It is denied that each and every member of the class chose to pay BT's prices."

THE CHAIRMAN: Yes.

MS KREISBERGER: So that's directly going to the conscious decision makers point.

Then under 27, which relates to mitigation, it refers to burdens, costs and/or disincentives to switching by SFV customers, not particular members of the class. And then 27(d) is the point about BT taking steps to obscure price rises, which again applies to class members generally, not to class members with particular attributes.

THE CHAIRMAN: Well, I am not here dealing with what is in issue, I am dealing with what the expert evidence goes to. We are just going to take a couple of minutes to consider this.

MS KREISBERGER: I am grateful.

THE CHAIRMAN: Thank you.

(2.55 pm)

(A short break)

(3.00 pm)

THE CHAIRMAN: Right. We will just give a short further ruling.

Ruling 3

THE CHAIR:

1. We are not prepared to make the family document order which is sought by the class representative for these reasons. We do not accept, whatever may have been ordered in other cases, that it is necessarily a standard practice. We can understand in cases where there may only be a very limited number of documents, the easiest way to do it might be to include, for example, the covering emails.

2. But with many thousands of documents it seems to us that the position is different. The covering emails or the parent documents will already have been reviewed for relevance and will have been unresponsive to that. In addition, BT have agreed to provide the metadata so that in relation to each -- what I might call underlying or substantive document, it can be seen when they were sent and by whom and to whom.

3. Ms Kreisberger says, in response to a suggestion that they should look through the underlying documents and if they have any particular queries or need to have the parent document they can ask for it, that would be unduly burdensome on them because they would have to go through the documents. That is a non-point in our judgment because they are going to have to go through the documents anyway. That is because this is the substantive disclosure which they have been given, and that is the time at which, in relation to any of those documents, they can raise the question: "it is not clear if this is an approved or a draft" and matters of that kind.

4. We say that particularly in the context of this case, which is not about whether one party made an agreement with another party and it is essential to see all the emails that went before it. These are likely to be underlying substantive documents

that go to decisions of policy and pricing and matters of that kind. A lone email is unlikely to make any difference, but if that arises it can be done in relation to the disclosure exercise that the class representative is going to have to do in any event. So that is our ruling.

THE CHAIRMAN: Right, thank you.

Now does that then take us to the disclosure application or what do you want to say about that in the light of what Mr Beard has said?

Further submissions by MS KREISBERGER

MS KREISBERGER: Yes. So we have heard what Mr Beard has to say and we are keen to engage constructively on this point of course.

THE CHAIRMAN: Yes.

MS KREISBERGER: There are two narrow points which I can deal with in just a few minutes.

THE CHAIRMAN: Right.

MS KREISBERGER: That I think are worth addressing.

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: So on the -- I will refer to them as the Professor Loomes documents.

THE CHAIRMAN: Yes.

MS KREISBERGER: Mitigation is a misnomer. One point, a particular point has arisen through the exchange of evidence and it relates to call notes by call centre advisers.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now the best place to see this is in the second statement of Mr Boylan on behalf of BT and it's in the CMC, bundle 1, tab 13, page 439.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, I think the best thing is if the members of the panel could just read the subparagraphs. **(Pause)**

So that's paragraph 20.1.1 --

THE CHAIRMAN: Yes.

MS KREISBERGER: -- down to 20.1.3.

THE CHAIRMAN: Yes. **(Pause)**

Yes, this is about looking at 2.3 million records.

MS KREISBERGER: That is correct.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now I understand BT's position is that this is unworkable. The class representative's position is that: look, these records should be within disclosure in any event, irrespective of what's transpired today. Really the point we want to make is we want -- the class representative is really looking for some constructive proposal as to how to get at this data --

THE CHAIRMAN: Yes.

MS KREISBERGER: -- which is relevant.

THE CHAIRMAN: Yes.

MS KREISBERGER: So that is the point we bring to you today.

THE CHAIRMAN: Yes.

MS KREISBERGER: It may not be one for you to order today but we do want it on the radar.

THE CHAIRMAN: Can I say, because we've given some thought to this and we can

see the potential disadvantage of ploughing through call notes, which may well exist but they are in relation to 2.3 million customers.

The point which occurred to us, which may or may not have any attraction, is whether there is some kind of sampling exercise which can be done, which would give a flavour of the sort of thing that happens rather than going through all of them. That is as far as we've got because we were not attracted at the moment by the proposal that BT should start trawling through each of the 2.3 million records in relation to those matters.

MS KREISBERGER: Sir, we had the same thought.

THE CHAIRMAN: Yes.

MS KREISBERGER: So what we are asking for is not a blanket refusal but some constructive engagement. I should say that there is some concern on the part of the class representative, that page 459 of the same bundle, tab 14, this is Mr Boylan's third statement at paragraph 55.

THE CHAIRMAN: Yes.

MS KREISBERGER: He says this:

"BT and [their advisers] Deloitte have not been in a position to begin the preliminary work in what would be an extensive exercise."

So we were little taken back by that.

THE CHAIRMAN: Sorry, because?

MS KREISBERGER: Because BT have been on notice of the need to do this for some time and we do hope that BT is engaging constructively, for instance, as to what a reasonable sampling exercise might look like. At the moment it --

THE CHAIRMAN: That hasn't been suggested. We only suggested that today.

MS KREISBERGER: I appreciate that.

Submissions by MR BEARD

MR BEARD: Can I cut through this? We'll certainly have a look. There is a big structural problem with this. It's a massive database that leads to each customer and if someone calls in sometimes the person taking the call makes notes in a field, sometimes they don't. Those can be scattered through the record --

THE CHAIRMAN: I mean what might happen, provided you can agree some sort of procedure, is that if you take -- if you investigate 100 or 200 or 300 of these records you might find they are completely random.

MR BEARD: Yes.

THE CHAIRMAN: In which case it's not going to help anybody at all.

MR BEARD: All I can do is take it away. The problem is whether we can do anything useful sampling but we hear --

THE CHAIRMAN: I understand that and we tried to give you a steer here. I don't think we can take that matter further.

Ms Kreisberger, you said there was another point.

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir. The second point is family documents, which is a discrete issue.

THE CHAIRMAN: Yes, we will deal with that today. But before we get there I wanted to make clear, and I should have done in our little mini ruling, the decision we've made about expert evidence does not mean other points aren't in issue on reasonableness. It does not mean there isn't an issue about what documents BT did in fact produce or that BT didn't produce the information. So who could look at it

anyway? All those points are there, it's just a question of what the expert evidence goes to.

Right. Family documents. Yes.

MS KREISBERGER: Sir, I will try to cut through this and really pinpoint the parameters of the dispute between the parties.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, the tribunal will be familiar with family documents.

THE CHAIRMAN: Yes.

MS KREISBERGER: They are documents connected to disclosed documents like covering emails and attachments to the disclosed documents.

THE CHAIRMAN: Yes.

MS KREISBERGER: Referred rather endearingly as parent and sibling documents.

THE CHAIRMAN: Yes.

MS KREISBERGER: And BT's approach is, candidly, they've said they are not going to disclose family documents if they weren't independently identified under their e-disclosure processes.

THE CHAIRMAN: Yes.

MS KREISBERGER: So they say family documents have been determined to be irrelevant in accordance with the e-disclosure process agreed.

THE CHAIRMAN: Yes.

MS KREISBERGER: Just so you have it, they have fleshed out the factual position, which is BT has identified the category of family documents. They originally said there were 41,000. They have revised that. There are 26,000 family documents.

7,315 have been manually reviewed for relevance. Those which BT say were relevant were disclosed. That leaves 18,685 documents which BT says absolutely

categorically in its skeleton have never and will never be reviewed.

That is what the skeleton says.

Now the issue is BT relies on the e-disclosure model and the class representative says, in addition to the e-disclosure model, where the e-disclosure protocol flags a relevant document, the family documents should also be treated as relevant. You don't have to wait for your e-disclosure model to separately flag the family document to reach the conclusion that it's disclosable. It's disclosable because it's a family document. It's a family document which gives context to the disclosed document and it gives information.

That is the standard approach. I don't want to take up too much of the tribunal's time but I can show you that, for instance, in the Trucks litigation, which is --

THE CHAIRMAN: I have seen reference to that.

MS KREISBERGER: -- grinding through -- I am sorry, sir?

THE CHAIRMAN: I saw the reference to that in your skeleton argument.

MS KREISBERGER: Would you like me to go there?

THE CHAIRMAN: Can we try to cut through this one as well. If we can't we can't, but BT have offered to give you the metadata in relation to each of these. So any points about we don't know who this was sent to, but the second thing is, and it goes to a question of proportionality, I mean I don't know at the moment whether and to what extent there are going to be questions raised about the parent document or context.

One of the points you put in your skeleton argument is we may not know whether it's a draft or not. Usually a draft says it's a draft, but if there is question about that, in relation to any particular document, then you can raise that with BT and then they can give you an answer.

At the moment I just have difficulty in seeing whatever may have been ordered in another case, why BT have got to go and start trawling through all of these things all over again.

MS KREISBERGER: Perhaps I could give you an example, sir.

THE CHAIRMAN: Yes.

MS KREISBERGER: It's in the papers.

THE CHAIRMAN: Right.

MS KREISBERGER: Ms Houghton in her second statement refers to a document. So that, sir, if we just go there, it's tab 6 page 324. If I could just ... I don't have the reference to the document.

I am just going to bring up the document itself as well at the same time.

THE CHAIRMAN: Yes, because I was trying to find that but unfortunately somebody's exhibit wasn't --

MS KREISBERGER: Yes, it was left out of my bundle.

THE CHAIRMAN: It was left out of ours. It was Mr Boylan's -- exhibit.

MR BEARD: The supplemental.

THE CHAIRMAN: We have not had a chance to go through that.

MS KREISBERGER: Yes, apologies for that, sir. Page 386 and 387. Can we hand that up?

THE CHAIRMAN: Sorry, there may have been some additions because what you are looking at is 386 and 387. I don't know about my other tribunal -- we've all got that I think now. 386 and 387.

MS KREISBERGER: I am grateful.

Now, this is the document that I have referred to a few times which refers to minimising press in relation to price rises on the August bank holiday.

You see that it's just -- one does not really know anything about this document at all. It's just posited in a vacuum because we don't see the covering email.

THE CHAIRMAN: Sorry, this is on 386, the executive summary?

MS KREISBERGER: Headed "Executive Summary".

THE CHAIRMAN: Well I follow that. But you can ask a question about that. You can ask for it.

MS KREISBERGER: We have and it's not been disclosed.

THE CHAIRMAN: What? On a particular -- you made a particular request for the parent --

MS KREISBERGER: The covering email to this, well --

THE CHAIRMAN: -- and they --

MS KREISBERGER: -- we've raised it in the evidence.

MR BEARD: (audio distortion and interference) email --

MS KREISBERGER: Oh, has it been disclosed?

MR BEARD: No, it says document not disclosed.

MS KREISBERGER: It simply says document. We've raised this in the evidence and it still has not been disclosed.

THE CHAIRMAN: Sorry, you've asked for the parent document in relation to 386 and -- 386?

MS KREISBERGER: I think the position is in the evidence it's been raised.

THE CHAIRMAN: I am sorry, if you want to raise a particular issue I think Mr Beard will be quite content to give you the parent document to that particular -- the parent email to that particular document if that's what you are after. But what I have no feel for at the moment is how many other of the documents, the substantive documents, which have been disclosed give rise to a question where you say, well, we can't

really do anything with this document unless we see the covering email.

MS KREISBERGER: Sir, that's an approach but it obviously puts the burden on the class representative.

THE CHAIRMAN: It does, yes, because in this particular case the underlying -- I mean some of the documents are probably emails themselves no doubt, because they have been responsive to the e-disclosure. It's not that you haven't got any emails.

MS KREISBERGER: No, as I said, sir, we are given the figure. There are over 18,000, something short of 19,000 family documents which have never and will never be reviewed.

THE CHAIRMAN: No, sorry, let me repeat the question. You presumably have been given disclosure of some emails, which themselves have been responsive to the e-disclosure --

MS KREISBERGER: Of course we have.

THE CHAIRMAN: You have. Right. Well what I don't understand at the moment is how many of the documents, the substantive documents, which have been disclosed without the covering email and in relation to which you are now going to get the metadata give a problem?

MS KREISBERGER: Sir, we can look at that but it's rather shifting the burden. It involves an intensive review on our side rather than simply -- sir, the nub is this. We say that if there are documents around a document they should simply be disclosed for that reason.

Of course if that is not the position taken then the class representative is in the position, first of all BT have to disclose metadata. So that's extra work. Then the class representative has to review all of those documents and make individual

requests. Let me give you an example.

Let's say there is a cover email to that document and all it says is "Approved". That won't come up in metadata so the metadata will not assist on that question and then the class representative will have to make a specific request for that document. One cuts through that if an approach is the standard approach you get the family documents.

THE CHAIRMAN: Right. Well, let me hear Mr Beard.

Submissions by MR BEARD

MR BEARD: It isn't standard. The family documents are just documents. They have all been fed into the whole system, individually. So these family documents that are being talked about, they have been through the whole e-disclosure review process. If they triggered the relevant relevancy thresholds, which were agreed, then they were subject to further review and they would have been disclosed.

In other words, they have been subject to the whole review process that was agreed and we've referred to Sportradar, where the president of this tribunal said: look if you've been through a process of agreeing an e-disclosure protocol and you have put all the documents through it you should not then be essentially adding another whole sift to this. And that's what's being done on the basis they are somehow attached.

We say that doesn't matter. If it didn't trigger relevance the first time that's a very good reason why they shouldn't be disclosed. We shouldn't be put through reviewing them for things like privilege and so on.

THE CHAIRMAN: I think what is being suggested is you should just give them anyway.

MR BEARD: Yes, but we can't. Because we'd have to review them for privilege. We'd have to go through all these wretched documents again.

THE CHAIRMAN: Actually just looking at the practicalities. If you have the -- this only arises where you have a parent document. So let's just take an example, a covering email which encloses an underlying substantive document which you have disclosed because what they are talking about is they've got the underlying document and they haven't got the covering email.

MR BEARD: But if the covering email has anything relevant in it then it will have been picked up. So the example Ms Kreisberger gives is the sort of thing that is picked up by the e-disclosure and then the review process. That's what that is there to do. They then have said, oh, but we are not sure about in relation to cover emails or where these documents may have gone. And we say, okay, well we can give you the metadata that links to all these documents so you can see it. But that doesn't involve us having to do a resift of them all.

THE CHAIRMAN: No, I was just wondering whether in fact if you provided them in any event even if they may not add anything there's going to be any questions of privilege, where you have already agreed to disclose the underlying documents.

MR BEARD: No there are questions of privilege. I asked that same question, sir. I said: is there a way of cutting through this? We just dump these on them and say get on with it, knock yourself out and we'll deal with the costs of this afterwards because we say it's totally futile. That is one of the problems with this because we are increasing the level of costs if we give them more documents.

Sir, I asked that same question. The answer is no. Those would then have to be reviewed for legal privilege, which is not what the relevancy search is doing. So we end up with 21,000 documents that we've got to go through again and it's an

enormous burden. I have already given you indications that actually the numbers, the costs of this disclosure exercise that are even in this witness statement are under counting. We say this is just disproportionate. If they hit a document -- when they are actually doing substantive stuff and come to us and say, look even with metadata we just don't understand what is going on here. We are not trying to hold stuff back. We want to do it proportionately. This is not proportionate.

THE CHAIRMAN: Thank you.

Reply submissions by MS KREISBERGER

MS KREISBERGER: Sir, just coming back to my example, if the cover email said "Approved" there's no reason to think that would be picked up. So we are willing and prepared to deal with the dump of data from Mr Beard's clients. It's a few thousand documents. This is the efficient way to go about it, otherwise we are having various steps, disclosure of metadata, we look at the metadata, we have to make requests, rather than simply -- it's not a resift. Review for privilege but it is not a resift. They have the documents.

THE CHAIRMAN: Yes. Thank you.

(Pause)

(Ruling given but reserved for approval)

THE CHAIRMAN: Now, Ms Kreisberger, is there anything else that we can assist with at the moment?

MS KREISBERGER: No, sir, I am grateful. That's all from us.

THE CHAIRMAN: That's all from you.

MS KREISBERGER: The timetable is agreed.

THE CHAIRMAN: Yes. What you will need to do is put the issue as I have articulated it with any drafting and purely drafting amendments into the list of issues because it's not actually there at the moment.

Anything from your side, Mr Beard?

MS KREISBERGER: Sir, I apologise, I should just mention it may be that we need to put another CMC in the diary.

THE CHAIRMAN: Yes.

MS KREISBERGER: Can I suggest we take that --

THE CHAIRMAN: We can take that offline and deal with that, yes.

MR BEARD: I concur with the latter observation. Let's deal with it separately.

No, we have nothing more.

THE CHAIRMAN: Good. Thank you both very much indeed for your assistance. We will rise now.

(3.25 pm)

(The hearing concluded)